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[I

FREEDOM OF CONTRACT IN SALE OF GOODS LEGISLATION.

By

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The Sale of Goods Act was the product of law—gives trained in *laissez-faire* philosophy and it bears substantial evidence of their allegiance to that theory of Social and Economic Organisation. The statutory provisions are applicable in crucial matters like the conditions in a contract of sale of goods only in absence of terms in the bargain of parties to the contrary. In a closely related field, namely, in the field of hire-purchase, however which has been the subject of legislation in England in this century against the background of a changed social philosophy, we find restrictions on these very same matters upon the power to contract out of its provisions.¹ This freedom under the Sale of Goods Legislation of the parties is particularly out of place in the modern days of adhesion contracts in which the bargaining power of one of the parties is *ex hypothesi* unequal to that of the other party. One of the chief weapons in the armoury of the Courts, in the absence, of specific legislation to mitigate, if not to undo altogether, the mischief of such contracts, has been the doctrine of fundamental obligation.² In the case of contracts of sale of goods, two or three matters must be held to be fundamental and falling out of parties' power to bargain, which, if such contracts are made on a mass scale and therefore become subject to the defects of adhesion contracts, can be effected only by means of such a doctrine. The alleviation even by such a doctrine is rendered all the more difficult by the presence in the existing Sale of Goods Legislation of a clause providing, such power in the parties to bargain away even those matters. From what follows the need for a change in the law will become apparent.

Condition as to title.

A contract of sale of goods is, as per the definition³, a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. And

1. Hire-purchase Act, 1938.

2. This doctrine, is, by now in the West, a judicially recognised subject of controversy; if not of importance, in its own right. Cf., *The Swiss Atlantique Case*, (1966) 2 W.L.R. 944 (H.L.). In India it has not been fully explored, though the possibilities seem to be quite assuring. See my article, *Fundamental obligation and the Indian Law of Contract*, in the *Journal of the Indian Law Institute*, (1968) Vol. 10, p. 331.

3. In section 4 of the Sale of Goods Act, 1930.

property means according to section 2 (11) a general property in goods and not merely a special property. In other words, under a contract of sale of goods, it is of the essence of the transaction that there should be a transfer of ownership of the goods from the seller to the buyer. It is pertinent to observe here that such a transfer of ownership lies at the root of the transaction and cannot be considered merely to be a necessary and implied condition of the contract. Yet this is what the Sale of Goods Act says in section 14 (a) which reads as follows :

“In a contract of sale, unless the circumstances of the transfer are such as to show a different intention there is,

(a) an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods and that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass :”

And although this is stated to be a condition which is a stipulation “essential to the main purpose of the contract the breach of which gives rise to a right to treat the contract as repudiated”⁴, the buyer cannot reject the goods and repudiate the contract in case of breach of the condition under two sets of circumstances :

(1) Where the contract of sale is not severable and the buyer has accepted the goods or part thereof :

(2) Where the contract is for specific goods the property in which has passed to the buyer.⁵

Property in specific goods passes under normal circumstances to the buyer when the contract is made, and it is immaterial whether payment of the price or delivery of goods or both is postponed.⁶ Under the above provisions, suppose there is a contract of sale of a motor car, the title to the car passes to the buyer from the moment of the making of the contract. After he receives delivery of the car, suppose, it is found that it was a stolen car and the seller had no title to it, the buyer cannot repudiate the transaction but has merely to seek damages from the seller as if there has been breach of merely a warranty and not a condition. Apart from this, there is also the freedom given to the parties in section 14 to exclude this condition altogether. Hence under the present position, a seller may exclude his liability for lack of his title to the goods, although he purports to transfer such title under his contract.

Cheshire and Fifoot have drawn attention to this anomalous position under the English Sale of Goods Act on which our Indian enactment is based.⁷ The learned authors have pointed out the inadequacy of the law and also urged that the condition as to title cannot be contracted out. They observe that to suppose that a clause in a contract of sale of goods can absolve the seller from his obligation to convey title would be “to admit a hopeless incongruity. On the one hand he would be promising to sell the goods, and on the other insisting that he was not passing the property and therefore not making a sale.” Mr. A. H. Hudson has however raised at least three objections⁸ to the argument of Cheshire and Fifoot.

4. Section 12 (2).

5. Section 13 (2).

6. Section 20.

7. Cheshire and Fifoot. *Law of Contract*, 6th Edn., page 142.

8. (1937) 20 Mod. L. Rev. 236 ; (1961) 24 Mod.L. Rev. 690.

First, Cheshire and Fifoot have relied on *Rowland v. Divall*⁹ for their theory but that case did not decide that the condition as to title could not be contracted out and that was not the question in issue. Rather Scrutton, J. recognised in his judgment in that case the possibility of such exclusion, when he observed that the buyer would demand a return of the purchase price, "unless he has with knowledge of the facts held on to the bargain so as to waive the condition."¹⁰

Second, since a contract of sale of goods can be absolute or conditional¹¹, a seller can aver, under his contract that property may pass but refuse to guarantee that it will, "why should not a contract be a contract of sale within the Act simply because the seller's offer was, 'I will sell you this car which I believe to be mine : but if I should prove to have no title to it, you shall not be entitled to sue for me for return of the price or damages ?'" In such a case the contract can be an "*emptio spei*" the purchase of a chance of obtaining the goods.

Third, the argument of Cheshire and Fifoot seems to run contrary to a fairly considerable body of authority both pre and post Act cases and opinion of text-writers as well as the opinion in other jurisdictions. As examples of the former, *Eichholz v. Bannister*¹², and *Niblett v. Confectioners Materials*¹³, and the opinions of *Chalmers*¹⁴ and *Benjamin*¹⁵, are cited. Authorities from the U. S. as well as Australia are also cited in support of the view that exclusion of the condition as to title is permissible in a contract of sale of goods.

In the face of such sharp difference of opinion in England, the position in India is not any the less confusing. There seems to be the authority of *Dorab Ally v. Abdool Aziz*¹⁶, which lays down that there is no warranty of title in the case of sales by pawnbrokers of unredeemed pledges. Further, in *Radha Krishan v. Ganga Bizhan*¹⁷, the plaintiff purchased certain ornaments from the defendant which were subsequently held by a criminal Court to be stolen property ; as a consequence the plaintiff was deprived of the ornaments under the orders of the criminal Court. Plaintiff brought thereupon a suit against the seller defendant for the price of the ornaments. On the suit being dismissed by the trial Court, as there was no evidence other than the judgment of the criminal Court to prove that the ornaments were stolen property, the Lahore High Court in revision held that "the onus is on the seller to prove his title¹⁸ because of the implied warranty in section 109 of the Contract Act. Hence the case was remanded to the trial Court which was directed to give the seller opportunity to adduce evidence in support of his title. This is a short judgment and we cannot seek much guidance from it. We can perhaps infer that if the seller did

9. (1923) 2 K.B. 500.

10. At page 505.

11. i.e. under the Statute, see section 4 (2) of the Indian Act.

12. (1864) 17 C.B. (N.S.) 708.

13. (1921) 3 K.B. 387.

14. Sale of Goods (12th edn.), page 52.

15. Sale (8th edn.).

16. (1877-78) I.L.R. 3 Cal. 806.

17. (1925) 86 I.C. 1020.

18. *ibid* at page 1020.

not prove his title, the buyer could repudiate the contract on the ground that there was a fundamental breach although presumably he had had some use of the goods before being deprived of them for lack of seller's title to the goods. We can only suggest that in view of its likely abuse in adhesion contracts, this freedom to exclude condition as to title given under the existing legislation, must at least be restricted by providing, for example, that sufficient notice of the exclusion, if any, must be given to the buyer by bold type letters or otherwise.

*Condition as to correspondence of goods with their description
in the contract.*

Section 15 says where there is a contract of sale goods by description, there is an implied condition that the goods shall correspond with the description. It is recognised to be a condition which goes to the root of the contract and the breach of it entitles the buyer to reject the goods. The oftquoted observation of Lord Abinger in *Chanter v. Hopkins*¹⁹, puts the matter in an expressive manner: "If you contract to sell peas, you cannot oblige a party to take beans."

But the matter for enquiry here is whether (1) this condition can be excluded by contract, and (2) whether it sinks to the level of a warranty as per the provisions of section 13 (2) already quoted. (See note 5).

Prima facie, as this is stated to be an implied condition in the section, it can be excluded by an express term in the contract. But it has been recognised in England to belong to the case of the contract²⁰ and cannot possibly be excluded. That is, notwithstanding any express provision in the contract, a buyer will have his rights against the seller in case the goods do not correspond with their description in the contract. There seems to be no authority on this aspect of the question in India except for one solitary exception. In *Bombay-Baroda and Central Indian Railway v. Firm Nihal Chand Jagan Nath*²¹, the Lahore High Court allowed the seller to go without liability for lack of correspondence of the goods with the description because "although the company (seller) intimated that they believed the goods to be of mild steel, they did not wish to give any guarantee and made it clear that if it turned out to be a case of misdescription, they would not be liable for damages. In the circumstances it must be held that the plaintiffs took delivery of the goods at their own risk."²²

But as regards the latter question, namely, whether such a condition sinks to the level of warranty as per section 13 (2) in much the same fashion as other implied conditions, we have the authority of the Calcutta and Madras High Courts for the proposition that it does not so sink merely on the ground that property in a contract

19. (1838) 4 M. and W. 399.

20. Melville—Core of a contract, (1956) 19 Mod.L.R. 26 and Guest—Fundamental Breach of Contract, (1961) 77 L.Q.R. 98.

21. (1941) 192 I.C. 175.

22. *ibid* at page 176.

for sale of specific goods has passed to the buyer. In *Mitchell Reid & Co. v. Buldeo Doss Khettry*²³, the Calcutta High Court held that if the goods are not in accordance with the description in the contract, the buyer is entitled to reject the goods, whether the property in them has passed to him or not. In a more recent case²⁴, Mr. Justice Ramachandra Iyer (as he then was) pertinently observed: "the passing of property in the goods is not the test of this right (of the buyer to reject the goods in case the goods are not of the contract description) if the goods do not conform to the description, there is no performance of the contract at all.....the default of the seller goes to the root of the transaction."

The buyer will however lose his right to reject the goods although they are not according to contract description, if he accepts or can be deemed to accept the goods. As per section 42, he is deemed to have accepted the goods either when he intimates to the seller that he has accepted them or when on receiving delivery of the goods he does any act in relation to them which is inconsistent with the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. And on the facts of the case in *National Traders v. Hindusthan Soap Works*²⁴, it was in fact held that the buyer was entitled only to damages and not to a refund of the price as he had accepted the goods.

In summing up the points made in the above discussion, we find that the two sets of obligations cast upon the seller under a contract of sale of goods are the *sine qua non* or such contracts. If the evil of adhesion contracts lies in the abuse of the party in superior bargaining position of his power to extract maximum conditions of non-liability from the other, the minimum safeguard in favour of the latter that the law can provide is to prescribe such obligations to be beyond the pale of negotiation by the parties. In any reform of the Sale of Goods Legislation, the need to categorise these obligations on the part of the seller as fundamental would seem to be imperative. And such a reform will fill up a lacuna in the present law of sale of goods which is all the more significant in that in other fields like law of carriage and bailment there has already been laid down minima of liability which cannot be contracted out.²⁵⁻¹

On this subject we may very well take the cue from the development in the U. S. A. where the Uniform Commercial Code adopted in a number of states (now section 2.302 of the Code) empowers a Court to refuse the enforcement of a sales contract where it finds the contract or any clause therein to be unconscionable at the time it was made. This is by far the most controversial provision in the entire code as it violates the principle of freedom of contract and strikes at the security of transactions by allowing the Court to remake a contract. On the other hand, the protagonists have supported it on the very same ground of freedom of contract by

²³. (1888) I.L.R. 15 Cal. 1.

²⁴. *National Traders v. Hindusthan Soap Works*, (1960) 2 M.L.J. 195 : A.I.R. 1959 Mad-112, 116.

²⁵⁻¹. Carriers Act (III of 1865), sections 6 and 8, Carriage of Goods by Sea Act, 1925, section 8 and Article III (8) of the Schedule, Indian Railways Act, 1890, section 73. Carriage by Air Act, 1932, Schedule I, Rule 32.

pointing out that it applies only where the element of free choice is absent and that it will contribute and not hinder the freedom of contract in that the 'private autonomy' of contracting parties will be kept within bounds.² If we cannot bring ourselves to bear the shock of such a sudden and far-reaching change in our law, trained as we are in the traditions of strict adherence to freedom of contract, we should at least make a beginning, here and now, to lay down the obligations above stated as fundamental in suitable statutory provisions.

2. "Unconscionable contracts under U.G.C." (1961) Univ. Pa.L.R. 401 citing F. Kessler—*Contracts of Adhesion—Some thoughts about the Freedom of Contract*, (1943) 43 Col.L.R. 629.

THE PROBLEM OF SOVEREIGNTY IN OUTER SPACE AND CELESTIAL BODIES.

By

V. G. GOSWAMI, M.A., LL.M. *Advocate.*

The present century has seen two related developments of outstanding importance to the future of humanity. One is the amazingly rapid advance in science and technology ; the other almost equally remarkable, is the growth of the willingness of Governments to undertake projects involving research and production on a stupendous scale. In view of these developments the possibility that space travel may become a reality within a few decades cannot be lightly dismissed, and interest in what would be mankind's greatest adventure has recently been stimulated by the work on high altitude rockets and by the announcement that artificial satellites are to be launched during the International Geophysical Year.¹

The space science has turned the dreams of men to fly in sky, true. The space scientists have contributed much in this field. They have enabled men to penetrate greater and greater distances into space beyond the earth's atmosphere and have opened the way for the use of Outer Space for scientific purposes and telecommunications by means of rockets and artificial satellites equipped with scientific instruments and even by manned rockets. Indeed, they have brought within contemplation the landing of man on other planets.²

Since the sounding rocket is relatively small and inexpensive, it gave developing nations an opportunity to participate in space research without economic hardship. At present more than 70 nations participate in some form of space activity construction of flights equipments and vehicles, operation of ground stations, or training of technicians for projects³. India with its Thumbu arange is participating in space experiments with U. S. National Aeronautics and Space Administration. It may be recalled that the United Nations adopted a resolution sponsoring Thumba Equatorial Launching Site as an international range for scientific research open to all U.N. member states⁴. It is worth noting that the Prime Minister of India agreed to provide international research facilities at Thumba site which has begun functioning regularly.

Some years ago what was only talked about in legends has proved to be reality and who knows what is still in abeyance may not come to be a fact within a few decades. The Soviet Union and the United States have launched manned vehicles with marked success in the field of space exploration. The nature of recent developments and projects indicated a shift towards direct planetary activities. The aim is to explore Moon, Mars and Venus and to put man on the moon by 1969.⁵

1. D. R. Bates, in foreword to 'Space and Exploration' (1959).

2. Prof. Brierly, 'The Law of Nations', page 219.

3. W. A. Swartworth; 'NASA Spurs Worldwide Co-operation in Space Research'. American Reporter, 17th January, 1968, page 8.

4. American Reporter, 31st January, 1968, page 1.

5. Imre Csabafi and Savita Rani, 'The Law of Celestial Bodies' 6 I.J.I.L., April, 1966, page 195.

It is remarkable that landing men on the moon this year has proved to be the greatest and most daring scientific feat yet in history. This great achievement of the United States has been hailed around the world as a triumph for all mankind.

"Eight days of triumph for mankind", as one newspaper described the Apollo 11 mission, had a fitting climax on 24th July when the men who left their mark on the moon returned to earth in the view of a global television audience and a well done reception from President Richard M. Nixon.⁶ He termed their moon expedition as the greatest work in the history of the world since creation and said that as a result of what happened in this week the world is bigger, infinitely.⁷

The Prime Minister Indira Gandhi paid tribute to the space men and said "Armstrong and Aldrin, who walked on the moon, are delegates of the irrepresible spirit or man the spirit which discovered fire and thought, song and science, the spirit which crosses oceans on a bundle of reeds and leaps from one celestial body to another in a small vehicle of its own making." She further added: "Let us direct this power of man which soars starward into strengthening the bonds of peace and brotherhood on earth."⁸

The triumphs of human spirit over nature by means of space instrumentalities tend to revolutionize the thinking of men on our planet. The launching of the maiden sputnik was considered to be the beginning of new challenges, new problems and new prospects for human civilization. The launching of earth satellites and space rockets has its repercussions on International Law. A new concept has evolved the 'Law of Outer Space'⁹

Space research has slowly advanced from the stage of exploration of outer space to that of military exploitation. The conqueror of space may become the conqueror of the whole universe. Thus there started race and rivalry between the Space Powers. As a result, international jurists contemplated fear of cosmic war.¹⁰ Outer space would be one more arena for virulent forms of nationalism, powerfully reinforced by the clash of ideologies, suspicions, ever greater militarism and perhaps in the end world war third.¹¹

The advent of space exploration gave rise to a number of problems, such as the limits of national sovereignty in outer space above a country's territory and its territorial waters: liability for the damage or injury, and even such highly problematic questions as to the correct behaviour to be adopted towards any living beings which man might meet on the moon.¹² Dr. Jenks classifying such problems in three groups also termed, relations with intelligent life encountered in other worlds as one of the remote problems.¹³

Moreover, the problems such as definition of Outer Space, the limit of Air Space, fixing of boundary line between the two the formulation of law applicable to

6. American Reporter, 2nd August, 1969, page 5.

7. *Ibid.*

8. National Herald, 22nd July, 1969, page 10.

9. G. Osmitskaya: 'Legal Aspects of the conquest of Space' Review of Contemporary Law, December, 1960, page 51.

10. B. Cheng: 'The United Nations and Outer Space' 14, C.L.P., page 24.

11. Bloomfield: 'Outer Space and International Co-operation', International Organisation, Summer 1965, page 605.

12. G. Osmitskaya, *loc. cit.* pp. 51-52.

13. 'Common Law of Mankind', (1958) pages 388-401.

outer space and the problem of compensation to third states are also knocking at the doors of jurists for their best and just solutions.

After the achievement by the United States in the field of space exploration, the problem of sovereignty over moon is apt to rise as the space men have marked their footprints on the soil of the moon for the first time in the history of mankind and have placed the flag of the United States on the moon. Time alone can show whether American Government will stake a claim of sovereignty over moon by the well-known theory of Flag symbol in international law.

The present article is an attempt to examine the cardinal problem of sovereignty in its different aspects. The main questions in this sphere are as to how far State sovereignty extends in Outer Space? What is Outer Space? What are the criteria to limit territorial Air Space in Outer Space? Where does Outer Space begin from? Where should a boundary line between Air Space and Outer Space be drawn? What are the views of International Jurists in this respect? What are the views of Space Powers on this issue? What does the state practice, if any, of the United States, the Soviet Union and the smaller countries show? How far International Space Treaty has solved the problem in question? How far has the United Nations succeeded in keeping Outer Space and Celestial Bodies immune from the concept of State sovereignty?

The Space age may be taken to have commenced on 4th October, 1957, when the first satellite was launched by the Soviet Union and since then a number of satellites have followed. The United States has won the space race to the moon. It is expected that whatever benefits will come from the moon programme, they will reach every nation of the world and would prove to be to the advantage of the whole mankind. The space research is going on and other planets are also the object of it, more particularly the Mars.

Before the day when the flight above the earth's surface became a reality it was generally believed that Air Space was free for peaceful uses. Grotius refers incidentally to the air and seems to suggest that in his opinion it should be linked to open sea and be incapable of appropriation.¹⁴

The opposite view is that the subjacent state has an absolute right of sovereignty over the entire superincumbent aerial domain without regard to height.¹⁵ Some writers maintain the general principle of the freedom of air; some others allow the subjacent state a certain right of control for purposes of protection and conservation upto a certain height or inverting the order maintain the right of control for purposes of conservation as the general rule subject to the right of innocent passage. Among the exponents of this view are, Fauchile, Rolland, Garies, Oppenheim and many others. Perhaps a majority of recent writers adopt this general view of the right of the states over Air space.¹⁶ The Air space is within the sovereignty of the state subject to a servitude of innocent passage for foreign civil but not military air craft.¹⁷ But these theories as to Air space have tended to become outmoded in recent times. The concept of full and absolute sovereignty of each state in the Air space above its territories found universal agreement after the First World War.¹⁸

14. Oppenheim: 'International Law', Vol. 1, page 517.

15. J. W. Garner, 'Recent developments in International Law' (1925), page 145.

16. J. W. Garner: *loc. cit.*, page 147.

17. Oppenheim, *loc. cit.* p. 518.

18. Kuhn: 34, A.J.I.L. (1904) page, 104.

An appreciable amount of literature on space law has considered the question of the extent of sovereignty as a cardinal problem of the day. As a point of departure for such discussion is usually the existing law relating to sovereignty in the Air space under the provisions of the municipal legislation of at least fifty countries¹⁹ and under the terms of International Conventions concluded at Paris (1919) and Chicago (1944) it is recognized that a State has complete and exclusive sovereignty over the Air Space above its territory.²⁰ This recognition has crystalized into a rule of customary International Law. However, the difficulty is to determine the meaning and extent of the word 'Air space'²¹ on which the question of sovereignty depends.

*The Opinion of International Jurists as to criteria to determine Boundary
Line between Air Space and Outer Space.*

One school of thought interprets Air Space in terms of 'aerodynamic lift' and maintains that a State may claim sovereignty over the height upto which air craft can ascend. Cooper points out: "After many years of careful research, I am convinced that the term 'Air Space' as used in Paris Convention, was there meant to include only those parts of the atmosphere above the surface of the earth where gaseous air is sufficiently found dense to support balloons and airplanes, the only type of aircraft then in existence."²² Such height would be not more than 20 miles. As far as performance of the existing conventional aircraft is guide to the definition of Air Space, the term 'Jet' which makes more efficient use of air as is available, can breathe at greater height than jet or piston engined aircraft, but 25 miles is probably the outside limit of effective aerodynamic lift.

This theory stems from a recognition of the fact that until the launching of the first sputnik, customary and conventional law of the air had been developed exclusively in relation to flight of aircraft and that despite the flight of a few V. 2's prior to the drafting of the Chicago Convention, the existence of rockets and satellites in the Air Space had neither been provided for nor envisaged.

The merits of such a common sense approach are quite evident, However, it fails to offer a sufficiently precise criterion for drawing the line in Air Space and is rendered less useful by the hybrid craft as the X-15 which possesses characteristics of both, aircraft and spacecraft and can attain a height of upto 47 miles.²³ It is also unlikely that States will be content to restrict their claims to sovereignty to 20 miles when they might claim substantially more without unduly interfering with exploration of outer space by other States. Thus a State might claim the lowest height at which it was possible to put a satellite into orbit (about 70-100 miles.)²⁴

Other factors which might induce a State to claim sovereignty above 20 miles would be the increasing ability of States to exercise effective control over greater

19. Haley, 'Survey of legal opinion on Extra Terrestrial Jurisdiction' Proceedings of III Colloquium on the Law of Outer Space (1960) pages 54-87.

20. Chicago Convention (1944) Article 1.

21. J. F. McMahon, 'Legal aspects of Outer Space' B.Y.I.L. (1962), page 340.

22. Cooper, 'Flight, Space and the Satellites' I.C.L.Q. (1958) pages 82-91.

23. 'Draft Code of Rules on Exploration and Uses of Outer Space' in David Davies Memorial Institute of International Studies (1962) page 8. Survey of Legal Opinion on Extra Terrestrial Jurisdiction Proceedings of III Colloquium on the Law of Outer Space (1960), page 38.

24. *Ibid* page 6.

heights and that Air Space only begins to lose its character as a continuous medium when a height of 50-55 miles is reached²⁵.

A number of writers invoking what they call the natural interpretation maintain that Air Space is synonymous with 'atmospheric space' and includes any space where air is to be found. This approach has been suggested by Professor Goedhuis in his article 'Some trends in political and legal thinking on the conquest of Space' published in April, 1962. Writers who share the opinion of the writer of this article that Air Space in the International Conventions and National Laws, is synonymous with atmospheric space, include Mayer, W.H. Prince of Hanover, Aaronson, Jenks, Pepin and Cheng.¹

The above approach which seeks to interpret Air Space in terms of atmosphere rather than in terms of aircraft, is open to several criticisms.

(a) One cannot place exclusive emphasis on the natural meaning of the word 'Air Space' without any reference to the actual context in which the word has been used for the past 40 years. Fitzmaurice points out that particular words and phrases are to be given their normal, natural and unstrained meaning in the context in which they occur. It can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one.² The context in which the word was employed during this period in International Conventions, Customary and National Legislation, clearly indicates that it was used in relation to the flight of aircraft. To extract the term Air Space from such a context and to inflate it to prevent height upto the limit of the atmosphere is to give it wholly an artificial meaning.

(b) The natural geographical links are not necessarily juridical links, even though a natural link may sometimes be one factor, *inter alia*, for putting forward a claim to sovereignty, for example the territorial sea and the continental Shelf.³

(c) As traces of air may be found in the atmosphere upto 10,000 miles, where is one to draw the line?. If such a theory allows the line to be drawn anywhere between 100 and 10,000 miles, it becomes so accommodating that it ceases to have any recognizable identity.

(d) Such an approach implies that every satellite that has been launched violated and continues to violate the Air Space over every country through which it passes. Yet not one State has protested or reserved its position on this matter; on the contrary both individually and collectively, they have propounded the view that outer space is free for the use of all states and its exploration is not to be paralysed by the veto of any one State.⁴

A third approach, representing an even more exaggerated view than the one above maintains that State sovereignty extends '*usque ad infinitum*.'⁵

Such a view may be more accurately characterised as '*usque ad absurdum*' as Dr. Jenks submitted that the upward extent of territorial sovereignty is not unlimited. He rightly observed the difficulties: "There are, however, more fundamental

25. A. G. Halcy, 'Survey of legal opinion' loc. cit. p. 6.

1. J. F. McMahon, loc. cit. B.Y.I.L. 1962, page 341.

2. 'The Law and the Procedure of the I.C.J.' B.Y.I.L. (1957), page 211.

3. Lauterpacht, 'Sovereignty over Submarine Areas' 27 B.U.I.L. (1950) pages 385, 386.

4. J. F. McMahon, loc. cit. page 342.

5. Milde, 'Considerations on legal problems of space above National Territory' reprinted in Legal Problems of Space Exploration—A symposium, page 1107.

difficulties. The first is that any projection of territorial sovereignty into space beyond the atmosphere would be inconsistent with the basic astronomical facts. The revolution of the earth on its axis, its rotation around the sun and the motions of the sun and planets through the galaxy, all require that relationship of particular sovereignties on the surface of the earth to space beyond the atmosphere is never consistent for the smallest conceivable fraction of time, such a projection into space of sovereignties based on particular areas of the earth's surface would give us a series of adjacent irregularly shaped cones with a constantly changing content. Celestial bodies would move in and out of these cones all the time. In these circumstances the concept of space cone of sovereignty is meaningless and dangerous abstraction. The second difficulty is that missiles, space stations and space ships moving in space would be constantly changing their positions in relation to subjacent territorial sovereignties at such high speed that whatever relationship of control might subsist between earth and such objects in space would have no territorial aspect analogous to the control exerted by a State in its Air Space or territorial waters—by reason of the astronomical facts—space beyond the atmosphere of the earth is and must always be 'a *res extra commercium*' incapable of appropriation by the projection into such space of any particular sovereignty based on a fraction of the earth's surface."⁶

Thus this view is contrary to astronomical facts and it is also contrary to any meaningful concept of sovereignty and contrary to State practice.⁷

Some thinkers namely, Cooper⁸ and Kopal⁹ proceeding by the analogy to the law of the sea, suggest the drawing of several lines rather than one. It has been proposed that a State should exercise full sovereignty upto the height to which aircraft can ascend; that then there should be a second area of upto 300 miles, designated as a 'contiguous zone' and allowing for a right of transit through this zone for all non-military flight instrumentalities and that finally there should be Outer Space, free to all. More recently it has been suggested¹⁰ that there be established a 'neutral zone' between the upper limits of Air Space and the lower limits of Outer Space to be known as 'Neutralia' in which the right of innocent passage would be recognized. Such an attempt to divide space up into sectors and zones would seem to be too impracticable and artificial to commend itself.

Many other proposals have also been made. They suggest more or less arbitrary criteria. One may note the suggestion that sovereignty should extend as far out as the subjacent State could exercise effective control.¹¹

This theory is open to certain criticisms. The main one levelled against it is that under this theory there would be not one single boundary but several boundary lines, since some States were more technically proficient than others and secondly that the boundary would keep going up as science added new techniques for controlling space

6. Dr. Jenks, 'International Law and Activities in Space' 5 I.C.L.Q. pages 103-104. Dr. Jenks, *Common Law of Mankind* pages 389-390.

7. I. F. McMahon, loc. cit. pages 342-343.

8. 'Legal problems of upper space' *Proceedings of American Society of International Law*, 1956 page 91.

9. 'Sovereignty of States and the legal status of Outer Space' *Legal problems of space exploration—Symposium*, page 1122.

10. Hyman, 'Sovereignty over Space' III Colloquium on the Law of Outer Space, page 33. *New York Times*, 16th April, 1961.

11. Kovalev and Cheprov, 'Artificial Satellites and International Law.' *The Soviet Yearbook of International Law* (1968) Summary in English, pp. 145-148.

activities. For these reasons the proposals seems unlikely to be acceptable to many States.¹²

The next proposal suggesting a slight modified criterion has been advocated, that is the so-called Karman Jurisdiction line which would extend upto about 53 miles. Haley observed, "As practical guide for space age, the weight of authority favours a measure of the sort, I have termed the Karman Primary Jurisdiction Line—simply stated the Karman Jurisdiction boundary falls approximately 275,000 feet (53 km.) where an object travelling at 25,000 feet (7 km.) per second loses its aerodynamic lift and centrifugal force takes over, the resulting boundary line would be about 53 miles."¹³

Finally, the proposal is that instead of drawing a demarcation line between Air Space and Outer Space, there should be one doctrine, namely freedom of all inclusive space subject to agreed restrictions.¹⁴

A more sensible approach would be the suggestion that a State should only exercise sovereignty over that area whose boundary is the lowest altitude at which an artificial satellite may be put in orbit at least once around the earth.¹⁵ It would seem that the maximum altitude required to do this would be between 70 and 100 miles.¹⁶

The advantage of such an approach is that it takes cognizance of State practice since the launching of the first sputnik and it recognizes the legality of those satellites already in orbit and may easily be reconciled with claims to sovereignty upto the height of aerodynamic lift or even upto 70 miles. This view may be taken as a reasonable one.

Most of the above theories pre-suppose that a demarcation line must be drawn somewhere in space and the problem is to determine where. However the General Assembly of the United Nations has requested the U.N. Committee on the Peaceful Uses of Outer Space to work out a definition of Outer Space. This issue was included in the agenda of the 6th Session of the Legal Sub-Committee of the U.N. Committee on the Peaceful Uses of Outer Space, held in Geneva in 1967 in accordance with a suggestion made by France. Giving his reasons for the necessity of defining Outer Space, the French representative stressed that the countries should have a clear idea of the limits of their sovereignty in extra-terrestrial space. He said that the definition of Outer Space should conform to the interests of every State's security and at the same time should not hamper their space exploration efforts.¹⁷

The Indian delegate said that a ban on military activities in Space would facilitate the problem of Space definition and asked the Sub-committee to consider the various aspects of the issue very carefully. The Soviet representative pointed out the complicated nature of the problem and observed that International law experts appeared to be holding opposite views in this regard. The main problem is whether it is necessary and possible to set upper limits of a State's sovereignty in Outer Space.¹⁸

12. The Law of Outer Space, The Report to the NASA, October, 1960, page 17 cited in B.Y.I.L (1962) page 346.

13. Proceedings of III Colloquium on the Law of Outer Space, 1960, page 40.

14. Binet, 'Towards Solving the Space Sovereignty Problem' Quoted by J. F. McMahon, B.Y.I.L., 1962, page 344.

15. Leopold and Scafuri, 'Orbital Space Flight under International Law' Federal Bar Journal (July, 1959) pages 227-241.

16. 'Draft Code of Rules on the Exploration and the uses of Outer Space' loc. cit. page 7.

17. Gennady Zhukov, 'Outer Space: Legal Aspects' I.J.L.L. April, 1968, pages 242-243.

18. Gennady Zhukov, loc. cit. p. 243.

At present there are no such limits on State sovereignty in Outer Space. Some writers while considering the prospects of space law have offered the most diverse criteria for defining Outer Space. While some hold the view that the sphere of State sovereignty is identical with that of the earth's atmosphere, others have sought to identify it with height that an aircraft or an artificial satellite could reach. Some lawyers identify the sphere of State sovereignty with the part of space effectively controlled by a State, or with the sphere of earth's gravitation. Having failed to find the criteria, physical or technological, necessary for finding a solution to the problem of the upper limit of State sovereignty, many lawyers have plainly rejected the necessity of setting such a limit at all. Outer Space is not merely part of the universe but a medium where the universe exists and where all celestial bodies are in constant movement. In that case one cannot but agree with Albert Einstein that Outer Space is a limitless medium in which heavenly bodies moved.¹⁹

In such conflicting circumstances it would be reasonable to support the view that a State should only exercise its sovereignty over that area whose boundary is the lowest altitude at which an artificial satellite may be placed into orbit at least once around the earth. The view is advantageous in the sense that it takes in view the State practice concerning the flights of earth satellites.

In order to have clear conception of Outer Space it would be proper to consider the views of Space Powers in relation to their State practice. As smaller countries are also involved in this problem their views and practice are quite relevant on the question of State sovereignty in Outer Space. This article presents the views and practice of Soviet Union, the United States and other countries.

The Russian view Point.

During the first five years of space age the Soviet Space Law developed from a collection of principles hastily adopted as a defensive measure against Soviet Space encroachments.²⁰

Many of the view points discussed above have been advanced and adopted at one time or the other by Soviet writers. A new legal posture or difference is apparent in almost every article, for example in the article entitled 'Artificial Satellites and International Law' where the authors mention (a) A aerodynamic lift, (b) Security and (c) Effective Control, as suitable criteria for determining the sovereignty of State in space.²¹

The Russian Jurist Korovin in his book viewed that territorial Air Space comprises the atmosphere over the land and waters of a State to an unrestricted height. It includes the entire atmosphere, lower layers (Troposphere) and upper layers (stratosphere). States as a rule do not fix any upper limit for their Air Space.²² Professor Korovin observed that the Paris, Chicago and related conventions were inapplicable to cosmic space and that National Law did not go to that extent and that analogies drawn from sea or Air Law were not pertinent either. He insisted that all universally accepted rules of International Law, including the protection of foreign

19. Gennady Zhukov, loc. cit, pages 243-244.

20. Robert D. Crane, 'Soviet attitude toward International Space Law' A.J.I.L. (1962) pages 685-723.

21. Kovalev and Cheprov, Soviet Year Book of International Law (1958) Summary in English, pages 145-149.

22. 'International Law', page 190.

citizens, the ban on the use of force and inter-governmental responsibility for losses due to Government action, apply to Outer Space.²³

On the basis of the criteria expounded above the first Soviet sputnik would have violated the space of every country over which it passed. It is not strange therefore to read shortly after the launching of the first sputnik, a Soviet article propounding that in practice, however, hitherto the question of sovereignty over air space has been concerned only with the lower layers of the atmosphere to the extent of 20-30 kilometres from the earth, within the limits of maximum ascent ceiling of present airplanes, and the Soviet earth satellite does not violate the air sovereignty of any State.²⁴

The view basing sovereignty on aerodynamic lift was strongly criticised on the ground that it failed to provide an adequate safeguard for State security.²⁵ The Soviet jurists Kovalev and Cheprov also affirmed this view and gave importance to State security.¹

The principle of effective control has also been advanced by the Soviet jurists after the flight of the first sputnik justifying the freedom of Outer Space. It has its own defects as developed countries might effectively control their Air Space to a greater extent than the undeveloped countries with negligible technical resources. This view thus had a very short lease of life.²

It would be worth-noting that Soviet writers have been propounding new criteria and rejecting the old ones. Even the principle of security has now been abandoned in view of the fact that State security can only be guaranteed by an international agreement prohibiting certain activities in space whenever they occur and not by an unlimited extension of State sovereignty.³

Zhukov in 1959 wrote, "In any case in my opinion, the extent of State sovereignty should not include the space where the first sputnik travelled the majority of the authors stand. more correctly in my view, for a limited interpretation of the notion of 'Air Space'. Some consider that sovereignty in space ends where the area of satellite orbits starts."⁴

The Soviet Union has reserved its freedom of action with respect to claims in Outer Space.⁵ It would be submitted that Soviet writers have accepted in the last the freedom of Outer Space and rejected extensive projection of State sovereignty into Outer Space.

The representatives of the Soviet Government at the meeting of the Legal Subcommittee on Peaceful uses of Outer Space held in Geneva in 1962 appear to have come very close to expressing the view that the resolution adopted by the General Assembly, recommending that Outer Space and celestial bodies are free for explora-

23. Quoted by P. K. Kartha, 'Some Legal Problems concerning Outer Space'. 3 I.J.I.L. (1963) pages 8-9.

24. Zadorazhnyi. 'The Artificial Satellites and International Law Republished in' 'Legal Problems of Space Exploration—A symposium' pages 1047-1048.

25. Osnitskaya, 'International Law Problems of the Conquest of Space' Soviet Year Book of International Law (1959) pages 65-71.

1. Kovalev and Cheprov, loc. cit, pages 147-148.

2. Robert D. Crane, loc. cit. p. 690.

3. Zhukov, 'Conquest of Outer Space and Some Problems of International Relations' International Affairs (Moscow 1959), pages 88-96.

4. Zhukov, loc. cit. published in Legal Problems of Space Exploration—A symposium, page 1083.

5. Jessup and Taubenfeld, 'Controls for Outer Space' (1959) page 219.

tion and use by all States⁶, has the force of law. The resolution laid down certain principles which were binding upon all States with respect to activities in Outer Space. The Soviet Union took her success in Outer Space as an achievement not only of the Soviet people but of all mankind.

Russian Practice.

The practice is obvious that the Soviet Union on no occasion sought permission beforehand from those States over which its satellites were to pass and on no occasion has it protested against the passage of American satellites on Russian territory. It is thus clear that State sovereignty does not extend "*ad infinitum*" and the Soviet Union gives way to other States satellites by not claiming its air space to the height where it is possible to place a satellite in orbit as indicated by the Soviet jurists, by Government representatives and by the practice of the Soviet Government.

The above mentioned view has been reaffirmed by the Soviet Union adopting the Resolution 1962 (XVIII) indicating that Outer Space and Celestial bodies are from for exploration and use by all States.⁷

The declaration was welcomed as the first chapter in the book of Space Law. It was felt necessary to embody the principles contained therein in a binding treaty. Thus the draft treaty agreed upon in the Sub-committee was approved by the general Assembly in a unanimously adopted Resolution 2222 (XII) of 19th December, 1966.⁸

The treaty provides that Outer Space including the Moon and other celestial bodies shall be free for exploration and use by all States without discrimination of any kind on a basis of equality.⁹

Therefore the Space treaty has established that Outer Space and Celestial bodies are not subject to control and sovereignty of any one State. As the Soviet Union is one of the parties to the present treaty, her intention seems clear on this point.

The American View Point.

The silence of the Governments of the world on the question of sovereignty and other questions relating to rights in Outer Space has vanished. The view of the American Government is embodied in various statements of Mr. Loftu Becker during his legal advisership of the U. S. Government.¹⁰ Thus his statements before a number of congressional committees may be worth considering.

Mr. O. J. Lissitzyn¹¹, in his article has critically examined his statements. The legal position indicated by Mr. Becker seems to be designed mainly to reserve for the United States the greatest possible bargaining in any future negotiation on Outer Space. In the first place the author has given a summary of statements and then levelled certain criticisms against the statements. One of the striking features of his statements is that they lend no support to the suggestions that Outer Space is '*Res Communis*' which like the high seas is incapable of being appropriated by any State. On the other hand there is little indication that the United States has recognized no limit to its sovereignty.

6. G. A. Resolution 1721 (XVI) 20th December, 1961.

7. U. N. Resolution 1962 (XVIII) 13th December, 1963.

8. M. Chandra Shekharan, 'The Space Treaty' VII, I.J.I.L. 1967, page 61.

9. The Space Treaty (Article 1). International Legal Materials, Vols. V. November 1966, pages 1109-1112.

10. J.-F. McMahon, loc. cit. page 349.

11. 'American position on Outer Space and Antarctica' 53 A.J.I.L. (1959) pages 126-131.

The suggestion that the United States has already engaged in activities in Outer Space which might serve as the foundation for a claim of sovereignty is not consistent with the suggestion that the Air Space as distinct from Outer Space subject to the sovereignty of the United States may extend 10,000 miles upward, for as Mr. Becker recognized all of the satellites upto the time of his remarks, had been orbiting below this altitude, and there is no information indicating that the United States had engaged in any activities in the space above 10,000 miles¹². The two suggestion are thus divergent.

If Mr. Becker's view is accepted then as the United States and the Soviet Union are only engaged in such activities in what may be regarded as Outer Space, the same ought to be divided in between these two Powers only.¹²

The analogy drawn by Mr. Becker between Antarctica and Outer Space is not altogether convincing. There are some clear out differences between the two concepts.¹³ However, the present view of the United States is that Outer Space shall be used for scientific and peaceful purposes. This view has been confirmed by the U. S. Government by adopting the Resolutions 1721 (XVI), 1962 (XVIII) and 1884 (XIII).

The U. S. Deputy Secretary of State for International Organizations Affairs, recognized that the boundary line between Air Space and Outer Space was still undetermined. However, he stated that it was the general view that the satellites so far placed in orbit have been operating in Outer Space. In other words it would seem to imply that the boundary line would be drawn below the height at which it was possible to place a satellite in orbit.¹⁴

Mr. Johnson (then Senator) expressed the same view, Today the space is free. It is unscattered by conflict. No nation holds a concession there. It must remain this way".¹⁵

Mr. Plimson speaking before the Committee on Peaceful Uses of Outer Space observed, "We have rejected the concept of national sovereignty in Outer Space No Moon, no planet shall ever fly a single nation's flag."¹⁶

The most important proposal made by the then President Eisenhower¹⁷ before the General Assembly needs careful consideration. He proposed,

1. I agree that the celestial bodies are not subject to national appropriation by any claim of sovereignty.

2. We press forward with a programme of international co-operation for constructive peaceful uses of Outer Space under the United Nations.

Those principles have been established by way of resolutions of the General Assembly of the United Nations. Under the circumstances to put the claims of sovereignty in Outer Space in the manner adopted by Mr. Becker is to help to demonstrate the absurdity of claims of national sovereignty in Outer Space.¹⁸

12. O. J. Lissitzyn, loc. cit. page 129.

13. *Ibid*, page 131.

14. See B.Y.I.L. 1962, page 351.

15. U. N. Doc. A/C 1/S.R. 986, page 208 cited in B.Y.I.L. 1962, page 351.

16. U. N. Doc. A/A.C. 105/P.V. 2, pages 13-15.

17. The Official Records of General Assembly, G.A. (XV) A/P.V. 868 (22nd September, 1960), pages 45-48.

18. O. J. Lissitzyn, loc. cit. page 130.

Mr. Johnson, the former President remarked, "It is underscored by the fact that in the earliest days of space age, the United States formally insisted that the exploration of space should be a joint adventure of nations with the express objective of fostering peaceful uses. This has been and continues to be our position in word and deed. He further said, "It is my conviction that space can be mankind's first real avenue to peace by giving all men and all nations a common self interest and joint adventure."¹⁹

Consequently the current views sound that the United States also does not project its claim of sovereignty infinitely. An International Space treaty has been concluded to which the United States is one of the parties. It provides that Outer Space including moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. It further provides that the exploration and use of Outer Space including the moon and other celestial bodies shall be carried out for the benefit of and in the interest of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. Outer Space including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind.²⁰

Thus the treaty gives recognition to the principle of sovereign equality of States and categorically eliminates all possibility of discrimination.²¹

It would be proper to consider the recent triumph of the United States in order to conclude the practice of the Space Power in discussion. The United States has planted its flag on the surface of the moon. It has sent its citizens on the moon according to scheduled programme. The question arises whether the United States may change its position on the issue of claim of sovereignty.

The Space men have left a message on the moon which is very appreciable and suggestive of intention of the Government of the United States. The message reads ²², "Here men from the planet earth, first set foot upon the moon, July, 1969. We came in peace for all mankind."

The message suggests that the United States does not intend to claim sovereignty over the moon but the success of the United States is to be treated as the success of the whole mankind. The message bears the signature of the President of the United States which suggests that the message is an authoritative one and it embodies the clear intention of the U.S. Government.

The message is in accordance with the provisions of the Space Treaty. It is expected that all nations will comply with the provisions of the treaty in the same spirit as the United States has complied with it at a very critical moment when it is in position to claim sovereignty over the moon. It has been reported that the first men on the moon, Neil Armstrong and Edwin Aldrin did not claim the moon for the United States. ²³

Practice and Views of other States.

Since December 1958, when the debate in the political Committee of the U.N. General Assembly was held a majority of the states expressed that Outer Space did

19. 'The principles of the Space Age', *Space: Its Impact on Man and Society*. (1965), pp. 6-7.

20. Provisions of Space Treaty as cited in *American Reporter*, 2nd August, 1969, page 5.

21. M. Chandra Shekharan, 'The Space Treaty' 7, *I.J.I.L.*, January, 1967, page 62.

22. "National Herald", 17th July, 1969, page 1.

23. "American Reporter", 2nd August, 1969, page 5.

not belong to any one state. The debate further showed the complexity of problems with regard to Outer Space. The international character of Outer Space as '*Res Communis Omnium*' seems to have been generally accepted.²⁴ and this has subsequently been confirmed by the unanimous adoption of Resolution 1721 (XVI) both in the Political Committee of the United Nations and in the General Assembly stating that Outer Space is to be free for exploration and use by all States.²⁵

Some representatives pointed out that Outer Space, unlike the Seas, which are finite in nature, was indivisible and hence not subject to national sovereignty. Delegates of several small nations cited the lack of protest at the passage overhead of the Russian and American satellites as proof of the non-existence of national sovereignty at these altitudes.¹

For instance, the representative of Iran stated in the first Committee of the General Assembly, thus, "Furthermore, lack of objection of any State to the free orbiting of satellites seems to be a tacit acknowledgment that territorial sovereignty does not extend beyond any State's own 'Air Space'. These developments point towards the possibility of abiding by the rule of '*Res Communis Omnium*' in Outer Space and the free use of Outer Space by all states. Certain analogies may be drawn from the law of Sea, Air Law and the Law of polar regions. Such analogies may be useful only in that they provide a general pattern for action; it would, of course, be a mistake to push them too far in their technicalities."²

The concept that Outer Space was '*Res Nullius*' and therefore subject to acquisition, was rejected by several representatives of smaller nations who termed the appropriation of Outer Space or heavenly bodies, impossible or atleast improper, while others argued that, the space, the moon and other heavenly bodies were owned or belonged to or were the common domain or common property of all nations and all peoples.

The delegate of Canada suggested that while Outer Space might belong to the world as a whole, jurisdiction over Outer Space and its contents was properly in the United Nations.³ The Italian delegate asserted that Outer Space belonged to all the states of the world and that it was equally the property of all other communities of thinking and organized beings living on other planets.⁴

Most of those who discussed this point noted that rights of free use by all would be feasible only under international control due to danger to the rest of the world of abuse of such rights.⁵

The representative of Peru insisted that there should be jurisdiction of the international community in Outer Space and over celestial bodies. He observed, "So that I am going beyond the theory of '*Res Communis*', to the theory of the jurisdiction of international community, I know full well that this jurisdiction must be expressed in the stipulation of a treaty."⁶

24. U. N. Doc. A/C 1/P.V. 1213, page 16, 13th December, 1958 (Austria) Reporting on debate in the First Committee, page 615.

25. G. A. Resolution 1721 (XVI) 20th December, 1961.

1. Statements by the delegates of Austria, Chile, Iran, Netherlands, Peru and Sweden cited in 3, I.J.I.L. 1963 pages 9-10.

2. U. N. Doc. A/C 1/P.V. 1213, page 16.

3. The representative of Canada, S.R. 989, page 9.

4. Italy, S.R. 982, page 10.

5. Austria, Australia, Canada, Italy, Peru, and Yugoslavia, cited in 3, I.J.I.L. 1963, page 10.

6. U. N. Doc. A/C 1/P.V. 1211, pages 46-51, cited in 3, I.J.I.L. 1963, page 10.

The United Kingdom has shown her willingness by adopting the Resolution 1721 (XVI) maintaining that the Outer Space and Celestial Bodies are free for exploration and use by all states in conformity with International Law and are not subject to national appropriation.⁷

Consequently one might find that the statements by the delegates of Great Britain, Argentina, Australia, Italy, Peru, Poland, Iran, Spain, Brazil, Sweden, Cuba, Yugoslavia, Austria, France, Japan and Canada who have unanimously adopted the Resolution 1721 (XVI) maintaining that Outer Space is free for use of all States and is not subject to appropriation by one State, are to the same effect.

The practice of States is also obvious when they adopted the Resolution 1962 (XVIII) on 13th December, 1963 which re-affirmed and re-stated with slight modifications the principles promulgated in the Resolution 1721 (XVI). Thus claims of sovereignty in Outer Space and Celestial Bodies are not recognized by these smaller States too. It is also affirmed that Outer Space and Celestial Bodies should be explored for the betterment of whole mankind and benefit of all States irrespective of their economic and scientific developments. "The conference of eminent lawyers of 108 countries has recommended the United Nations control over Outer Space."⁸

The problem of sovereignty seems however, to have been solved since an International Space Treaty has been concluded providing that there shall be freedom of exploration and use of Outer Space and Celestial Bodies for all States on a basis of equality barring the claims of sovereignty and national appropriation.⁹

From the fact that the United States had landed its citizens on the moon with the message that they have gone there for all mankind, it becomes clear that the conqueror of the new planet intends not to claim sovereignty over the moon and this attitude is consistent with the spirit of the Space Treaty and in consonance with the world opinion. It is expected that the Space Powers will comply with the provisions of the Space Treaty to keep the balance of power in the world arena of today.

7. Hansard, House of Lords debates, Vol. 216, Col. 975 ; House of Commons debates, Vol. 653, Cols. 192-193.

8. 'Changed Pattern of International Law' Lawyer, February, 1966, page 18.

9. International Legal Materials, Vol. V, November, 1966, pages 1109-1112.

The Supreme Court Journal

(Reports)

I]

JANUARY

[1970

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. M. SHELAT AND V. BHARGAVA, JJ.

Town Municipal Council, Athani

.. Appellant*

v.

The Presiding Officer, Labour Court, Hubli and others etc. .. Respondents.

Industrial Disputes Act (XIV of 1947), section 33-C (2) and the Minimum Wages Act (XI of 1948), section 20 (1)—Interpretation—Claim for wages for overtime and for payment for work done on days of rest—No dispute as to rates—Applications under section 33-C (2)—Jurisdiction of the Labour Court, if barred by the remedy under section 20 (1) of the Minimum Wages Act.

Limitation Act (XXXVI of 1963), section 137 and third division of the Schedule—Interpretation—Ejusdem generis—Meaning of the word “other”—Other Articles in the third division has reference to applications under Civil Procedure Code with the exception of applications under the Arbitration Act and also under the Criminal Procedure Code—Applications to be to Courts to be governed by the Articles in the third division and not to Industrial Tribunal or Labour Court.

The language used in section 20 (1) of the Minimum Wages Act shows that the Authority appointed under that provision of law is to exercise jurisdiction for deciding claims which relate to rates of wages, rates for payment of work done on days of rest and overtime rates. If there be no dispute as to rates between the employer and the employees, section 20 (1) would not be attracted. The purpose of section 20 (1) seems to be ensure that the rates prescribed under the Minimum Wages Act are complied with by the employer in making payment and, if any attempt is made to make payments at lower rates, the workmen are given the right to invoke the aid of the Authority appointed under section 20 (1). In cases where there is no dispute as to rates of wages, and the only question is whether a particular payment at the agreed rate in respect of minimum wages, overtime or work on off-days is due to a workman or not, the appropriate remedy is provided in the Payment of Wages Act. If the payment is withheld beyond the time permitted by the Payment of Wages Act even on the ground that the amount claimed by the workman is not due, or if the amount claimed by the workman is not paid on the ground that deductions are to be made by the employer, the employee can seek his remedy by an application under section 15 (1) of the Payment of Wages Act. In cases where section 15 of the Payment of Wages Act may not provide adequate remedy, the remedy can be sought either under section 33-C of the Industrial Disputes Act or by raising an industrial disputes under the Act and having it decided under the various provisions of that Act. In these circumstances,

the contention on behalf of the appellant that section 20 (1) of the Minimum Wages Act should not be interpreted as intended to cover all claims in respect of minimum wages or overtime payment or payment for days of rest even though there may be no dispute as to the rates at which those payments are to be claimed could not be accepted. It is true that, under section 20 (3), power is given to the Authority dealing with an application under section 20 (1) to direct payment of the actual amount found due; but this is only an incidental power granted to that Authority, so that the directions made by the Authority under section 20 (1) may be effectively carried out and there may not be unnecessary multiplicity of proceedings. The power to make orders for payment of actual amount due to an employee under section 20 (3) cannot, therefore, be interpreted as indicating that the jurisdiction to the Authority under section 20 (1) has been given for the purpose of enforcement of payment of amounts and not for the purpose of ensuring compliance by the employer with the various rates fixed under that Act.

In the present case there was no dispute relating to the rates. It is true that, in their applications, the workmen did plead the rates at which their claims had to be computed; but it was nowhere stated that those rates were being disputed by the appellant. Even in the pleadings put forward on behalf of the appellant as incorporated in the order of the Labour Court, there was no pleading that the claims of the workmen were payable at a rate different from the rates claimed by them. The only question that arose was whether there were any rates at all fixed under the Minimum Wages Act for overtime and for payment for work done on days of rest. Such a question does not relate to a dispute as to the rates enforceable between the parties so that the remedy under section 20 (1) of the Minimum Wages Act could not have been sought by the applicants in any of these application. No question can therefore arise of the jurisdiction of the Labour Court to entertain these application under section 33-C (2) of the Act being barred because of the provisions of the Minimum Wages Act.

The language of Article 137, Limitation Act, 1963 is only slightly different from that of the earlier Article 181 inasmuch as when prescribing the three years period of limitation the first column giving the description of the application reads as "any other application for which no period of limitation is provided elsewhere in this division." In fact, the addition of the word "other" between the words "any" and "application" would indicate that the Legislature wanted to make it clear that the principle of interpretation of Article 181 of Act IX of 1908, on the basis of *ejusdem generis* should be applied when interpreting the new Article 137. This word "other" implies a reference to earlier articles and, consequently, in interpreting this article, regard must be had to the provisions contained in all the earlier articles. The other articles in the third division to the schedule refer to applications under the Civil Procedure Code, with the exception of application under the Arbitration Act and also in two cases applications under the Criminal Procedure Code. The effect of introduction in the third division of the schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered in the case of *Sha Mulchand & Co., Ltd.*, (1953) S.C.J. 68. On the same principle, it must be held that even the further alteration made in the articles contained in the third division of the schedule to the new Limitation Act containing references to applications under the Criminal Procedure Code cannot be held to have materially altered the scope of the residuary Article 137 which deals with other applications. It is not possible to hold that the intention of the Legislature was to drastically alter the scope of this article so as to include within it all applications, irrespective of the fact whether they had any reference to the Civil Procedure Code.

This point may be looked at from another angle also. When this Court earlier held that all the articles in the third division to the schedule, including Article 181 of the Limitation Act of 1908 governed applications under the Civil Procedure Code only, it clearly implied that the applications must be presented to a Court

governed by the Civil Procedure Code. Even the applications under the Arbitration Act that were included within the third division by amendment of Articles 158 and 178 were to be presented to Courts whose proceedings were governed by the Civil Procedure Code. At best, the further amendment now made enlarges the scope of the third division of the schedule so also to include some applications presented to Courts governed by the Criminal Procedure Code. One factor at least remains constant and that is that the applications must be to Courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than Courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not Courts and they are in no way governed either by the Civil Procedure Code or the Criminal Procedure Code. It is difficult, therefore, to accept the submission made that this article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the article and in the new Act cannot justify the interpretation that even applications presented to bodies, other than Courts, are now to be governed for purposes of limitation by Article 137.

Appeals by Special Leave from the Judgment and Order dated the 25th August, 1967 of the Mysore High Court in Writ Petitions Nos. 741, 973, 974 and 975 of 1956.

B. Sen, Senior Advocate (*S. N. Prasad* and *R. B. Dattar*, Advocates, with him), for Appellant (In all the Appeals.)

Jayardan Sharma, Advocate, for Respondents Nos. 4 to 14 (In C.A.No. 170 of 1968), Respondents Nos. 4 to 24 and 26 to 53 (In C.A. No. 171 of 1968), Respondent No. 4 (In C.A. No. 172 of 1968) and Respondents Nos. 4 to 17 (In C.A. No. 173 of 1968).

The Judgment of the Court was delivered by

Bhargava, J.—These four connected appeals have been filed, by Special Leave, by the Town Municipal Council, Athani, and are directed against a common judgment of the High Court of Mysore in four writ petitions filed by the appellant under Article 226 of the Constitution, dismissing the writ petitions. The circumstances in which these appeals have arisen may be briefly stated.

Four different applications under section 33-G (2) of the Industrial Disputes Act XIV of 1947 (hereinafter referred to as "the Act") were filed in the Labour Court, Hubli, by various workmen of the appellant. Application (LCH) No. 139 of 1965 was filed by eleven workmen on 28th July, 1965, seeking computation of their claim for overtime work for the period between 1st April, 1955 and 31st December, 1957, and for work done on weekly off-days for the period between 1st April, 1955 and 31st December, 1960. The amount claimed by each workman was separately indicated in the application under each head. The total claim of all workmen was computed at Rs. 62,420.82 P. according to the workmen themselves. The second application (LCH) No. 138 of 1965 was presented by 50 workmen on 23rd July, 1965, putting forward a claim for washing allowance at Rs. 36 each from 1st January, 1964 to 30th June, 1965, and cost of uniform at Rs. 40 each from 1st January, 1964 to 30th June, 1965 in respect of 18 of those 50 workmen. The third application (LCH) No. 101 of 1965 was filed by one workman alone on 19th April, 1965, claiming a sum of Rs. 8,910.72P. in respect of his overtime work and compensation for work done on weekly off-days. The fourth application (LCH) No. 140 of 1965 was filed on 26th July, 1965 by 14 workmen making a total claim of Rs. 17,302.60 P. for work done on weekly off-days during the period from 1st December, 1960 to 30th June, 1965. 13 of the workmen claimed that they were entitled to payment at Rs. 1,190 each, while one workman's claim was to the extent of Rs. 1,832.60 P.

The Labour Court at Hubli entertained all these applications under section 33-C (2) of the Act, computed the amounts due to the various workmen who had filed the applications, and directed the appellant to make payment of the amounts found due. Thereupon, the appellant challenged the decision of the Labour Court before the High Court of Mysore by four different writ petitions under Article 226 of the Constitution. The order in Application (LCH) No. 139 of 1965 was challenged in Writ Petition No. 741 of 1966, that in Application (LCH) No. 138 of 1965 in Writ Petition No. 973 of 1966 ; that in Application (LCH) No. 101 of 1965 in Writ Petition No. 974 of 1966 ; and that in Application (LCH) No. 140 of 1965 in Writ Petition No. 975 of 1966. The principal ground for challenging the decision of the Labour Court was that all these amounts could have been claimed by the workmen by filing applications under section 20 (1) of the Minimum Wages Act XI of 1948 ; and, since that Act was a self-contained Act making provision for relief in such cases, the jurisdiction of the Labour Court under the general Act, *viz.*, the Industrial Disputes Act, 1947 was taken away and excluded. It was further pleaded that the jurisdiction of the Labour Court to deal with the claims under section 20 (1) of the Minimum Wages Act had become time-barred and such claims, which had become time-barred, could not be entertained by the Labour Court under section 33-C (2) of the Act. Some other pleas were also taken in the writ petitions which we need not mention as they have not been raised before us. The High Court did not accept the plea put forward on behalf of the appellant and dismissed the writ petitions by a common order, dated 25th August, 1967. These four appeals are directed against that common order dismissing the four writ petitions. Civil Appeals Nos. 170, 171, 172 and 173 of 1968 are directed against the order governing Writ Petitions Nos. 741 of 1966, 973 of 1966, 974 of 1966 and 975 of 1966 respectively.

In these appeals in this Court also, the principal point urged by the learned Counsel for the appellant was the same which was raised before the High Court in the Writ Petitions, *viz.*, that the jurisdiction of the Labour Court to deal with the claims of the workmen under section 33-C (2) of the Act was barred by the fact that the same relief could have been claimed by the workmen under section 20 (1) of the Minimum Wages Act. In the course of the arguments, however, learned Counsel conceded that he could not press this point in Civil Appeal No. 171 of 1968 arising out of Writ Petition No. 973 of 1966 which was directed against the order of the Labour Court in Application (LCH) No. 138 of 1965, because the claim in that application before the Labour Court was confined to washing allowance and cost of uniform which are items not governed by the Minimum Wages Act at all. His submissions have, therefore, been confined before us to the other three appeals in which the claim of the workmen was for computation of their benefit in respect of overtime work and work done on weekly off-days.

It may be mentioned that the objection to the jurisdiction of the Labour Court was raised on behalf of the appellant not only in the writ petitions before the High Court, but even before the Labour Court itself when that Court took up the hearing of the applications under section 33-C (2) of the Act. However, the ground for challenging the jurisdiction of the Labour Court was confined to the point mentioned by us above. It was not contended either before the Labour Court or in the writ petitions before the High Court that the applications were not covered by the provisions of section 33-C (2) of the Act. The plea taken was that, even though the applications could be made under section 33-C (2) of the Act, the jurisdiction of the Labour Court to proceed under that provisions of law was barred by the provisions of the Minimum Wages Act. Mr. B. Sen, appearing on behalf of the appellant, wanted permission to raise the question whether these applications before the Labour Court were at all included within the scope of section 33-C (2) of the Act ; but, on the objection of learned Counsel for the respondents, the permission sought was refused. As we have mentioned earlier, the jurisdiction of the Labour Court on this ground was not challenged either before the Labour Court itself or before the High Court. No such ground was raised even in the Special Leave petition, nor was it

raised at any earlier stage by any application. It was sought to be raised by Mr. Sen for the first time in the course of the arguments in the appeals at the time of final hearing. We did not consider it correct to allow such a new point to be raised at this late stage. However, another new point, which had not been raised before the Labour Court and in the writ petitions before the High Court, was permitted to be argued, because it was raised by a separate application, presented before the hearing, seeking permission to raise it. The new question sought to be raised is that, even if the applications under section 33-C (2) of the Act were competent and not barred by the provisions of the Minimum Wages Act, they were time-barred when presented under Article 137 of the Schedule to the Limitation Act XXXVI of 1963. The question of limitation was incidentally mentioned before the Labour Court as well as the High Court, relying on the circumstance that applications under section 20 (1) of the Minimum Wages Act could only have been presented within period of six months from the date when the claims arose. At that stage, reliance was not placed on Article 137 of the Schedule to the Limitation Act ; but well before the final hearing, a written application was presented on behalf of the appellant seeking permission to raise this plea of limitation on these appeals. Notice of that application was served on the respondents well in time, so that by the time the appeals came up for hearing, they knew that this point was sought to be raised by the appellant. A question of limitation raises a plea of want of jurisdiction and, in these cases, this question could be decided on the basis of the facts on the record, being a pure question of law. It is in this background that we have permitted this question also to be raised in these appeals, though it was not put forward either in the High Court or before the Labour Court. Thus, we are concerned in these appeals with the two aspects relating to the exclusion of the jurisdiction of the Labour Court to entertain application under section 33-C (2) of the Act because of the provisions of the Minimum Wages Act, and the plea that the applications under section 33-C (2) of the Act were time-barred or at least part of the claims under the applications were time-barred in view of Article 137 of the Schedule to the Limitation Act, 1963.

On the first question both the Labour Court and the High Court held that the contention raised on behalf of the appellant that the jurisdiction of the Labour was excluded because of section 20 (1) of the Minimum Wages Act has no force on the assumption that the claims made in these applications under section 33-C (2) of the Act could have been presented before the Labour Court under section 20(1) of the Minimum Wages Act. In our view this assumption was not justified. As we shall indicate hereafter, the claims made by the workmen in the applications under section 33-C (2) of the Act could not have been made before the Labour Court under section 20 (1) of the Minimum Wages Act, so that it is not necessary for us to decide the general question of law whether an application under section 33-C(2) of the Act can or cannot be competently entertained by a Labour Court if an application for the same relief is entertainable by the Labour Court under section 20 (1) of the Minimum Wages Act.

The long title and the preamble to the Minimum Wages Act show that this Act was passed with the object of making provision for fixing minimum rates of wages in certain employments. The word "wages" has been given a wide meaning in its definition in section 2(h) of that Act and, quite clearly, includes payment in respect of overtime and for work done on weekly off-days which are required to be given by any employer to the workmen under the provisions of that Act itself. Section 13 (1), which deals with weekly off-days, and section 14 (1), which deals with overtime, are as follows :—

" 13. (1) In regard to any scheduled employment minimum rates of wages in respect of which have been fixed under this Act, the appropriate Government may—

(a) fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals ;

(b) provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such days of rest ;

(c) provide for payment for work on a day of rest at a rate not less than the overtime rate."

" 14. (1) Where an employee, whose minimum rate of wages is fixed under this Act by the hour, by the day or by such a longer wage-period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess at the overtime rate fixed under this Act or under any law of the appropriate Government for the time being in force, whichever is higher."

In order to provide a remedy against breach of orders made under sections 13 (1) and 14 (1), that Act provides a forum and the manner of seeking the remedy in section 20 which is as follows :—

" 20. (1) The appropriate Government may by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or any officer of the Central Government exercising functions as a Labour Commissioner for any region, or any officer of the State Government not below the rank of Labour Commissioner or any other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the Authority to hear and decide for any specified area all claims arising out of payment of less than the minimum rates of wages or in respect of the payment of remuneration for days of rest or for work done on such days under clause (b) or clause (c) of sub-section (1) of section 13 or of wages at the overtime rate under section 14 to employees employed or paid in that area.

(2) Where an employee has any claim of the nature referred to in sub-section (1) the employee himself or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector, or any person acting with the permission of the Authority appointed under sub-section (1) may apply to such Authority for a direction under sub-section (3) :

Provided that every such application shall be presented within six months from the date on which the minimum wages or other amount became payable :

Provided further that any application may be admitted after the said period of six months when the applicant satisfies the Authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-section (2) is entertained, the Authority shall hear the applicant and the employer, or give them an opportunity of being heard and after such further inquiry, if any, as it may consider necessary, may, without prejudice to any other penalty to which the employer may be liable under this Act, direct—

(i) in the case of a claim arising out of payment of less than the minimum rates of wages the payment to the employee of the amount by which the minimum wages payable to him exceed the amount actually paid together with the payment of such compensation as the Authority may think fit not exceeding ten times the amount of such excess ;

(ii) in any other case, the payment of the amount due to the employee, together with the payment of such compensation as the Authority may think fit, not exceeding ten rupees ;

and the Authority may direct payment of such compensation in cases where the excess or the amount due is paid by the employer to the employee before the disposal of the application.

(4) If the Authority hearing any application under this section is satisfied that it was either malicious or vexatious it may direct that a penalty not exceeding fifty rupees be paid to the employer by the person presenting the application.

(5) Any amount directed to be paid under this section may be recovered—

(a) if the Authority is a Magistrate by the Authority as if it were a fine imposed by the Authority as a Magistrate, or

(b) if the Authority is not a Magistrate, by any Magistrate to whom the Authority makes application in this behalf, as if it were a fine imposed by such Magistrate.

(6) Every direction of the Authority under this section shall be final.

(7) Every Authority appointed under sub-section (1) shall have all the powers of a civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such Authority shall be deemed to be a civil Court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898."

We have mentioned these provisions of the Minimum Wages Act, because the language used at all stages in that Act leads to the clear inference that that Act is primarily concerned with fixing of rates—rates of minimum wages, overtime rates, rate for payment for work on a day of rest—and is not really intended to be an Act for enforcement of payment of wages for which provision is made in other laws, such as the Payment of Wages Act IV of 1936, and the Industrial Disputes Act XIV of 1947. In section 20 (1) of the Minimum Wages Act also, provision is made for seeking remedy in respect of claims arising out of payment of less than the minimum rates of wages or in respect of payment of remuneration for days of rest or for work done on such days under clause (b) or clause (c) of sub-section (1) of section 13 or of wages at the overtime rate under section 14. This language used in section 20 (1) shows that the Authority appointed under that provision of law is to exercise jurisdiction for deciding claims which relates to rates of wages, rates for payment of work done on days of rest and overtime rates. If there be no dispute as to rates between the employer and the employees, section 20 (1) would not be attracted. The purpose of section 20 (1) seems to be to ensure that the rates prescribed under the Minimum Wages Act are complied with by the employer in making payments and, if any attempt is made to make payments at lower rates, the workmen are given the right to invoke the aid of the Authority appointed under section 20 (1). In cases where there is no dispute as to rates of wages, and the only question is whether a particular payment at the agreed rate in respect of minimum wages, overtime or work on off-days is due to a workman or not, the appropriate remedy is provided in the Payment of Wages Act. If the payment is withheld beyond the time permitted by the Payment of Wages Act even on the ground that the amount claimed by the workman is not due, or if the amount claimed by the workman is not paid on the ground that deductions are to be made by the employer, the employee can seek his remedy by an application under section 15 (1) of the Payment of Wages Act. In cases where section 15 of the Payment of Wages Act may not provide adequate remedy, the remedy can be sought either under section 33-C of the Act or by raising an industrial dispute under the Act and having it decided under the various provisions of that Act. In these circumstances, we are unable to accept the submission made by Mr. Sen on behalf of the appellant that section 20 (1) of the Minimum Wages Act should be interpreted as intended to cover all claims in respect of minimum wages or overtime payment or payment for days of rest even though there may be no dispute as to the rates at which those payments are to be claimed. It is true that, under section 20 (3), power is given to the Authority dealing with an application under section 20 (1) to direct payment of the actual amount found due; but this, it appears to us, is only an incidental power granted to that Authority, so that the directions made by the Authority under section 20 (1) may be effectively carried out and there may not be unnecessary multiplicity of proceedings. The power to make orders for payment of actual amount due to an employee under section 20 (3) cannot, therefore, be inter-

puted as indicating that the jurisdiction to the Authority under section 20(1) has been given for the purpose of enforcement of payment of amounts and for the purpose of ensuring compliance by the employer with the various rates fixed under that Act. This interpretation in our opinion, also harmonises the provisions of the Minimum Wages Act with the provisions of the Payment of Wages Act which was already in existence when the Minimum Wages Act was passed. In the present appeals, therefore, we have to see whether the claims which were made by the workmen in the various applications under section 33-C (2) of the Act were of such a nature that they could have been brought before the Authority under section 20 (1) of the Minimum Wages Act inasmuch as they raised disputes relating to the rates for payment of overtime and for work done on weekly off days.

We have examined the applications which were presented before the Labour Court under section 33-C (2) of the Act in these appeals and have also taken into account the pleadings which were put forward on behalf of the appellant in contesting those applications and we are unable to find that there was any dispute relating to the rates. It is true that, in their applications, the workmen did plead the rates at which their claims had to be computed ; but it was nowhere stated that those rates were being disputed by the appellant. Even in the pleadings put forward on behalf of the appellant as incorporated in the order of the Labour Court, there was no pleading that the claims of the workmen were payable at a rate different from the rates claimed by them. It does appear that, in one case, there was a pleading on behalf of the appellant that no rates at all had been prescribed by the Mysore Government. That pleading did not mean that it became a dispute as to the rates at which the payments were to be made by the appellant. The only question that arose was whether there were any rates at all fixed under the Minimum Wages Act for overtime and for payment for work done on days of rest. Such a question does not relate to a dispute as to the rates enforceable between the parties, so that the remedy under section 20 (1) of the Minimum Wages Act could not have been sought by the applicants in any of these applications. No question can, therefore, arise of the jurisdiction of the Labour Court to entertain these applications under section 33-C (2) of the Act being barred because of the provisions of the Minimum Wages Act. The first point raised on behalf of the appellant thus fails.

In dealing with the second question relating to the applicability of Article 137 of the schedule to the Limitation Act, 1963 to applications under section 33-C (2) of the Act, we may first take notice of two decisions of this Court on the scope of the parallel provision contained in Article 181 of the First Schedule to the Indian Limitation Act IX of 1908. Article 181 of that Schedule laid down that the period of limitation for an application, for which no period of limitation was provided elsewhere in the schedule or by section 48 of the Code of Civil Procedure, 1908, would be three years, and the time from which the period would begin to run would be when the right to apply accrued. The scope of this article was considered first by this Court in *Sha Mulchand & Co., Ltd. (In Liquidation) v. Jawahar Mills Ltd.*¹, where the Court had to consider the question whether this article would govern an application made by the Official Receiver under section 38 of the Indian Companies Act for rectification of the register of a limited company. The Court noted the fact that the advocate appearing in the case relied strongly on Article 181 of the Limitation Act and, thereafter, took notice of the fact that that article had, in a long series of decisions of most, if not all, of the High Courts been held to govern only applications under the Code of Civil Procedure. The Court also dealt with the argument advanced that the reason for holding that Article 181 was confined to applications under the Code was that the article should be construed *ejusdem generis* and that as all the articles in the third division of the schedule to the Limitation Act related to applications under the Code Article 181 which was the residuary article must be

1. (1953) S.C.J. 68 : (1953) 1 M.L.J. 364 : (1953) S.C.R. 351,

limited to applications under the Code. That reasoning it was pointed out was no longer applicable because of the amendment of the Limitation Act by the introduction of Articles 158 and 178 which governed applications under the Arbitration Act and not thus under the Code. The Court then considered the views expressed by the various High Courts in a number of cases and held :—

“It does not appear to us quite convincing without further argument that the mere amendment of Articles 158 and 178 can *ipso facto* alter the meaning which as a result of a long series of judicial decisions of the different High Courts in India came to be attached to the language used in Article 181. This long catena of decisions may well be said to have as it were added the words ‘under the Code’ in the first column of that article. If those words had actually been used in that column then a subsequent amendment of Articles 158 and 178 certainly would not have affected the meaning of that article. If however as a result of judicial construction those words have come to be read into the first column as if those words actually occurred therein we are not of opinion as at present advised that the subsequent amendment of Articles 158 and 178 must necessarily and automatically have the effect of altering the long acquired meaning of Article 181 on the sole and simple ground that after the amendment the reason on which the old construction was founded is no longer available.”

This earlier decision was relied upon by this Court in *Bombay Gas Co., Ltd. v. Gopal Bhiva and others*¹ where the Court had to deal with the argument that applications under section 33-C of the Act will be governed by three years’ limitation provided by Article 181 of the Limitation Act. The Court in dealing with this argument held :

“In our opinion this argument is one of desperation. It is well settled that Article 181 applies only to applications which are made under the Code of Civil Procedure and so its extension to applications made under section 33-C (2) of the Act would not be justified. As early as 1880 the Bombay High Court had held in *Rai Manekbai v. Manekji Kavāsji*² that Article 181 only relates to applications under the Code of Civil Procedure in which case no period of limitation has been prescribed for the application, and the consensus of judicial opinion on this point had been noticed by the Privy Council in *Hansraj Gupta v. Official Liquidators, Dehra Dun Mussoorie Electric Tramway Company Ltd.*³ An attempt was no doubt made in the case of *Sha Mulchand & Co. Ltd. v. Jawahar Mills Ltd.*⁴, to suggest that the amendment of Article 158 and 178 *ipso facto* altered the meaning which had been attached to the words in Article 181 by judicial decisions, but this attempt failed, because this Court held “that the long catena of decisions under Article 181 may well be said to have, as it were added the words ‘under the Code’ in the first column of that Article. Therefore, it is not possible to accede to the argument that the limitation prescribed by Article 181 can be invoked in dealing with applications under section 33-C (2) of the Act.”

It appears to us that the view expressed by this Court in those cases must be held to be applicable, even when considering the scope and applicability of Article 137 in the new Limitation Act of 1963. The language of Article 137 is only slightly different from that of the earlier Article 181 inasmuch as, when prescribing the three years period of limitation, the first column giving the description of the application reads as “any other application for which no period of limitation is provided elsewhere in this division”. In fact, the addition of the word “other” between the words “any” and “application” would indicate that the Legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of *ejusdem generis* should be applied when interpreting the new Article 137. This word “other” implies a reference to earlier articles and, consequently, in interpreting this article,

1. (1964) 3 S.C.R. 708 at pp. 722, 723.

2. (1880) I.L.R. 7 Bom. 213.

3. (1932) L.R. 60 I.A. 13 at p. 20; 64 M.L.J.

403; I.L.R. 54 All 1067.

4. (1953) S.C.J. 68; (1953) 1 M.L.J. 364,

regard must be had to the provisions contained in all the earlier articles. The other articles in the third division to the schedule refer to applications under the Code of Civil Procedure, with the exception of applications under the Arbitration Act and also in two cases applications under the Code of Criminal Procedure. The effect of introduction in the third division of the schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered by this Court in the case of *Sha Mulchand & Co., Ltd.*¹. We think that, on the same principle, it must be held that even the further alteration made in the Articles contained in the third division of the schedule to the new Limitation Act containing references to applications under the Code of Criminal Procedure cannot be held to have materially altered the scope of the residuary Article 137 which deals with other applications. It is not possible to hold that the intention of the Legislature was to drastically alter the scope of this article so as to include within it all applications, irrespective of the fact whether they had any reference to the Code of Civil Procedure.

This point in our opinion, may be looked at from another angle also. When this Court earlier held that all the articles in the third division to the schedule, including Article 181 of the Limitation Act of 1908 governed applications under the Code of Civil Procedure only it clearly implied that the applications must be presented to a Court governed by the Code of Civil Procedure. Even the applications under the Arbitration Act that were included within the third division by amendment of Articles 158 and 178 were to be presented to Courts whose proceedings were governed by the Code of Civil Procedure. At best, the further amendment now made enlarges the scope of the third division of the schedule so as also to include some applications presented to Courts governed by the Code of Criminal Procedure. One factor at least remains constant and that is that the applications must be to Courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than Courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not Courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. We cannot, therefore, accept the submission made that this article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the article and in the new Act cannot, in our opinion, justify the interpretation that even applications presented to bodies, other than Courts, are now to be governed for purposes of limitation by Article 137.

Reliance in this connection was placed by learned Counsel for the appellant primarily on the decision of the Bombay High Court in *The Manager, M/s. P.K. Porwall v. The Labour Court of Nagpur*². We are unable to agree with the view taken by the Bombay High Court in that case. The High Court ignored the circumstance that the provisions of Article 137 were sought to be applied to an application which was presented not to a Court but to a Labour Court dealing with an application under section 33-C (2) of the Act and that such a Labour Court is not governed by any procedural code relating to civil or criminal proceedings. That Court appears to have been considerably impressed by the fact that, in the new Limitation Act of 1963, an alteration was made in the Long Title which has been incorrectly described by that Court as Preamble. Under the old Limitation Act, no doubt, the long title was "An Act to consolidate and amend the law for the limitation of suits and for other purposes", while in the new Act of 1963 the long title is "An Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith." In the long title thus the words "other proceedings" have been added; but we do not think that this addition necessarily implies that the limitation Act is intended to govern proceedings before any authority whether

1. (1953) S.C.J. 68: (1953) 1 M.L.J. 364.

2. (1968) 70 Bom.L.R. 500.

executive or quasi-judicial when earlier the old Act was intended to govern proceedings before civil Courts only. It is also true that the Preamble which existed in the old Limitation Act of 1908 has been omitted in the new Act of 1963. The omission of the preamble does not however indicate that there was any intention of the Legislature to change the purposes for which the Limitation Act has been enforced. The Bombay High Court also attached importance to the circumstance that the scope of the new Limitation Act has been enlarged by changing the definition of "applicant" in section 2 (a) of the new Act so as to include even a petitioner and the word "application" so as to include a petition. The question still remains whether this alteration can be held to be intended to cover petitions by a petitioner to authorities other than Courts. We are unable to find any provision in the new Limitation Act which would justify holding that these changes in definition were intended to make the Limitation Act applicable to proceedings before bodies other than Courts. We have already taken notice of the change introduced in the third division of the schedule by including references to applications under the Code of Criminal Procedure which was the only other aspect relied upon by the Bombay High Court in support of its view that applications under section 33-C of the Act will also be governed by the new Article 137. For the reasons we have indicated earlier, we are unable to accept the view expressed by the Bombay High Court; and we hold that Article 137 of the schedule to the Limitation Act, 1963 does not apply to applications under section 33-C (2) of the Act, so that the previous decision of this Court that no limitation is prescribed for such applications remains unaffected.

The appeals fail and are dismissed with costs. One hearing fee.

V.M.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

Khemchand Dayalji and Co.

.. *Appellant**

v.

Mohammadbhai Chandbhai

.. *Respondent.*

Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947), section 49 and rule 5—Presidency Small Cause Courts Act (XV of 1882), section 53—Ahmedabad City Courts Act, 1961—Whether rule 5 ultra vires the State Government—Jurisdiction of Court of Small Causes, Ahmedabad to issue distress warrants pending application for determination of standard rent under section 11—Whether municipal taxes and electricity charges constitute rent recoverable by issue of distress warrant.

By the enactment of the Ahmedabad City Courts Act, 1961, the proceedings before the Court of Small Causes at Ahmedabad were governed by that Act and by virtue of the amendment made in section 28 of Bombay Act LVII of 1947 it became a Court of exclusive jurisdiction to try suits, proceedings, claims and questions arising under that Act. Being a Court governed by the Presidency Small Cause Courts Act, the Ahmedabad Court of Small Causes was competent to exercise, subject to the Ahmedabad City Courts Act, all the powers which a Presidency Small Cause Court may exercise, power to issue a distress warrant being expressly conferred by section 53 of the Presidency Small Cause Courts Act upon the Courts governed by it, the Court of Small Causes, Ahmedabad, was competent to exercise that power.

Rule 5 was framed under the Bombay Act LVII of 1947 in exercise of the authority conferred by section 49 (2) (iii). After the enactment of the Ahmedabad City Courts Act, 1961, rule 5 as originally framed by the Government of Bombay

continued in force by virtue of section 87 of the Bombay Re-organisation Act XI of 1960, and applied to the Ahmedabad Small Causes Court. When rule 5 was framed under Bombay Act LVII of 1947 it was not *ultra vires*, and it is not shown to have become *ultra vires* after the enactment of Ahmedabad City Courts Act in its applications to the City of Ahmedabad.

The argument that section 28 sets up a new set of Courts with special powers and jurisdiction is without substance. Section 28 merely confers upon the existing Courts exclusive jurisdiction in respect of matters relating to possession of premises and recovery of rent and to determine claims and question arising under that Act. On that account it does not become a special Court; it is a Court which is competent to exercise all the powers which are conferred upon it by virtue of its constitution under the statute which governs it. The Court of Small Causes at Ahmedabad had, therefore, power to issue distress warrant and the power could be exercised even in respect of suits and proceedings which were exclusively triable by it by virtue of the Bombay Act LVII of 1947.

Until standard rent is determined, or an interim order is made, rent at contractual rate is payable and process for recovery by distress warrant will always be adopted. (The Court did not accept the contention that so long as application for fixation of standard rent is pending, the Court's jurisdiction to issue a distress warrant remains suspended.)

By the express terms of the tenancy the appellants had undertaken to pay the municipal taxes and electricity charges as part of the rent; it is not open to them to contend that they are not rent recoverable by the issue of a distress warrant.

Appeal by Special Leave from the Judgment and Order, dated the 3rd September, 1965 of the Gujarat High Court in Civil Revision Application No. 244 of 1965.

Arun H. Mehta and I. N. Shroff, Advocates, for Appellant.

S. T. Desai, Senior Advocate, (*P. C. Bhartari*, Advocate and *J. B. Dadachanji* and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The respondent is the owner of a house in the town of Ahmedabad. The appellants are the tenants of that house at a monthly rental of Rs. 2,171. Under the agreement of lease the appellants were to pay out of the agreed rent Rs. 810 per month, and the balance was to be appropriated towards a loan advanced by them to the respondent for constructing the house. The appellants had also agreed to pay municipal taxes and electricity charges.

The appellants filed suit No. 1308 of 1963 in the Court of the Small Causes, Ahmedabad, for an order, *inter alia*, determining the standard rent of the premises in exercise of the power under section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act LVII of 1947. The Court of Small Causes, Ahmedabad, on an application filed by the appellants fixed the contractual rent as "interim standard rent" and directed the appellants to pay the rent and municipal taxes. Pursuant to this order the appellants deposited Rs. 2,403 as rent and Rs. 8,921.25 due as municipal taxes for the year 1964-65. An application by the respondent to withdraw the amount deposited in Court was resisted by the appellants. The Court permitted the respondent to withdraw Rs. 2,403 but not the municipal taxes. The respondent then obtained an order for the issue of a distress warrant under section 53 of the Presidency Small Cause Courts Act XV of 1882 read with rule 5 of the Rules framed under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 for recovery of the amount due as municipal taxes. Distress was levied and the order was confirmed. A revision application moved in the High Court of Gujarat against that order was rejected.

In support of this appeal Counsel for the appellants urges that rule 5 of the Rules framed under section 49 of the Bombay Rents Hotel and Lodging House Rates Control Act LVII of 1947 is *ultra vires* the State Government ; that the Court of Small Causes, Ahmedabad has in any event no jurisdiction to pass an order issuing a distress warrant when trying a suit or proceeding under Bombay Act LVII of 1947 especially when an application for determination of standard rent under section 11 of the Act is pending ; and that the municipal taxes and electricity charges do not constitute rent which may be recovered by the issue of a distress warrant.

By the express terms of the tenancy the appellants had undertaken to pay the municipal taxes and electricity charges as part of the rent ; it is not open to them to contend that they are not rent recoverable by the issue of a distress warrant. The last branch of the argument has therefore, no force.

The relevant provisions of the Bombay Rents Hotel and Lodging House Rates Control Act LVII of 1947 and other statutes which have a bearing may first be noticed. Bombay Act LVII of 1947 was intended to control rents and to confer protection against eviction upon tenants of premises in certain urban areas in the Province of Bombay. By section 28 of the Act certain Courts were designated as Courts of exclusive jurisdiction to entertain and try suits and proceedings between a landlord and tenant relating to recovery of rent or possession to which the provisions of the Act applied and also to decide claims or questions arising under the Act. Section 28 as originally enacted and later amended by Bombay Acts LVIII of 1949 and XV of 1952 in so far as it is material reads :

“(1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason the suit or proceeding would not but for this provision be within its jurisdiction,

(a) in Greater Bombay the Court of Small Causes, Bombay,

(aa) in any area for which a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and

(b) * * * * *

shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of sub-section (2) no other Court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question.

* * * * *

Section 28 did not set up new Courts to try suits or proceedings between landlords and tenants : it invested existing Courts with exclusive jurisdiction to try suits and proceedings of the nature set out and claims or questions arising under the Act. Section 31 of the Act provides *inter alia* that the Courts specified in section 28 shall follow the prescribed procedure in trying and hearing suits proceedings applications and appeals and in executing orders made by them. Section 49 authorises the State Government to make rules for the purpose of giving effect to the provisions of the Act and in particular to make rules among other subjects for the procedure to be followed in trying or hearing suits proceedings (including proceedings for execution of decrees and distress warrants) applications, appeals and execution of orders. Pursuant to the authority conferred, rules were framed by Government of Bombay and rule 5 which dealt with the procedure to be followed by the Court of Small Causes, Bombay, for suits, proceedings, appeals, etc., provided in so far as it is material :

“In such of the following suits and proceedings as are cognizable by the Court of Small Causes, Bombay, on the date of the coming into force of these Rules, namely :—

(1) * * * *

(2) proceedings under Chapters VII and VIII of the Presidency Small Cause Courts Act, 1882, and

(3) proceedings for execution of any decree or order passed in any such suit or proceedings,

the Court of Small Causes, Bombay, shall follow the practice and procedure provided for the time being (a) in the said Act except Chapter VI thereof, and (b) in the rules made under section 9 of the said Act."

By the enactment of the Bombay Reorganization Act XI of 1960, a separate State of Gujarat was constituted out of the territory which formed the State of Bombay, and the area within the city limits of Ahmedabad formed part of the State of Gujarat. By the Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960, clause (a) of sub-section (1) of section 28 of Bombay Act LVII of 1947 as it was originally enacted was deleted. The Legislature of the State of Gujarat enacted the Ahmedabad City Courts Act XIX of 1961 which by section 17 provided that the Presidency Small Cause Courts Act, 1882 (XV of 1882), shall extend to and come into force in the City of Ahmedabad on and from the appointed day. By section 18 it was provided :

"The Presidency Small Cause Courts Act, 1882 (XV of 1882), and the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act LVII of 1947), shall in their application to the City of Ahmedabad stand amended in the manner and to the extent specified in the Schedule."

By section 19 it was provided :

"With effect on and from the appointed day * * * *
the Provincial Small Cause Courts Act, 1887 (IX of 1887), and all rules, notifications and orders made thereunder shall cease to apply to or be in force in the City of Ahmedabad

* * * * *

By the schedule certain amendments were made in the Presidency Small Causes Courts Act, 1882 in its application to the City of Ahmedabad. By clause 13 of the schedule section 50 of the Presidency Small Cause Courts Act was to apply to every place within the City of Ahmedabad. Certain amendments were also made in section 28 of the Bombay Rents Hotel and Lodging Houses Rates Control Act, 1947, and in sub-section (1) of section 28, before clause (aa) the following clause was inserted :

"(a) in the City of Ahmedabad, the Court of Small Causes of Ahmedabad."

By the enactment of the Ahmedabad City Courts Act, 1961, the proceedings before the Court of Small Causes at Ahmedabad were governed by that Act and by virtue of the amendment made in section 28 of Bombay Act LVII of 1947 it became a Court of exclusive jurisdiction to try suits, proceedings, claims and questions arising under that Act. Being a Court governed by the Presidency Small Cause Courts Act, the Ahmedabad Court of Small Causes was competent to exercise, subject to the Ahmedabad City Courts Act, all the powers which a Presidency Small Causes Court may exercise. Power to issue a distress warrant being expressly conferred by section 53 of the Presidency Small Cause Courts Act upon the Courts governed by it, the Court of Small Causes, Ahmedabad, was competent to exercise that power.

Rule 5 was framed under the Bombay Act LVII of 1947 in exercise of the authority conferred by section 49 (2) (iii). After the enactment of the Ahmedabad City Courts Act, 1961, rule 5 as originally framed by the Government of Bombay continued in force by virtue of section 87 of the Bombay Reorganization Act XI of 1960, and applied to the Ahmedabad Small Causes Court. When rule 5 was framed under Bombay Act LVII of 1947 it was not *ultra vires*, and it is not shown to

have become *ultra vires* after the enactment of the Ahmedabad City Courts Act in its application to the City of Ahmedabad.

The argument that section 28 sets up a new set of Courts with special powers and jurisdiction is without substance. Section 28 merely confers upon the existing Courts exclusive jurisdiction in respect of matters relating to possession of premises and recovery of rent and to determine claims and questions arising under that Act. On that account it does not become a Special Court : it is a Court which is competent to exercise all the powers which are conferred upon it by virtue of its constitution under the statute which governs it. The Court of Small Causes at Ahmedabad had, therefore, power to issue distress warrant and that power could be exercised even in respect of suits and proceedings which were exclusively triable by it by virtue of the Bombay Act LVII of 1947.

We are also unable to hold that so long as application for fixation of standard rent is pending, the Court's jurisdiction to issue a distress warrant remains suspended. Until standard rent is determined, or an interim order is made, rent at the contractual rate is payable and process for recovery by distress warrant may always be adopted. Section 11 of Bombay Act LVII of 1947 confers upon the Court power to fix standard rent and permitted increases in certain cases. The Court is also competent to determine interim standard rent, and direct payment pending final determination of standard rent.

The appellants applied for fixation of standard rent and invited the Court to pass an order fixing interim standard rent and the Court of Small Causes proceeded to pass the order for payment of rent and municipal taxes. In the present case there was an express order of the Court requiring the appellants to deposit in Court Rs. 810 per month and also to deposit municipal taxes. The Court of Small Causes ordered that the amount deposited by the appellants towards municipal taxes shall not be paid over to the landlord. The amount was on that account not available to the respondent. The respondent was unable to pay the taxes and the municipality threatened to attach the property. The amount of municipal taxes was due and it was payable by the appellants. Though deposited in Court, it could not be withdrawn by the respondent. The municipal taxes were, therefore, in arrears and a distress warrant could be applied for under section 53 of the Presidency Small Cause Courts Act by the respondent.

It was urged that the appellants had to pay the amount of interim standard rent twice over : once when they deposited it in the Court and again when they satisfied the demand to avoid execution of the distress warrant. The landlord undoubtedly cannot obtain the amount twice over. But that does not mean that when the tenant has not made the amount available to the landlord the application for distress was not maintainable.

The argument that the erroneous order passed by the Court of Small Causes preventing the landlord from recovering the amount of municipal taxes could have been got corrected by approaching the superior Courts and so long as that order stood, no distress could be levied, ignores the fact that the appellants had persuaded the Court of Small Causes to pass that order. In our judgment, there was no bar to the respondent maintaining the application for distress.

The appeal fails and is dismissed with costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT :—M. Hidayatullah, Chief Justice AND G. K. MITTER, J.

Debesh Chandra Das

.. Appellant*

v.

Union of India and others

.. Respondents.

Constitution of India (1950), Article 311 (2)—Scope—Tenure post in the Government of India—Appointment to—Reversion to the Assam State before the expiry of the tenure to post carrying smaller salary, if amounts to reduction in rank and involves a stigma.

The cadres for the Indian Administrative Services are to be found in the States only. There is no cadre in the Government of India. A few of these persons are however, intended to serve at the Centre. When they do so they enjoy better emoluments and status. They rank higher in the service and even in the Warrant of Precedence of the President. In the States they cannot get the same salary in any post as Secretaries are entitled to in the Centre. The appointments to the Centre are not in any sense a deputation. They mean promotion to a higher post. The only safeguard is that many of the posts at the Centre are tenure posts. Those of Secretaries and equivalent posts are for five years and for lower posts the duration of tenure is four years.

The appellant Das held one of the tenure posts. His tenure ordinarily was five years in the post. He got his secretaryship on 30th July, 1964 and was expected to continue in that post for five years, that is, till 29th July, 1969. The short question in this case is whether his reversion to the Assam State before the expiry of the period of his tenure to a post carrying a smaller salary amounts to reduction in rank and involves a stigma upon him.

Now it has been ruled again and again in this Court that reduction in rank accompanied by a stigma must follow the procedure of Article 311 (2) of the Constitution. It is manifest that if this was a reduction in rank, it was accompanied by a stigma. There was a stigma attaching to the reversion and it was not a pure accident of service. Nothing turns upon the words of the notification 'until further orders' because all appointments to tenure posts have the same kind of order. By an amendment of Fundamental Rule 9 (30) in 1967, a form was prescribed and that form was used in his case. These notifications also do not indicate that this was a deputation which could be terminated at any time. The notifications involving deputation always clearly so state the fact. Many notifications brought to the notice of the Court during the argument which bear out this fact and none to the contrary was shown. Das thus held a tenure post which was to last till 29th July, 1969. A few months alone remained and he was not so desperately required in Assam that he could not continue here for the full duration. The fact that it was found necessary to break into his tenure period close to its end must be read in conjunction with the three alternatives and they clearly demonstrate that the intention was to reduce him in rank by sheer pressure of denying him a secretaryship. No Secretary has so far been sent back in this manner and this emphasises the element of penalty. His retention in Government of India on a lower post thus was a reduction in rank.

No State Service (the highest being Chief Secretary's) carries the emoluments which Das was drawing as a Secretary for years. His reversion would have meant a big drop in his emoluments. Das was prepared to go to Assam provided he got his salary Rs. 4,000 per month but it was stated before that that was not possible. Das was prepared to serve at the Centre in any capacity which brought him the same salary. This too was said to be not possible. To give him a

Hobson's choice of choosing between reversion to a post carrying a lower salary or staying here on a lower salaried post, is to indirectly reduce him in rank.

Appeal from the Judgment and Order, dated the 18th September, 1968 of the Calcutta High Court in F.M.A. No. 381 of 1967.

B. Sen, Senior Advocate, *B. P. Maheshwari*, *A. N. Parikh* and *S. M. Jain*, Advocates, with him), for Appellant.

D. Narasraju, Senior Advocate (*R. H. Dhebar* and *S. P. Nayar*, Advocates, with him), for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Hidayatullah, C. J.—This is an appeal against the judgment of the High Court of Calcutta dismissing a writ petition filed by the appellant Debesh Chandra Das. This appeal is by certificate against the judgment, dated 18th September, 1968.

The appellant is a member of the Indian Civil Service. He qualified in 1933 and arrived in India in 1934 and was allotted to Assam. In 1940 he came to the Government of India and became in turn Under-Secretary and Deputy-Secretary, Home Ministry. In 1947 he went back to Assam where he held the post of Development Commissioner and Chief Secretary. In 1951 he again came to the Government of India as Secretary, Public Service Commission. In 1955 he became Joint Secretary to the Government of India and continued to hold that post till 1961. From 1961 to 1964 he was Managing Director of Central Warehousing Corporation. On 29th July, 1964, he was appointed Secretary, Department of Social Security with effect from, 30th July, 1964 and until further orders. On 6th March, 1965 the Appointments Committee of the Cabinet approved the proposal to continue him as Secretary, Department of Social Security. He continued in that Department, which is now renamed as the Department of Social Welfare. On 20th June, 1966 he received a letter from the Cabinet Secretary which was to the following effect :

“My dear Debesh :

For sometime, the Government has been examining the question of building up a higher level of administrative efficiency. This is much more important in the context of the recent developments in the country. The future is also likely to be full of problems. In this connection, the Government examined the names of those who are at present occupying top level administrative posts with a view to ascertaining whether they were fully capable of meeting the new challenges or whether they should make room for younger people. As a result of this examination, it has been decided that you should be asked either to revert to your parent State or to proceed on leave preparatory to retirement or to accept some post lower than that of Secretary of Government. I would be glad if you would please let me know immediately as to what you propose to do so that further action in the matter may be taken.

Yours sincerely:
(Sd.) DHARMA VIRA.”

He asked for interview with the Cabinet Secretary and the Prime Minister and represented his case but nothing seems to have come of it. On 7th September 1966 he received a second letter from the Cabinet Secretary which said *inter alia* as follows :

“.....I am now directed to inform you that after considering your oral and written representations in the matter Government has decided that your services may be placed at the disposal of your parent State, namely, Assam. In case, however you like to proceed on leave preparatory to retirement will you please let me know ?.....”

The appellant treated these orders as reduction in his rank and filed a writ petition in the High Court of Calcutta on 19th September, 1966. According to him the

order amounted to a reduction in rank since the pay of a Secretary to the Government of India (I.C.S.) is Rs. 4,000 and the highest pay in Assam (I.C.S.) is Rs.3,500. There being no equal post in the Government of Assam his reversion to the Assam Service meant a reduction not only in his emoluments but also in his rank. He also contended that he held a 5 years' tenure post and the tenure was to end on 29th July, 1969 but was wrongly terminated before the expiry of five years. He also alleged that there was a stigma attached to his reversion as was clear from the three alternatives which the letter of the Cabinet Secretary gave him. The highest post in the Government of Assam being equivalent to the Joint Secretary of Government of India, his reversion to the highest post, i.e. Chief Secretary to the Government of Assam, amounted to a reduction in rank. He contended, if this was the case, the procedure under Article 311 (2) of the Constitution ought to have been followed and without following that procedure the order was not sustainable.

When the appellant filed the writ petition he was appointed as a Special Secretary on 15th October, 1966 but under one of his juniors. It may be mentioned here that the appellant is next only to the Cabinet Secretary in the matter of seniority. He also received a letter from the Government of India dated 20th October, 1966 in which it was said that Government was considering giving him a post equal to that of a Secretary. The writ petition was dismissed by Justice A. N. Ray on 19th May, 1967. The following day the appellant was again reposted to Assam but he filed an appeal and obtained a stay. On 21st March, 1968 he was appointed Secretary in the Department of Statistics in the Central Government. The appeal was heard by Justice P. B. Mukharji and Justice A. N. Sen who differed, the former was in favour of dismissing the appeal while the latter was in favour of allowing it. The appeal was then laid before Sankar Prosad Mitra, J. who agreed with Justice Mukharji and the appeal was dismissed on 18th September, 1968. On 20th September, 1968 the appellant was reposted to Assam. He, however, filed the present appeal and has proceeded on leave although no orders on leave application seemed to have been passed when we heard the appeal.

In this appeal also, it is contended that the reversion of the appellant to the Assam Service amounts to a reduction in rank. This is on the ground that he held a higher post in the Government of India and there is no post equal to it under the Assam Government. The post of the Chief Secretary in the Assam Government is equal to the post of a Joint Secretary in the Government of India and his reversion would therefore indirectly mean a reduction in his rank and also in his emoluments because the highest post in Assam does not carry a salary equal to that of a Secretary in the Government of India. He also contends that under Article 311 (2) an enquiry had to be made and he had to be given a chance of explaining his case if the reduction in rank amounted to a penalty. He contends that the letters of the Cabinet Secretary speaks for themselves and clearly show that he was being offered a lower post even in the Government of India if he was to continue here denoting thereby a desire to reduce him in rank. The letters also speak of his unsatisfactory work and, therefore, cast a stigma on him and therefore his reversion must be treated as a penalty and if the procedure laid down under Article 311(2) is not followed, the order of the Government of India could not be sustained. This, in short, is the case which he had put up before the High Court and has now put up before us.

The Government of India contends that he was on deputation and the deputation could be terminated at any time ; that his orders of appointment clearly show that the appointment were "until further orders" and that he had no right to continue in the Government of India if his services were not required and that his reversion to his parent State did not amount either to any reduction in rank or a penalty, and, therefore, the order was quite legal.

Prior to 1946 the members of the Indian Civil Service were in a Civil Service of the Secretary of State. As a result of a conference between Chief Ministers and the Government of India an All India Administrative Service was constituted in

October, 1946. This agreement was entered into under section 263 of the Government of India Act, 1935. The Indian Administrative Service was common to the Centre and the Provinces. On 25th January, 1950 rules were framed under sections 241 (2) and 247 of the Government of India Act, 1935. These rules were known as the Indian Civil Administrative (Cadre) Rules, 1950. Under these rules cadres were constituted. A 'cadre' is defined in Fundamental Rule 9 (4) as the strength of a service or a part of a service sanctioned as a separate unit. In these rules 'cadre officer' meant an officer belonging to any of these categories specified in rule 4 and 'cadre post' meant any duty post included in the Schedule to the Rules. In rule 4, it was provided that every cadre post shall be filled *inter alia* by an officer who is a member of the Indian Civil Service. In the Schedule Assam was to have 20 senior posts under the Provincial Government, 6 senior posts under the Central Government and 37 posts for direct recruitment, and junior posts and certain reserves. After 1954 a number of Rules were framed and we are concerned in this case with the Indian Administrative Service (Cadre) Rules, 1954, Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 and Indian Administrative Service (Pay) Rules, 1954. Under the Pay Rules were shown the posts carrying pay above the time-scale pay in the Administrative Service under the State Governments. In Assam there were four such posts—Chief Secretary (Rs. 3,000), Member, Board of Revenue, Commissioners and Development Commissioners (Rs. 2,500—125/3—2,750). These four were the only posts above the time-scale and the highest pay possible was that of a Chief Secretary carrying Rs. 3,000 P.M. [*Vide All India Services Manual* (1967), p. 248]. The lower posts in Assam were: Secretaries, Additional Secretaries, Joint Secretaries, etc., who were on a time-scale with ceiling of Rs. 2,250 P.M. (*ibid* p. 263). As against this the post carrying pay above the time-scale or special pay in addition to pay in the time-scale under the Central Government when held by Indian Administrative Service men were Secretaries to the Government of India with a pay of Rs. 3,500 (Rs. 4,000 for Indian Civil Service men) and so on in a downward position. There was no separate cadre in the Government of India as defined in the Fundamental Rules mentioned above. There were only cadres in the States. Posts beyond the State cadre limit were only to be found in the Government of India. The Indian Administrative Service (Cadre) Rules, 1954 provided an elaborate machinery for getting persons to fill the posts in the Government of India. Similarly, the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 provided for these matters. Rule 3 of the Indian Administrative Service (Cadre) Rules provided as follows :

“ 3. *Constitution of Cadre,*—

(1) There shall be constituted for each State or group of States an Indian Administrative Service Cadre.

(2) The cadre so constituted for a State or a group of States is hereinafter referred to as a 'State Cadre' or, as the case may be, a 'Joint Cadre.' ”

Rule 4 next provided :

“ *Strength of Cadres,*—

(1) The strength and composition of each of the cadres constituted under rule 3 shall be as determined by regulations made by the Central Government in consultation with the State Governments in this behalf and until such regulations are made, shall be as in force immediately before the commencement of these rules.

(2) The Central Government shall, at the interval of every three years, re-examine the strength and composition of each such cadre in consultation with the State Government or the State Governments concerned and may make such alterations therein as it deems fit ;

Provided that nothing in this sub-rule shall be deemed to affect the power of the Central Government to alter the strength and composition of any cadre at any other time :

Provided further that the State Government concerned may add for a period not exceeding one year and with the approval of the Central Government for a further period not exceeding two years, to a State or Joint Cadre one or more posts carrying duties or responsibilities of a like nature to cadre posts. ”

Rule 6 then provided for deputation of cadre officers. It reads as follows :

“ 6. *Deputation of cadre officers.*—

(1) A cadre officer may, with the concurrence of the State Government or the State Governments concerned and the Central Government, be deputed for service under the Central Government, or another State Government or under a company, association or body of individuals, whether incorporated or not, which is wholly or substantially owned or controlled by the Government.

(2) A cadre officer may also be deputed for service under :—

(i) a Municipal Corporation or a Local Body, by the State Government on whose cadre he is borne, or by the Central Government with the concurrence of the State Government on whose cadre he is borne, as the case may be : and

(ii) an international organisation, an autonomous body not controlled by the Government, or a private body, by the Central Government in consultation with the State Government on whose cadre he is borne :

Provided that no cadre officer shall be deputed to any organisation or body of the type referred to in item (ii) of this sub-rule except with his consent. ”

It may be pointed out here that “ permanent post” is defined by the Fundamental Rules as a post carrying a definite rate of pay and sanctioned without limit of time; a ‘temporary post’ is defined as a post carrying definite rate of pay sanctioned for a limited time and a ‘tenure post’ means a permanent post which an individual Government servant may not hold for more than a limited period. All cadre posts were to be filled by cadre officers (rule 8), but temporary appointments of non-cadre officers to cadre posts were possible under certain circumstances (rule 9).

Under the Indian Administrative Service (Fixation of Cadre) Strength Regulations, 1955, Assam was to have a total of 117 cadre posts. Of these, 55 were under the Government of Assam and 22 senior posts were to be under the Central Government. 19 were promotion posts and 58 were to be filled by direct recruitment. There were certain reserved posts for leave reserves, deputation reserves, training reserves and finally there were junior posts. By the agreement which formed an annexure to the Indian Civil Administrative (Cadre) Rules, 1950, Assam was to have 20 senior posts under the Provincial Government and 6 senior posts under the Central Government with some provision for direct recruitment posts, junior posts and reserves. These posts denoted combined Service between the Central Government and the Assam Government. The arrangement allowed an officer to go from one post to another whether under the Centre or the State but not to a lower post unless the exigency of the case so demanded. The posts in the Government of India were held in the ordinary course and were not deputation posts. They were not as a part of the deputation reserves.

Under Article 312, these services must be considered common to the Union and the State. Under section 4 of the All India Services Act, 1951 all rules in force immediately before the commencement of the Act and applicable to an All India Service were continued, thus the Indian Civil Administrative (Cadre) Rules, 1950 continued to remain in force.

The position that emerges is that the cadres for the Indian Administrative Services are to be found in the States only. There is no cadre in the Government of

India. A few of these persons are, however, intended to serve at the Centre. When they do so they enjoy better emoluments and status. They rank higher in the service and even in the Warrant of Precedence of the President. In the States they cannot get the same salary in any post as Secretaries are entitled to in the Centre. The appointments to the Centre are not in any sense a deputation. They mean promotion to a higher post. The only safeguard is that many of the posts at the Centre are tenure posts. Those of Secretaries and equivalent posts are for five years and for lower posts the duration of tenure is four years.

Now Das held one of the tenure posts. His tenure ordinarily was five years in the post. He got his secretaryship on 30th July, 1964 and was expected to continue in that post for five years, that is, till 29th July, 1969. The short question in this case is whether his reversion to the Assam State before the expiry of the period of his tenure to a post carrying a smaller salary amounts to reduction in rank and involves stigma upon him.

Reversion to a lower post does not *per se* amount to a stigma. But we have here evidence that the reversion is accompanied by a stigma. In the first letter issued to him on 20th June, 1969 by Mr. Dharma Vira (Cabinet Secretary) it was said that Government was considering whether the persons at top level administrative posts were capable of meeting the new challenges or must make room for younger men. The letter goes on to say that he may choose one of three alternatives : accept a lower post at the Centre go back to a post carrying lower salary in Assam or take leave preparatory to retirement. The offer of a lower post in Delhi is a clear pointer to the fact of his demotion. It clearly tells him that his reversion is not due to any exigency of service but because he is found wanting. The three alternatives speak volumes. This was not a case of reverting him to Assam at the end of a deputation or tenure. He can be retained in the Central Services provided he accepts a lower post, and the final alternative that he may retire clearly shows that the Government is bent upon removing him from his present post. In the next letter this fact is recognised because on 7th September, 1966 he is offered only two alternatives. The alternative of a lower post is advisedly dropped because it discloses too clearly a stigma. If any doubt remained it is cleared by the affidavit which is now filed. Paragraphs 7 and 10 of the affidavit read as follows :—

“7. With reference to the allegations made in paragraphs 13 to 23 of the said application, I make no admission in respect thereof except what appears from relevant records. I further say that the performance of the petitioner did not come to the standard expected of a Secretary to the Government of India.”

“10. The allegations made in paragraph 26 of the said application are correct. I further say that the said representation was rejected by the Prime Minister in view of the standard of performance of the petitioner.”

Now it has been ruled again and again in this Court that reduction in rank accompanied by a stigma must follow the procedure of Article 311 (2) of the Constitution. It is manifest that if this was a reduction in rank, it was accompanied by a stigma. We are satisfied that there was a stigma attaching to the reversion and that it was not a pure accident of service.

It remains to see whether there was a reduction in rank. There is no definition of reduction in rank in the Constitution. But we get some assistance from rule 3 of the All India Services (Discipline and Appeal) Rules, which provides ;

“3. *Penalties.*—The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a member of the Service, namely :—

(iii) reduction in rank including reduction to a lower post or time-scale, or to a lower stage in a time-scale ;

We have shown above that he was holding a tenure post. Nothing turns upon the words of the notification 'until further orders' because all appointments to tenure posts have the same kind of order. By an amendment of F.R. 9 (30) in 1967, a form was prescribed and that form was used in his case. These notifications also do not indicate that this was a deputation which could be terminated at any time. The notifications involving deputation always clearly so state the fact. Many notifications were brought to our notice during the argument which bear out this fact and none to the contrary was shown. Das thus held a tenure post which was to last till 29th July, 1969. A few months alone remained and he was not so desperately required in Assam that he could not continue here for the full duration. The fact that it was found necessary to break into his tenure period close to its end must be read in conjunction with the three alternatives and they clearly demonstrate that the intention was to reduce him in rank by sheer pressure of denying him a secretaryship. No Secretary, we were told, has so far been sent back in this manner and this emphasises the element of penalty. His retention in Government of India on a lower post thus was a reduction in rank.

Finally we have to consider whether his reversion to Assam means a reduction in rank. It has been noticed above that no State Service (the highest being Chief Secretary's) carries the emoluments which Das was drawing as a Secretary for years. His reversion would have meant a big drop in his emoluments. Das was prepared to go to Assam provided he got his salary of Rs. 4,000 per month but it was stated before us that that was not possible. Das was prepared to serve at the Centre in any capacity which brought him the same salary. This too was said to be not possible. This case was adjourned several times to enable Government to consider the proposal but ultimately it was turned down. All that was said was that he could only be kept in a lower post. If this is not reduction in rank we do not see what else it is. To give him a Hobson's choice of choosing between reversion to a post carrying a lower salary or staying here on a lower salaried post, is to indirectly reduce him in rank.

Therefore, we are satisfied that Das was being reduced in rank with a stigma upon his work without following the procedure laid down in Article 311 (2). We say nothing about a genuine case of accident of service in which a person drafted from a State has to go back for any reason not connected with his work or conduct. Cases must obviously arise when a person takes from the State may have to go back for reasons unconnected with his work or conduct. Those cases are different and we are not expressing any opinion about them. But this case is clearly one of reduction in rank with a distinct stigma upon the man. This requires action in accordance with Article 311 (2) of the Constitution and since none was taken, the order of reversion cannot be sustained. We quash it and order the retention of Das in a post comparable to the post of a Secretary in emoluments till such time as his present tenure lasts or there is an inquiry against him as contemplated by the Constitution.

Before we leave this case we are constrained to say that the attitude in respect of this case was not very happy. Das offered to take leave preparatory to retirement on the 29th July, 1969 if he was retained in Delhi on this or other post. This coincided with his present tenure. But vast as the Delhi Secretariat is, no job was found for him. This confirms us in our view of the matter that he was being sent away not because of exigency of service but definitely because he was not required for reasons connected with his work and conduct.

The appeal is thus allowed with costs here and in the High Court.

V.M.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

K. R. Chinna Krishna Chettiar

.. Appellant *

v.

Sri Ambal & Co. and another

.. Respondents.

Trade and Merchandise Marks Act (XLIII of 1958), sections 2 (j) and section 12 (1)
Registration of trade mark—‘Andal’ and ‘Ambal’—Deceptively similar in sound
Ocular Comparison not always the decisive test.

Constitution of India (1950), Article 136—Appeal by Special Leave—Concurrent finding of Court below—Onus on appellant to show that the finding is erroneous.

There can be no doubt that the word ‘Ambal’ is an essential feature of the trade marks. The common ‘Sri’ is the subsidiary part of the two words ‘Ambal’ is the more distinctive and fixes itself in the recollection of an average buyer with imperfect recollection.

It is for the Court to decide the question on a comparison of the competing marks as a whole and their distinctive and essential features. If the proposed mark is used in a normal and fair manner the mark would come to be known by its distinguishing feature ‘Andal’. There is a striking similarity and affinity of sound between the words ‘Andal’ and ‘Ambal’ (held, there is real danger of confusion between the two marks.).

There is no evidence of actual confusion, but that might be due to the fact that the appellant’s trade is not of long standing. There is no visual resemblance between the two marks, but ocular comparison is not always the decisive test. The resemblance between the two marks must be considered with reference to the ear as well as the eye. *Held*, there is a close affinity of sound between Ambal and Andal. The distinguishing feature of the respondents mark is Ambal while that of the Appellant’s mark is Andal. The two words are deceptively similar in sound.

The name Andal does not cease to be deceptively similar because it is used in conjunction with a pictorial device.

The Hindus in the south of India may be well aware that the words Ambal and Andal represent the names of two distinct goddesses. But the respondent’s customers are not confined to Hindus alone. Many of their customers are Christians, Parsis, Muslims and persons of other religious denominations. Moreover, their business is not confined to south of India. The customers who are not Hindus or who do not belong to the south of India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff. The customer who use the respondent’s goods will have recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign goddess used in connection with the mark. They are not likely to remember the fine distinctions between a Vaishnavite goddess and a Shivaite diety.

The Registrar has expert knowledge of such matters and his decision should not be lightly disturbed. But both the Courts have found that he was clearly wrong and held that there is a deceptive similarity between the two marks. In an appeal under Article 136 of the Constitution, the onus is upon the appellant to show that the concurrent finding of the Courts below is erroneous. The appellant must

satisfy the Court that the conditions of section 12 (1) have been satisfied. If those conditions are not satisfied his mark cannot be registered.

Appeal by Special Leave from the Judgment and Order, dated the 21st November, 1962 of the Madras High Court in Letters Patent Appeal No. 57 of 1962.

A. K. Sen, Senior Advocate, (*K. Jayaram* and *R. Thiagarajan*, Advocates, with him), for Appellant.

M. C. Chagla, Senior Advocate (*N. R. Anand* and *M. P. Rao*, Advocates, and *O. C. Mathur*, Advocate of *M/s. J. B. Dadachanji & Co.* with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Bachawat, J.—The appellant is the sole proprietor of a trading concern known as Radha and Co. The respondents Ambal and Co., are a partnership firm. The respondents as also the appellant are manufacturers and dealers in snuff carrying on business at Madras and having business activities inside and outside the State of Madras. On 10th March, 1958 the appellant filed application No. 183961 for registration of a trade mark in class 34 in respect of "snuff manufactured in Madras". The respondents filed a notice of opposition. The main ground of opposition was that the proposed mark was deceptively similar to their registered trade marks. The respondents were the proprietors of the registered marks Nos. 126808 and 146291. Trade mark No. 126808 consists of a label containing a device of a Goddess Sri Ambal seated on a globe floating on water enclosed in a circular frame with the legend "Sri Ambal parimala snuff" at the top of the label, and the name and address "Sri Ambal and Co., Madras" at the bottom. Trade mark No. 146291 consists of the expression "Sri Ambal". The mark of which the appellant seeks registration consists of a label containing three panels. The first and the third panels contain in Tamil, Devanagiri, Telugu and Kannada the equivalents of the words "Sri Andal Madras Snuff". The centre panel contains the picture of Goddess Sri Andal and the legend, "Sri Andal".

Sri Andal and Sri Ambal are separate divinities. Sri Andal was a Vaishnavite woman saint of Srivilliputtur village and was deified because of her union with Lord Ranganatha. Sri Ambal is the consort of Siva or Maheshwara.

The respondents have been in the snuff business for several decades and have used the word Ambal as part of their work for more than half a century. The question in issue is whether the proposed mark is deceptively similar to the respondents' marks. "Mark" as defined in section 2 (j) of the Trade and Merchandise Marks Act, 1958 includes "a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof." Section 12 (1) provides that "save as provided in sub-section (3), no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods." The Registrar of Trade of Marks observed :—

"In a composite mark the distinctive words, appearing on it play an important part. Words always talk more than devices, because it is generally by the word part of a composite mark that orders will be given. Apart from that, the opponents have a registered mark consisting of the expression Sri Ambal. I have, therefore, to determine whether the expression Sri Andal, is deceptively similar to Sri Ambal."

He held :

"the sound of "Ambal" does not so nearly resemble the sound of "Andal", in spite of certain letters being common to both the marks, as to be likely to cause confusion or deception among a substantial number of persons."

The respondents filed an appeal in the Madras High Court. Jagadishan, J. observed :

"It is settled law that a trade mark comprehends not merely the picture design or symbol but also its descriptive name. A copy or colourable imitation of the name, would constitute an infringement of the mark containing the name. No-body can abstract the name or use a phonetical equivalent of it and escape the charge of piracy of the mark pleading that the visual aspect of his mark is different from the mark of the person opposing its registration."

He held :—

"The words, Ambal and Andal, have such great phonetic similarity that they are undistinguishable having the same sound and pronunciation. In whatever way they are uttered or spoken slowly or quickly, perfectly or imperfectly, metaculously or carelessly and whoever utters them, a foreigner or a native of India, wherever they are uttered in the noisy market place or in a calm and secluded area, over the phone or in person the danger of confusion between the two phonetically allied names is imminent and unavoidable."

Accordingly, he allowed the appeal and dismissed the appellant's application for registration of the trade mark. The appellant filed a letters patent appeal. The Divisional Bench of the High Court dismissed the appeal. The learned Registrar and the two Courts below concurrently found that the appellant failed to prove honest concurrent use so as to bring his case within section 12 (3). The present appeal has been filed by the appellant after obtaining Special Leave.

The Registrar was of the view that the appellant's mark was not deceptively similar to the respondent's trade marks. He has expert knowledge of such matters and his decision should not be lightly disturbed. But both the Courts have found that he was clearly wrong and held that there is a deceptive similarity between the two marks. In an appeal under Article 136 of the Constitution the onus is upon the appellant to show that the concurrent finding of the Courts below is erroneous. The appellant must satisfy the Court that the conditions of section 12 (1) have been satisfied. If those conditions are not satisfied this mark cannot be registered.

Now the words "Sri Ambal" form part of trade mark No. 126808 and are the whole of trade mark No. 146291. There can be no doubt that the word "Ambal" is an essential feature of the trade marks. The common "Sri" is the subsidiary part. Of the two words "Ambal" is the more distinctive and fixes itself in the recollection of an average buyer with imperfect recollection.

The vital question in issue is whether, if the appellant's mark is used in a normal and fair manner in connection with the snuff and if similarly fair and normal user is assumed of the existing registered marks, will there be such a likelihood of deception that the mark ought not to be allowed to be registered (see *In the matter of Broadhead's Application for registration of a trade mark*)¹. It is for the Court to decide the question on a comparison of the competing marks as a whole and their distinctive and essential features. We have no doubt in our mind that if the proposed mark is used in a normal and fair manner the mark would come to be known by its distinguishing feature "Andal". There is a striking similarity and affinity of sound between the words "Andal" and "Ambal." Giving due weight to the judgment of the Registrar and bearing in mind the conclusions of the learned Single Judge and the Divisional Bench, we are satisfied that there is a real danger of confusion between the two marks.

There is no evidence of actual confusion but that might be due to the fact that the appellant's trade is not of long standing. There is no visual resemblance between the two marks, but ocular comparison is not always the decisive test. The resemblance between the two marks must be considered with reference to the ear as well as the eye. There is a close affinity of sound between Ambal and Andal.

In the case of *Coca-Cola Co. of Canada v. Pepsi Cola Co. of Canada Ltd.*¹, it was found that cola was in common use in Canada for naming the beverages. The distinguishing feature of the mark coca-cola was coca and not cola. For the same reason the distinguishing feature of the mark Pepsi Cola was Pepsi and not cola. It was not likely that any one would confuse the word Pepsi with coca. In the present case the word "Sri" may be regarded as in common use. The distinguishing feature of the respondent's mark is Ambal while that of the appellant's mark is Andal. The two words are deceptively similar in sound.

The name Andal does not cease to be deceptively similar because it is used in conjunction with a pictorial device. The case of *Decordova and others v. Vick Chemical Coy.*² is instructive. From the Appendix printed at page 270 of the same volume it appears that Vick Chemical Coy were the proprietors of the registered trade mark consisting of the word "Vaporub" and another registered trade mark consisting of a design of which the words "Vicks Vaporub Salve" formed a part. The appendix at page 226 shows that the defendants advertised their ointment as "Karsote Vapour Rub". It was held that the defendants had infringed the registered marks. Lord Radcliffe said: "..... a mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods, he uses one or more of its essential features."

Mr. Sen stressed the point that the words Ambal and Andal had distinct meanings. Ambal is the consort of Lord Siva and Andal is the consort of Ranganatha. He said that in view of the distinct ideas conveyed by the two words a mere accidental phonetic resemblance could not lead to confusion. In this connection he relied on *Venkateswaran's Law of Trade and Merchandise Marks*, 1963 Ed., page 214, *Kerly's Law of Trade Marks and Trade Names*, 9th Ed., page 465, Article 852 and the decision *Application by Thomas A. Smith Ltd., to Register a trade mark*³. In that case Neville, J., held that the words "limit" and "summit" were words in common use, each conveying a distinctly definite idea; that there was no possibility of any one being deceived by the two marks; and there was no ground for refusing registration. Mr. Sen's argument loses sight of the realities of the case. The Hindus in the south of India may be well aware that the word Ambal and Andal represent the names of two distinct goddesses. But the respondent's customers are not confined to Hindus alone. Many of their customers are Christians, Parsees, Muslims and persons of other religious denominations. Moreover, their business is not confined to south of India. The customers who are not Hindus or who do not belong to the south of India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff. The customers who use the respondent's goods will have a recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign goddess used in connection with the mark. They are not likely to remember the fine distinctions between a Vaishnavite goddess and a Shivaite deity.

We think the judgment appealed from is right and should be affirmed. We are informed that the appellant filed another application No. 212575 seeking registration of labels of which the expression "Radha's Sri Ambal Madras Snuff" forms a part. The learned Registrar has disposed of the application in favour of the appellant. But we understand that an appeal is pending in the High Court. It was argued that there was no phonetic similarity between Sri Ambal and Radha's Sri Andal and the use of the expression Radha's Sri Andal was not likely to lead to confusion. The Divisional Bench found force in this argument. But as the matter is subjudice we express no opinion on it.

In the result, the appeal is dismissed with costs.

S.V.J.

Appeal dismissed.

1. (1942) 59 R.P.C. 127.
2. (1971) 68 R.P.C. 103.

3. (1913) 30 R.P.C. 363.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND G. K. MITTER, JJ.

Maghraj and others

.. Appellants*

v.

Mst. Bayabai and others

.. Respondents.

Civil Procedure Code (V of 1908), Order 34—Mortgage decree—Mortgagor depositing money into Court without specifying of that it is towards principal—Mortgagee not informed about nature of deposit—Normal rule is that the amount should first be applied towards interest and costs—Mortgagor to plead and prove agreement to the contrary.

Madhya Pradesh Money Lenders Act (XIII of 1934), section 9—Prohibits awarding interest exceeding the principal of loan.

Unless the mortgagees were informed that the mortgagors had deposited the amount only towards the Principal and not towards the interest, and the mortgagees agreed to withdraw the money frontier Court accepting the conditional deposit, the normal rule that the amounts deposited in Court should first be applied towards satisfaction of the interest and costs and thereafter towards the principal would apply. The normal rule is that in the case of a debt due with interest any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter to the principal. It was for the mortgagors to plead and prove an agreement that the amounts which were deposited by the mortgagees were accepted by the mortgagees subject to a condition imposed by the mortgagor (on facts held that there was no such agreement.)

Section 9 of the Madhya Pradesh Money-lenders Act (XIII of 1934) prohibits the Courts from awarding interest exceeding the principal of loan. The Prohibition of the statute is against the making of a decree for arrears of interest exceeding the amount of loan. (On facts held that the interest does not exceed the principal.

Appeal by Special Leave from the Order, dated the 30th November, 1964 of the Bombay High Court, Nagpur Bench in First Appeal No. 80 of 1964.

G. L. Sanghvi, Advocate and J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji & Co., for Appellants.

Dr. W. S. Barlingay, Senior Advocate, (R. Mahalingier and Ganpat Rai, Advocates, with him), for Respondent No. 6.

B. D. Sharma and S. P. Nayar, Advocates, for Respondent No. 11.

The Judgment of the Court was delivered by

Shah, J.—Seth Haroon and Sons a firm had ten partners. The Hindu undivided family of Jethmal Ramkaran mortgaged a house belonging to it to Seth Haroon and Sons to secure repayment of Rs. 40,000 due on the foot of an account. Seth Haroon and Sons filed Suit No. 12-A of 1936 for recovery of their dues by sale of the mortgaged house. On 28th December, 1940, a decree was passed in the suit by the Additional District Judge. The case was carried in appeal to the High Court of Nagpur. But the appeal was dismissed subject to a slight modification to be presently noticed. An appeal was carried against the decree to this Court. During the pendency of the appeal to this Court, nine out of ten members of Seth Haroon and Sons migrated to Pakistan and were declared evacuees. By an order passed by this Court on 28th March, 1958, the Custodian of Evacuee Property was impleaded as a party respondent in the appeal filed by the mortgagors. This Court dismissed the appeal on 8th August, 1958. Thereafter the 6th plaintiff Mohammad Ayyub—the only member of the firm who had not migrated—for himself and as agent of the evacuees under a general power-of-attorney applied for a decree absolute for sale,

The Custodian of Evacuee Property resisted the application filed by Mohammad Ayyub. Ultimately by the order passed by the High Court of Bombay the Custodian of Evacuee Property was joined as a party to the application. The Court however observed that the respective rights of the Custodian of Evacuee Property and the partners of Seth Haroon and Sons were not decided in that proceeding.

Diverse contentions were raised by the mortgagors : they contended, *inter alia* that on proper account being taken nothing was due by them on the mortgage, that interest was wrongly calculated at the rate of 4 per cent. per annum, that the claim for recovery of costs was barred by the law of limitation and that interest could not be awarded on costs. The learned Trial Judge substantially rejected the contentions raised by the mortgagors and passed a decree for Rs. 34,612.81 being the aggregate of Rs. 33,866.51 as principal and Rs. 746.30 as interest. An appeal filed against that order was summarily dismissed by the High Court. With Special Leave, this appeal is preferred by the mortgagors.

Counsel for the mortgagors contended that on a proper account of the monies paid by them in satisfaction of the dues under the mortgage decree, the mortgage was satisfied and the mortgagees were overpaid. Counsel contended that from time to time payment were made by the mortgagors with specific directions that the amounts paid were to be credited towards the principal and not towards interest and if the amounts so paid were in the first instance credited towards the principal, it would be found that the mortgage dues had been overpaid. Now, the learned Trial Judge observed that Exhibits 44 to 55 relied upon by the mortgagors were silent as to any specific directions that the amounts paid in Court were to be appropriated only towards the principal. Counsel for the appellant has invited our attention to certain applications made at the time of making deposits in Court, in which it was recited that the amounts were being deposited towards the principal. Relying upon these recitals it was urged that the Trial Court was in error in holding that there were no directions for appropriation of payments towards the principal. We have not thought it necessary to ascertain the total number of applications in which recitals were made by the mortgagors at the time of making part payments towards the principal, because on the view we take, these recitals, without more, do not assist the claim of the mortgagors.

Under the preliminary decree an amount of Rs. 42,430-2-6 was declared due upto 23rd June, 1941 towards principal and interest. The mortgagors made no payments under the decree directly to the mortgagees. But from time to time they claim to have made deposits in the Court under Order 21, rule 1 of the Code of Civil Procedure and in depositing some of the amounts they stated that the payments were towards the principal due. But there is no evidence on the record that the mortgagees were informed that the amounts were deposited towards the principal due, nor is there evidence that the mortgagees accepted the amounts towards the principal. For quite a long time the mortgagees did not withdraw the amount lying in Court. Unless the mortgagees were informed that the mortgagors had deposited the amount only towards the principal and not towards the interest, and the mortgagees agreed to withdraw the money from the Court accepting the conditional deposit, the normal rule that the amounts deposited in Court should first be applied towards satisfaction of the interest and costs and thereafter towards the principal would apply.

In *K. Venkatadri Appa Row and others v. Parthasarathi Appa Row*¹, the Judicial Committee of the Privy Council observed that upon taking an account of principal and interest due, the ordinary rule with regard to payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of interest. Lord Buchmaster delivering the judgment of the Board observed :

"There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the

rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Rigby, L.J., in the case of *Parr's Banking Co. v. Yates*¹, in these words : 'The defendant's Counsel relied on the old rule that does, no doubt, apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract'."

Counsel for the appellant contended that in *Venkatadri Appa Row's case*², there was no specific appropriation by the debtor, whereas in the present case there is specific direction by the debtor. But the normal rule is that in the case of a debt due with interest any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter to the principal. It was for the mortgagor to plead and prove an agreement—that the amounts which were deposited in Court by the mortgagors were accepted by the mortgagees subject to a condition imposed by the mortgagors. In the present case there is no evidence which supports the contention raised by Counsel for the appellant.

Counsel urged that, in any event, when an account was finally submitted by the mortgagees they were aware of the fact that certain amounts were paid in Court and they knew that those amounts were paid conditionally and when the mortgagees withdrew the amounts deposited in Court they must be deemed to have accepted the conditions subject to which the amounts were deposited. But the account submitted by the mortgagees shows clearly that they had given credit for the amounts deposited towards the interest and costs in the first instance and the balance only towards the principal. The account submitted by the mortgagees clearly negatives the plea of the mortgagors.

An argument somewhat faintly suggested before us that it is the privilege of the debtor to impose conditions subject to which any payment is to be made by the mortgagor, and the mortgagee is bound to accept the condition needs no serious consideration.

It was next urged that the decree was passed by the Trial Court awarding interest at the rate of 3 per cent per annum and the order of the High Court in appeal modifying the original decree by awarding interest at the rate of 4 per cent. was erroneous. Under the decree of the Trial Court interest was awarded at 3 per cent. In appeal interest was awarded by the High Court at 4 per cent. Thereafter by a modification in an application for correction of the decree interest at 4 per cent. per annum was awarded from 12th August, 1941 to 10th November, 1946. It was urged, relying upon the order modifying the rate of interest, that from 11th November, 1946 the mortgagees were entitled only to interest at the rate of 3 per cent. There is no substance in that contention also. The High Court by order dated 10th August, 1946, observed:

"A preliminary decree for the sale shall be drawn accordingly and the defendants (the appellants) are given three months time from today to pay off the decretal amount. The amount shall carry interest at the rate of 3 per cent. per annum from the date of suit to 11th August, 1941, and at the rate of 4 per cent. per annum from 12th August, 1941, to the date of satisfaction."

Apparently the decree drawn up by the High Court was not consistent with the directions given in the judgment, and an application was made to rectify certain mistakes in the decree. One of the grounds urged in support of the application was that interest should have been computed only on the principal out of the total of Rs. 35,299-1-6. The Court rejected the application holding that the Trial Court had decreed the claim of the mortgagees and that interest was payable on Rs. 35,299-1-6 and

1. L.R. (1898) 2 Q.B. 460.

2. (1920) L.R. 47 I.A. 150.

the High Court had confirmed the decree holding that the amount of Rs. 35,299-1-6 was principal. The High Court observed that it was not relevant to consider whether that decision was right, because there was no application for review of judgment. They then directed that

“the interest will accordingly be calculated on Rs. 35,299-1-6 at 3 per cent. from 5th October, 1936 till 11th August, 1941 and at 4 per cent. from 12th August, 1941, till 10th November, 1946. This comes to Rs. 50,810-4-6. The decree will be amended accordingly”.

Relying upon this direction, Counsel for the appellants contended that the High Court by order dated 31st March, 1947, restored for the period after 10th November, 1946, the rate of interest as originally awarded by the Court of First Instance. We are unable to hold that the direction is capable of that interpretation. By directing that interest at the rate of 4 per cent. from 12th August, 1941 to 10th November, 1946, shall be calculated on Rs. 35,299-1-6, it was not, and could not be, intended by the High Court that interest after 10th November, 1946, was to be awarded only at the rate of 3 per cent. No such application was made by the debtors. It was apparently contended that the amount of Rs. 35,299-1-6 as claimed by the plaintiffs in the original suit included interest, and interest could be computed on the amount which formed the principal. The High Court, in view of the decree passed by the Trial Court and confirmed by it, declined to enter into that controversy and indicated the manner in which the interest was to be calculated between 5th October, 1936, and 10th November, 1946. The High Court did not reduce that rate of interest for the period after 10th November, 1946, i.e., the date fixed for redemption of mortgage under the decree of the High Court.

Counsel then urged that in any event the mortgagees are not entitled to interest exceeding the principal. Reliance in this connection was placed upon the Madhya Pradesh Money Lenders Act XIII of 1934. Section 9 of that Act provides :

“Notwithstanding anything contained in any other enactment for the time being in force, no Court original or appellate shall decree, in respect of any loan made before this Act comes into force, on account of arrears of interest, a sum greater than the principal of such loan.”

The section prohibits the Courts from awarding interest exceeding the principal of the loan. Counsel for the appellants contends that if all the amounts deposited from time to time by the debtors be aggregated, it will appear that an amount exceeding the loan was paid. But the prohibition of the statute is against the making of a decree for arrears of interest exceeding the amount of loan. In the present case the decree awards interest amounting of Rs. 74,630 whereas the principal is Rs. 33,866. 51.

Finally, it was contended that the Custodian of Evacuee Property is not entitled to claim a decree absolute for sale, and only Mohamad Ayyub—one of the partners in the firm of Seth Haroon and Sons—may alone be given a decree absolute in respect of his share. That contention is futile. The Court is concerned at this stage to pass a decree absolute for sale in a mortgage suit. It is not concerned to determine the respective rights of the mortgagees *inter se*. The mortgagee's interest is fully represented before the Court. Whether or not the Custodian of Evacuee Property is entitled to the money or that the evacuees have a subsisting interest is a matter which cannot be decided in this appeal. That was made clear by the judgment of the High Court in the application filed by the Custodian of Evacuee Property by order dated 12th November, 1962, when the High Court observed :

“Time has not come yet to determine this question and it is not necessary at this stage to decide what are the respective rights of the evacuees in the property which is before the Court as between the evacuee—plaintiffs and the Custodian.”

The appeal fails and is dismissed with costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, J. M. SHELAT, C. A. VAIDIALINGAM, K.S. HEGDE AND A. N. GROVER, JJ.

The State of Madras

.. Appellant*

v.

Davar & Co., etc.

.. Respondents.

Madras General Sales Tax Act (I of 1959) and Central Sales Tax Act (LXXIV of 1956), section 5 (2) Sea Customs Act, 1878, section 3-A Customs "frontier" in section 5 (2) of Central Act cannot be construed to mean "customs barriers"—Must be construed in accordance with notification issued under section 3-A of the Act read with the proclamation of the President of India, dated 22nd March, 1956.

The expression "Customs frontier" in section 15 of the Central Act cannot be construed to mean "Customs barrier" It must be construed in accordance with the notification issued by the Central Government under section 3-A of the Act, on 6th August, 1955 read with the Proclamation of the President of India dated 22nd March, 1956.

Held, on facts, the sales were effected by transfer of documents of title long after the goods had crossed the Customs frontier of India.

Appeals by Special Leave from the Judgment and Order dated the 17th July, 1963 of the Madras High Court in Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revision Nos. 16, 28, 81 and 98 of 1961**).

A. K. Sen, Senior Advocate, (A.V. Rangam, Advocate, with him), for Appellant.

R. Thiagarajan, for Respondent (In C.A. No. 1464 of 1967).

K. Jayaram, for Respondent (In C.A. No. 1465 of 1967).

The Judgment of the Court was delivered by

Vaidialingam, J.—These appeals, by Special Leave, by the State of Madras, are directed against the common judgment, dated 17th July, 1963 of the Madras High Court.

The short question, that arises for consideration in these appeals, is as to whether the turnover, which was the subject of consideration by the High Court, was liable for sales tax, under the Madras General Sales Tax Act, 1959 (I of 1959) (hereinafter called the Madras Act). The assessee claimed that the turnover in question represented sales in the course of import and, as such, not liable to tax under the Madras Act. The State of Madras claimed that in all these cases the sale had been effected by a transfer of documents of title to the respective buyers after the ships had crossed the territorial waters and hence they were liable to tax under the Madras Act. The contention of the assessee was negated by the Assistant Commercial Tax Officer, as also by the Appellate Assistant Commissioner of Commercial Taxes. But, on further appeal by the assessee, the Sales Tax Appellate Tribunal accepted their contention and held that the disputed turnovers were not liable to tax under the Madras Act. The revisions filed by the State against the orders of the Sales Tax Appellate Tribunal were dismissed by the High Court. Hence these appeals.

Though each of the respondents in these appeals is an importer of a different commodity, the pattern adopted by each of them in the matter of importing the goods concerned from foreign countries and in the matter of transferring title to the respective buyers, is more or less the same. We shall therefore refer only to the facts relating to the dealings adopted by Davar and Company (hereinafter called the assessee), the respondent in Civil Appeal No. 1462 of 1967.

* C.As. Nos. 1462 to 1465 of 1967.

** (1963) 14 S.T.C. 904.

The assessee was assessed by the Assistant Commercial Tax Officer, South Madras and Chingleput, under the Madras Act on a turnover of Rs. 6,60,200.07 for the year 1957-58. It was carrying on business in timber at Madras and in the course of its business the assessee imported timber from Burma and sold it to its costumers in India. Out of the turnover above-mentioned, the assessee disputed its liability to the extent of a turnover of Rs. 1,95,490.67 on the ground that the said amount represented sales in the course of import and that such sales were not liable to tax as they were covered by Article 286 (1) (b) of the Constitution. This claim was based on the following circumstances. The respondent-assessee entered into contracts for sale of timber with a firm of merchants called Velu and Brothers (hereinafter called the buyers). The timber was to be imported from Burma. Under the contract the buyers were to pay the assessee 8 per cent. profit on the C.I.F. value of timber sold and also the sales tax and other charges and expenses. The buyers were to retire the shipping documents at least 10 days before the expected arrival of the steamer carrying the timber. The assessee imported two consignments of timber from Rangoon. The value of the first consignment was Rs. 99,098.05. The ship carrying the consignment arrived at the Madras Harbour on 17th October 1957. The assessee got Rs. 1,00,000, from the buyers on 24th October, 1957, and retired the documents of title, from the bank and handed over the said documents on the same date to the buyers to enable them to clear the goods. All charges and expenses by way of import duty, clearance charges etc., were paid by the buyers on behalf of the assessee. A second consignment reached Madras by ship on 17th December, 1957. The assessee obtained from the buyers, on 23rd December, 1957 the value of this consignment after handing over to the buyers the necessary shipping documents.

On these facts both the Commercial Tax Officer as well as the Appellate Assistant Commissioner came to the conclusion that the sales effected by the assessee to the buyers were not sales in the course of import, but were local sales liable to tax under the Madras Act. The Sales Tax Appellate Tribunal, on the other hand, held to the contrary. The High Court has concurred with the view of the Appellate Tribunal.

According to the Assistant Commercial Tax Officer and the Appellate Assistant Commissioner the sale was effected by the assessee to the buyer after the consignment of timber had come into the Madras Port and in consequence there was no intention to transfer the property in the goods to the buyers before they were cleared from the customs frontier and hence the sales could not be considered to be sales in the course of import. The Appellate Tribunal took the view that the sale by the assessee to the buyers had been effected by transferring the documents of title relating to the goods before the goods, crossed the customs barrier and before the import became complete. Therefore, according to the Tribunal, the sales should be treated as being in the course of import and, in consequence, not liable for tax under the Madras Act.

On the facts stated above, the parties were not in dispute; but, before the High Court, the State raised the contention that the sales in question were not sales in the course of import as the documents of title were handed over by the assessee to the buyers after the ship had crossed the 'territorial waters'. According to the State, the expression 'customs frontier,' occurring in section 5 (2) of the Central Sales Tax Act, 1956 (LXXXIV of 1956), (hereinafter called the Central Act) is co-terminous with the extent of the 'territorial waters' of India, as fixed by the Proclamation, dated 22nd March, 1956 issued by the President of India. That is according to the State, the import is complete when the ship carrying the goods from a foreign port enters the territorial waters and any sale by the importer by transfer of documents of title to the goods subsequent to such entry will not amount to a sale in the course of import. According to the assessee 'customs frontier' in section 5 (2) of the Central Act must be treated as analogous to customs barrier and so read the position would be that a sale effected by transfer of documents of title before the goods cross the customs barrier would not be liable to tax under the Madras Act.

The High Court has, after a reference to various decisions of this Court as to when a sale can be considered to be in the course of import or export, held that the "customs frontier" as laid down by this Court does not mean any geographical features like land or coast or limits of territorial waters, but only the operation of the machinery of the Customs Department consisting of levy and collection of duty and clearance of the goods. The High Court further held that it would be proper to construe the words 'customs frontiers' as 'customs barriers' in the Central Act. In this view the High Court held that as the sale had been effected by transfer of title to the goods before they entered the customs barrier the sale was not liable to tax under the Madras Act.

On behalf of the appellant-State, Mr. A.K. Sen, learned Counsel, urged that the view of the Madras High Court construing the words 'customs frontiers' as 'customs barriers' in the Central Act was erroneous. According to the learned Counsel on the admitted facts the sales in all these cases had been effected by transfer of the documents of title long after the sales had ceased to be in the course of import. This contention, on behalf of the State, was resisted by Mr. Thiagarajan and Mr. K. Jaya Ram appearing for the respondent in Civil Appeals Nos. 1464 and 1465 of 1967 respectively.

We are of the view that the judgment of the Madras High Court cannot be sustained and the expression 'customs frontiers' in section 5 of the Central Act cannot be construed to mean 'customs barriers'. Article 286 (1) places a ban on the State imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State or in the course of import of goods into or export of goods out of the territory of India. Clause (2) of Article 286 gives power to the Parliament, by law, to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1). Accordingly Parliament has enacted the Central Act. Section 5 of that Act lays down the conditions under which a sale or purchase of goods can be said to take place in the course of import or export. Sub-sections (1) and (2) deal with sale or purchase of goods in the course of export and sale or purchase of goods in the course of import, respectively. As we are concerned with a sale in the course of import, the relevant provision is sub-section (2) of section 5, which is as follows :

"5. (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

In this case, the claim made by the assessee for exemption from tax liability is on the ground that the sale was effected by transfer to the buyer of documents of title to the goods. Under section 5 (2) of the Central Act, in order to treat the sale as one in the course of import the documents of title must have been transferred before the goods have crossed the customs frontiers of India. The question is what does the expression 'customs frontiers' or India in section 5 of the Central Act, mean? To answer this question, it is necessary to refer to certain Proclamations made by the President of India and Notifications issued by the Central Government under section 3-A of the Sea Customs Act, 1878 (VIII of 1878) (hereinafter called the Act).

The President of India has issued a Proclamation, dated 22nd March, 1956 and that contains a declaration as to the extent of the territorial waters of India. That Proclamation has been published with the notification of the Government of India in the Ministry of External Affairs, No. S.R.O. 669, dated 22nd March, 1956 and is as follows :

"S.R.O. 669.—The following proclamation by the President is published for general information.

PROCLAMATION.

"WHEREAS international law has always recognised that sovereignty of a State extends to a belt of sea adjacent to its coast ;

AND WHEREAS international practice is not uniform as regards the extent of this sea-belt commonly known as the territorial waters of the State, and consequently it is necessary to make a declaration as to the extent of the territorial waters of India ;

I, Rajendra Prasad, President of India, in the Seventh Year of the Republic. do hereby proclaim that, notwithstanding any rule of law or practice to the contrary, which may have been observed in the past in relation to India or any part thereof, the territorial waters of India extend into the sea to a distance of six nautical miles measured from the appropriate base line."

RAJENDRA PRASAD.
President "

On 30th September, 1967 another Proclamation was issued by the President of India and published with the notification of the Government of India in the Ministry of External Affairs, No. F.L./111 (1) of 1967, dated 30th September 1967. By this Proclamation the earlier proclamation of 22nd March, 1956 has been superseded and the territorial waters of India have been declared to extend into the sea to a distance of twelve nautical miles measured from the appropriate base line. But in the present appeals, we are concerned only with the earlier Proclamation dated 22nd March, 1956.

Section 3-A of the Act gives power to the Central Government, to define, by notification in the Official Gazette, the 'customs frontiers' of India. By virtue of the powers conferred by this section, the Central Government (Ministry of Finance, Revenue Division) had issued a notification No. 25-Customs, dated 1st April, 1950, defining the 'customs frontiers' of India; but it is not necessary to consider the definition contained in this notification, as it has been superseded by the issue of a fresh Notification No. S.R.O. 1683, dated 6th August, 1955. The latter notification, issued by the Ministry of Finance (Revenue Division), Customs, which is relevant for the present purpose, is as follows :

"New Delhi, the 6th August, 1955.

S.R.O. 1683.—In exercise of the powers conferred by section 3-A of the Sea Customs Act, 1878 (VIII of 1878), and in supersession of the notification of the Government of India in the Ministry of Finance (Revenue Division) No. 25-Customs, dated the 1st April, 1950, the Central Government hereby defines the customs frontiers of India as the boundaries of the territory, including territorial waters, of India.

(Sd.)

Jt. Secretary."

The expression 'customs frontiers of India' in section 5 of the Central Act, in our opinion, must be construed in accordance with the notification issued by the Central Government under section 3-A of the Act, on 6th August, 1955 read with the Proclamation of the President of India, dated 22nd March, 1956. So applying the definition of 'customs frontiers' it is clear that, in the instant case, the sales were effected by transfer of documents of title long after the goods had crossed the customs frontiers of India. We have already stated that the ships carrying the goods in question were all in the respective harbours within the State of Madras when the sales were effected by the assesseees by transfer of documents of title to the buyers. If so, it follows that the claims made by the assesseees that the sales in question were sales in the course of import, has been rightly rejected by the assessing authority. Unfortunately, though various aspects seem to have been pressed before the High Court by the State of Madras, this notification of 6th August, 1955, issued by the Government of India, defining the 'customs frontiers' of India, was not brought to the notice of the High Court.

In the result, the common order, dated 17th July, 1963 of the Madras High Court is set aside and the appeals allowed. In the circumstances of the case, there will be no order as to costs.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J.M. SHELAT AND V. BHARGAVA, JJ.

The Heavy Engineering Mazdoor Union

... Appellants*

v.

The State of Bihar and others

... Respondents.

Companies—Commercial Corporation—Incorporated under the Companies Act—Entire capital contributed by the Central Government—President of India and certain Officers of Central Government the shareholders—Extensive powers of control conferred on the Central Government by the Memorandum and Articles of Association—Undertaking, if carried on under the authority of the Central Government.

Companies Act (I of 1956), section 617.

Industrial Disputes Act (XIV of 1947), sections 2 (a) and 10.

Words and Phrases—‘Under the authority of’.

The appellants herein filed a writ petition in the High Court of Patna disputing the validity of the reference to the Industrial Tribunal by the State Government of Bihar the two following questions for adjudications, firstly, as regards the number of festival holidays and secondly whether the second Saturday of a month should be an off-day for the Heavy Engineering Corporation, Ranchi, a Government Company. The grounds set out in the writ petition were two : (1) the appropriate Government to make the reference was the Central Government ; and (2) the questions referred were at the time actually pending before the certifying authority under the Industrial Employees (Standing Orders) Act, 1946 on an application for modification of the company's Standing Orders and therefore the said questions would not be industrial disputes that could be validly referred for adjudication. The High Court held against both the contentions and upheld the reference. Hence the instant appeal to the Supreme Court with the certificate of the High Court.

Held: The words ‘under the authority of’ in section 2 (a) of the Industrial Disputes Act, 1947 mean pursuant to the authority, such as when an agent or servant acts under or pursuant to the authority of his principal or master. That cannot be said of the company incorporated under the Companies Act, 1956 which derives its powers and functions from and by virtue of its memorandum and articles of association.

The mere fact, that the entire share capital of the respondent-company was contributed by the Central Government or the fact that the President of India and certain officers of the Central Government held all its shares do not make any difference. The company is a separate entity.

No doubt extensive powers are conferred on the Central Government including the power to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salaries of the company's employees. But these powers are derived from the company's memorandum and articles of association and not by reason of the company being the agent of the Central Government.

The question whether a corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a Corporation so provides such a corporation can easily be identified as agent of the State. In the absence of a statutory provision, a commercial corporation acting on its own behalf even though it is controlled wholly or partially by a Government Department will be ordinarily presumed not to be a servant or agent of the State.

The contention that it is only the Central Government, as the appropriate Government, could make the reference, therefore fails.

* C.A. No. 1463 of 1968.

The second contention is concluded adversely to the appellant by the decisions in *Management of Bangalore Woollen, Cotton and Silk Mills Co., Ltd. v. Workmen*, (1968) 2 S.C.J. 415 : (1968) 1 S.C.R. 581 and *The Management of Shahdara Saharanpur Light Railway Co., Ltd. v. S. S. Railway Workers Union*, (1969) 2 S.C.J. 290.

Appeal from the Judgment and Order, dated the 5th September, 1967 of the Patna High Court in Civil Writ Jurisdiction Case No. 921 of 1966.

A.K. Nag, Jai Kishan and Ramen Roy, Advocates, for Appellant.

U.P. Singh, Advocate, for Respondent No. 1.

B.P. Singh, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Shelat, J.—The Heavy Engineering Corporation Ltd., Ranchi, is a company incorporated under the Companies Act, 1956. Its entire share capital is contributed by the Central Government and all its shares have been registered in the name of the President of India and certain officers of the Central Government. It is, therefore a Government company within the meaning of section 617 of the Companies Act. The Memorandum of Association and the Articles of Association of the company confer large powers on the Central Government including the power to give directions as regards the functioning of the company. The wages and salaries of its employees are also determined in accordance with the said directions. The directors of the company are appointed by the President. In its Standing Orders, the company is described as a Government undertaking. The workmen employed by the company have two unions, the Heavy Engineering Mazdoor Union and the Hatia Project Workers Union.

Certain disputes having arisen between the company and its workmen, into which it is not necessary for the purposes of this judgment to go, the State Government of Bihar by its Notification, dated 15th November, 1966 referred two questions to the Industrial Tribunal for its adjudication : firstly, as regards the number of festival holidays and secondly, whether the second Saturday in a month should be an off-day. The Mazdoor Union thereupon filed a writ petition under Articles 226 and 227 of the Constitution in the High Court of Patna disputing the validity of the said reference on two grounds : (1) that the appropriate Government to make the said reference under section 10 of the Industrial Disputes Act, 1947 was the Central Government and not the State Government and (2) that the questions referred to were at the time actually pending before the certifying authority under the Industrial Employment (Standing Orders) Act, 1946 on an application for modification of the company's standing orders and that therefore the said questions would not be industrial disputes which could be validly referred for adjudication. Before the High Court it was conceded that the company was not an industry carried on by the Central Government but the contention was that considering the fact that the entire share capital was contributed by the Central Government and extensive powers were conferred on it, the company must be regarded as an industry carried on under the authority of the Central Government and that therefore it was that Government which was the appropriate Government which could make the said reference. On the second question, the contention was that the Industrial Employment (Standing Orders) Act was a self-contained code, that once a question relating to conditions of service was before the certifying authority constituted under that Act and was pending before him, the said question could not be an industrial dispute which could be referred for adjudication under section 10 of the Industrial Disputes Act. It was urged that consequently the reference on both the grounds was invalid. The High Court negatived both the contentions and upheld the validity of the reference. The Mazdoor Union obtained a certificate under Article 133 (1) (c) and filed this appeal impugning the correctness of that decision.

Under section 2 (a) 'appropriate Government' (leaving aside the words which are not relevant for our purposes) means (i) in relation to any industrial dispute concerning an industry carried on by or under the authority of the Central Govern-

ment, and (ii) in relation to any other industrial dispute the State Government. As was done before the High Court, Mr. Nag, appearing for the appellant-union, conceded that he would not contend that the company is an industry carried on by the Central Government but argued that it is an industry carried on under the authority of the Central Government and therefore it is that Government and not the State Government which is the appropriate Government for making a reference under section 10 of the Act. The first question raised by the appellant-union, therefore, turns solely upon the construction of the words 'carried on under the authority of the Central Government.' The contention was primarily grounded on the fact that the entire share capital of the company has been contributed by the Central Government, all its shares are held by the President and certain officers of the Central Government presumably its nominees and extensive control is vested in the Central Government.

Before considering the authorities cited by counsel before us, we proceed first to examine the meaning of the words used by Parliament in the definition clause of 'appropriate Government.' It is an undisputed fact that the company was incorporated under the Companies Act and it is the company so incorporated which carries on the undertaking. The undertaking, therefore, is not one carried on directly by the Central Government or by any one of its departments as in the case of posts and telegraphs or the railways. It was, therefore, rightly conceded both in the High Court as also before us that it is not an industry carried on by the Central Government. That being the position, the question then is, is the undertaking carried on under the authority of the Central Government? There being nothing in section 2 (a) to the contrary, the word 'authority' must be construed according to its ordinary meaning and therefore must mean a legal power given by one person to another to do an act. A person is said to be authorised or to have an authority when he is in such a position that he can act in a certain manner without incurring liability, to which he would be exposed but for the authority, or, so as to produce the same effect as if the person granting the authority had for himself done the act. For instance, if *A* authorises *B* to sell certain goods for and on his behalf and *B* does so, *B* incurs no liability for so doing in respect of such goods and confers a good title on the purchaser. There clearly arises in such a case the relationship of a principal and an agent. The words, "under the authority of" mean pursuant to the authority, such as where an agent or a servant acts under or pursuant to the authority of his principal or master. Can the respondent-company, therefore, be said to be carrying on its business pursuant to the authority of the Central Government? That obviously cannot be said of a company incorporated under the Companies Act whose constitution, powers and functions are provided for and regulated by its memorandum of association and the articles of association. An incorporated company, as is well known, has a separate existence and the law recognises it as a juristic person separate and distinct from its members. This new personality emerges from the moment of its incorporation and from that date the persons subscribing to its memorandum of association and other joining it as members are regarded as a body incorporate or a corporation aggregate and the new person begins to function as an entity. cf. *Salomon v. Salomon and Co.*¹. Its rights and obligations are different from those of its shareholders. Action taken against it does not directly affect its shareholders. The company in holding its property and carrying on its business is not the agent of its shareholders. An infringement of its rights does not give a cause of action to its shareholders. Consequently, it has been said that if a man trusts a corporation he trusts that legal *persona* and must look to its assets for payment; he can call upon the individual shareholders to contribute only if the Act or charter creating the corporation so provides. The liability of an individual member is not increased by the fact that he is the sole person beneficially interested in the property of the corporation and that the other members have become members merely for the purpose of enabling the corporation to become incorporated and possess only a nominal interest in its property or hold it in trust for him. (cf. *Halsbury's Laws of England*, 3rd. Ed., Vol., 9, p. 9). Such a company even possesses the nationality of the country under the laws of which it is incorporated,

1. L.R. (1897) A.C. 22 : 66 L.J. Ch. 35 : 13 T.L.R. 46.

irrespective of the nationality of its members and does not cease to have that nationality even if in times of war it falls under enemy control. [cf. *Janson v. Driefontain Consolidated Mines*¹ and *Kuenigl v. Donnersmarck*². The company so incorporated derives its powers and functions from and by virtue of its memorandum of association and its articles of association. Therefore, the mere fact that the entire share capital of the respondent-company was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the shareholders being, as aforesaid, distinct entities the fact that the President of India and certain officers hold all its shares does not make the company an agent either of the President or the Central Government. A notice to the President of India and the said officers of the Central Government, who hold between them all the shares of the company, would not be a notice to the company : nor can a suit maintainable by and in the name of the company be sustained by or in the name of the President and the said officers.

It is true that besides the Central Government having contributed the entire share capital, extensive powers are conferred on it, including the power to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salaries payable by the company to its employees. But these powers are derived from the company's memorandum of association and the articles of association and not by reason of the company being the agent of the Central Government. The question whether a corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a corporation so provides, such a corporation can easily be identified as the agent of the State as in *Graham v. Public Works Commissioners*³, where Phillimore, J. said that the Crown does in certain cases establish with the consent of Parliament certain officials or bodies who are to be treated as agents of the Crown even though they have the power of contracting as principals. In the absence of a statutory provision, however, a commercial corporation acting on its own behalf, even though it is controlled wholly or partially by a Government department, will be ordinarily presumed not to be a servant or agent of the State. The fact that a Minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the Government. [see *The State Trading Corporation of India Ltd. v. The Commercial Tax Officer, Visakhapatnam*⁴ and *Tamlin v. Hannaford*⁵. Such an inference that the corporation is the agent of the Government may be drawn where it is performing in substance Governmental and not commercial functions. [cf. *London County Territorial and Auxiliary Forces Association v. Nichols*⁶.

In this connection the meaning of the word 'employer' as given in section 2 (g) of the Act may be looked at with some profit as the Legislature there has used identical words while defining 'an employer.' An employer under cl. (g) mean. in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in that behalf or where no such authority is prescribed, the head of the department. No such authority has been prescribed in regard to the business carried on by the respondent-company. But that does not mean that the head of the department which gives the directions as aforesaid or which supervises over the functioning of the company is the employer within the meaning of section 2 (g). The definition of the employer, on the contrary, suggests that an industry carried on by or under the authority of the Government means either the industry carried on directly by a department of the Government, such as the posts and telegraphs or the railways, or

1. L.R. (1932) A.C. 484; 71 L.J.K.B. 857 : 18 T.L.R. 796.

2. L.R. (1935) 1 Q.B. 515 : (1955) 2 W.L.R. 82 : (1955) 1 All E.R. 46.

3. L.R. (1901) 2 K.B. 781; 70 L.J.K.B. 860; 17 T.L.R. 540.

4. (1963) 2 S.C.J. 695 : (1963) 33 Comp. Cas. 1057; (1964) 4 S.C.R. 99 at 188; A.I.R. 1963 S.C. 1811.

5. L.R. (1950) K.B. 18 at 25, 26 : 65 T.L.R. 422.

6. (1948) 2 All E.R. 432; L.R. (1949) 1 K.B. 35.

one carried on by such department through the instrumentality of an agent. We find that the view which we are inclined to take on the interpretation of section 2 (a) is also taken by the High Courts of Calcutta, Punjab and Bombay. [see *Carlsbad Mineral Water Mfg. Co. v. P.K. Sarkar*¹, *Cantonment Board v. State of Punjab*² and *Abdul Rehman Abdul Gafur v. Mrs. E. Paul*.³ In our view the contention that the appropriate Government to make the aforesaid reference was the State Government and not the Central Government has no merit and cannot be sustained.

The second contention that the questions referred to were regulated by the company's standing orders and an application for a modification of the said standing orders relating to those questions was actually pending before the certifying authority under the Industrial Employees (Standing Orders) Act precluded a reference thereof under section 10 of the Act requires no discussion as it is covered by the decision in *Management of Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. Workmen*⁴ and *The Management of Shahdara (Delhi) Shaharanpur Light Railway Co. Ltd. v. S.S. Railway Workers Union*⁵.

Thus neither of the two contentions can be upheld. In the result the appeal is dismissed but there will be no order as to costs.

K.G.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

The State of West Bengal and another

.. Appellants*

v.

Jugal Kishore More and another

.. Respondents.

Extradition—Surrender of a person within the State to another—A political act, either in pursuance of a treaty or by an ad hoc arrangement—The municipal law to determine the procedure to be followed by the Courts.

Extradition—Duty of the Courts—Protection of the right of the individual—Courts of both the countries to be satisfied as to the existence of prima facie evidence of the commission of the offence—Requisition for surrender not the function of the Courts but of the State.

Fugitive Offenders Act (1881)—Several Colonies treating the Act as applicable to them—Act, not repealed by Indian Parliament—Act, if applicable to India after 26th January, 1950.

Extradition Act (XXXIV of 1962), section 12—Extradition of fugitive offenders—No notification including Hong Kong in the list of the Commonwealth countries—Securing the extradition of fugitive offender through diplomatic, if barred under the Act.

Extradition is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the Courts of the other State. Surrender of a person within the State to another State—whether a citizen or an alien—is a political act done in pursuance of a treaty or an agreement *ad hoc*. It is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to extradition between independent States is based on treaties. But the law has operation—national as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation

1. (1952) 1 L.L.J. 488.

2. (1961) 1 L.L.J. 734 : I.L.R. (1961) 1 Punj. 380; 63 Punj. L.R. 218 : A.I.R. 1961 Punj. 416.

3. (1962) 2 L.L.J. 693 : 65 Bom. L.R. 20 :

* Cr.L.A. No. 14 of 1968.

(1963) Mah. L.J. 261 : A.I.R. 1963 Bom. 267.

4. (1968) 1 S.C.R. 581 : (1968) 2 S.C.J. 415 : A.I.R. 1968 S.C. 585.

5. (1969) 2 S.C.J. 290 : A.I.R. 1969 S.C. 513.

10th January, 1969.

of the international commitments of the State the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law. Sanction behind an order of extradition is the international commitment of the State under which the Court functions, but Courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender. The Courts of the country which make a requisition for surrender deal with the *prima facie* proof of the offence and leave it to the State to make a requisition upon the other State in which the offender has taken refuge. Requisition for surrender is not the function of the Courts but of the State. A warrant issued by a Court for an offence committed in a country from its very nature has no extra-territorial operation. It is only a command by the Court in the name of the sovereign to its officer to arrest an offender and to bring him before the Court. By taking a requisition in pursuance of a warrant issued by a Court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with extra-territorial operation. If the other State requested agrees to lend its aid to arrest the fugitive the arrest is made either by the issue of an independent warrant or endorsement or authentication of the warrant of the Court which issued it. By endorsement or authentication of a warrant the country in which an offender has taken refuge signifies its willingness to lend its assistance, in implementation of the treaties or international commitments and to secure the arrest of the offender. The offender arrested pursuant to the warrant of an endorsement is brought before the Court of the country to which the requisition is made, and the Court holds an inquiry to determine whether the offender may be extradited. International commitment or treaty will be effective only if the Court of a country in which the offender is arrested after enquiry is of the view that the offender should be surrendered.

The functions which the Courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is *prima facie* evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid the requisition is transmitted to the Police authorities, and the Courts of that country consider, according to their own laws, whether the offender should be surrendered—the enquiry is in the absence of express provisions to the contrary relating to the *prima facie* evidence of the commission of the offence which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence.

The President of India adapted the Extradition Act, 1903, in certain particulars. The Fugitive Offenders Act, 1881, and the Extradition Act, 1870, in their application to India were however not repealed by the Indian Parliament and to the extent they were consistent with the constitutional scheme they remained applicable. By the declaration of the status of India as a Republic, India has not ceased to be a part of the Commonwealth and the United Kingdom and several Colonies have treated the Fugitive Offenders Act, 1881, as applicable to them for the purpose of honouring the requisition made by the Republic of India from time to time.

The Chief Presidency Magistrate had the power to issue the warrant for the arrest of More, because there was *prima facie* evidence before him that More had committed certain offences which he was competent to try. The warrant was in Form II of Schedule V of the Code of Criminal Procedure. If the warrant was to be successfully executed against More who was not in India, assistance of the Executive Government had to be obtained. It is not an invasion upon the authority of the Courts when they are informed that certain procedure may be followed for obtaining the assistance of the executive Department of the State in securing through diplomatic channels extradition of fugitive offenders. In pursuance of that warrant, on the endorsement made by the Central Magistrate Hong Kong, More was arrested. The warrant was issued with the knowledge that

it could not be enforced within India and undoubtedly to secure the extradition of More. Pursuant to the warrant the Ministry of External Affairs, Government of India, moved through diplomatic channels, and persuaded the Colonial Secretary of Hong Kong to arrest and deliver More. Issue of the warrant and the procedure followed in transmitting the warrant were not illegal, not even irregular.

It is true that under the Extradition Act XXXIV of 1962 no notification has been issued including Hong Kong in the list of the Commonwealth countries from which extradition of fugitives from justice may be secured. The provisions of the Extradition Act, 1962 cannot be availed of for securing the presence of More for trial in India. But that did not operate as a bar to the requisition made by the Ministry of External Affairs, Government of India, if they were able to persuade the Colonial Secretary, Hong Kong, to deliver More for trial in this country. If the Colonial Secretary of Hong Kong was willing to hand over More for trial in this country, it cannot be said that the warrant issued by the Chief Presidency Magistrate for the arrest of More with the aid of which requisition for securing his presence from Hong Kong was to be made, was illegal.

It cannot be said that the enactment of the Extradition Act XXXIV of 1962 the Government of India is prohibited from securing through diplomatic channels the extradition of an offender for trial of an offence committed within India. There was no illegality committed by the Chief Presidency Magistrate, Calcutta in sending the warrant to the Secretary, Home (Political) Department, Government of West Bengal, for transmission to the Government of India, Ministry of External Affairs, for taking further steps for securing the presence of More in India to undergo trial.

Appeal by Special Leave from the Judgment and Order dated the 20th April, 1967 of the Calcutta High Court in Criminal Revision No. 502 of 1966.

B. Sen, Senior Advocate, (*P.K. Chakravarti*, Advocate, with him), for Appellants.

A.S.R. Chari, Senior Advocate (*B.P. Maheshwari* and *Sobhag Mal Jain*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Shah, J.—In the course of investigation of offences under section 420, 467, 471 and 120-B, Indian Penal Code the Officer in charge of the investigation submitted an application before the Chief Presidency Magistrate, Calcutta, for an order that a warrant for the arrest of Jugal Kishore More and certain other named persons be issued and that the warrant be forwarded with the relevant records and evidence to the Ministry of External Affairs, Government of India, for securing extradition of More who was then believed to be in Hong Kong. It was stated in the application that More and others “were parties to a criminal conspiracy in Calcutta between May, 1961 and December, 1962 to defraud the Government of India in respect of India’s foreign exchange”, and their presence was required for trial.

The Chief Presidency Magistrate held an enquiry and recorded an order on 19th July, 1965, that on the materials placed before him, a *prima facie* case was made out of a criminal conspiracy, was “hatched in Calcutta” within his jurisdiction, and More was one of the conspirators. He accordingly directed that a non-bailable warrant in Form II Schedule V of the Code of Criminal Procedure be issued for the arrest of More, and the warrant be sent to the Secretary Home (Political) Department, Government of West Bengal, with a request to take all necessary steps to ensure execution of the warrant. A copy of the warrant was sent to the Commissioner of Police, Calcutta, for information. In the warrant More was described as Manager, Premko Traders of 7, Wyndham Street and 28th King’s Road, Hong Kong. The Chief Presidency Magistrate forwarded to the Government of West Bengal, the warrant with attested copies of the evidence recorded at the enquiry and photostat copies of documents tendered by the prosecution in evidence “in accordance with the procedure laid down in Government of India, Ministry of External Affairs, letter

No. K/52/6131/41 dated 21st May, 1955". The warrant was forwarded by the Government of West Bengal to the Ministry of External Affairs, Government of India. The Ministry of External Affairs forwarded the warrant to the High Commissioner for India, Hong Kong, who in his turn, requested the Colonial Secretary, Hong Kong, for an order extraditing More under the Fugitive Offenders Act, 1881. (44 and 45 Vict., c. 69), to India for trial for offences described in the warrant. The Central Magistrate, Hong Kong, endorsed the warrant and directed the Hong Kong Police, "pursuant to section 13 of Part II and section 26 of Part IV of the Fugitive Offenders Act, 1881", to arrest More. The order recited:—

"Whereas I have perused this warrant for the apprehension of Jugal Kishore More, * * * * * accused of an offence punishable by law in Calcutta, Republic of India, which warrant purports to be signed by the Chief Presidency Magistrate, Calcutta, and is sealed with the seal of the Court of the said Magistrate, and is attested by S.K. Chatterjee, Under Secretary in the Ministry of External Affairs of the Republic of India and sealed with the seal of the said Ministry;

And whereas I am satisfied that this warrant was issued by a person having lawful authority to issue the same;

And whereas it has been represented to me that the said Jugal Kishore More * * * is suspected of being in the Colony;

And whereas Order in Council S.R. and O. No. 28 of 1918 by virtue of which Part II of the Fugitive Offenders Act, 1881, was made to apply to a group of British Possessions and Protective States including Hong Kong and British India, appears to remain in full force and effect so far as the law of Hong Kong is concerned.

Now therefore under section 13 of the Fugitive Offenders Act, 1881, I hereby endorse this warrant and authorise and command you in Her Majesty's name, forthwith to execute this Warrant in the Colony to apprehend the said Jugal Kishore More, * * * wherever he may be found in the colony and to bring him before a Magistrate of the said Colony to be further dealt with according to law."

More was arrested on 24th November, 1965. By order dated 4th April, 1966, the Central Magistrate, Hong Kong, overruled the objection raised on behalf of More that the Court had no jurisdiction to proceed in the matter under the Fugitive Offenders Act, 1881, since the Republic of India was no longer a "British Possession".

On 16th May, 1966, Hanuman Prasad—father of More—moved in the High Court of Calcutta a petition under section 439 of the Code of Criminal Procedure and Art. 227 of the Constitution for an order quashing the warrant of arrest issued against More and all proceedings taken pursuant thereto and restraining the Chief Presidency Magistrate and the Union of India from taking any further steps pursuant to the said warrant of arrest and causing More to be extradited from Hong Kong to India. The petition was heard before a Division Bench of the High Court. A. Roy, J., held that the warrant issued by the Chief Presidency Magistrate was not illegal and the procedure followed for securing extradition of More was not irregular. In his view the assumption made by the Central Magistrate, Hong Kong, that for the purpose of the Fugitive Offenders Act, India was a "British Possession" was irrelevant since that was only a view expressed by him according to the municipal law of Hong Kong, and by acceding to the requisition for extradition and surrender made upon that country by the Government of India in exercise of sovereign rights the status of the Republic of India was not affected.

In the view of Gupta, J., the warrant issued by the Chief Presidency Magistrate and the steps taken pursuant to the warrant were without jurisdiction, that the request made to the Hong Kong Government by the Government of India was also without authority in the absence of a notified order under section 3 of the Extradition Act, 1962, and the High Court could not ignore the "laws of the land, even to

support a gesture of comity to another nation," that, what was done by the Hong Kong authorities pursuant to the request made for the surrender of More was "not an instance of international comity but was regarded as the legal obligation under the Fugitive Offenders Act under which the Central Magistrate, Hong Kong regarded India as a Colony or Possession of the British Commonwealth." The case was then posted for hearing before B. Mukherji, J. The learned Judge held that the Chief Presidency Magistrate had no power to issue the warrant of arrest in the manner he had done,—a manner which in his view was "unknown to the Code of Criminal Procedure," since the Fugitive Offenders Act, 1881, had ceased, on the coming into force of the Constitution, to be part of the law of India and could not on that account be resorted to for obtaining extradition of offenders from another country; that the instructions issued by the Government of India by letter No. 3516-J dated 14th June, 1955, laying down the procedure to be followed by the Courts for securing extradition of offenders from the Commonwealth countries should have been ignored by the Chief Presidency Magistrate, and that the Extradition Act XXXIV of 1962 did not authorise the Chief Presidency Magistrate to issue a warrant and to send it to the Secretary, Home (Political) Department, Government of West Bengal; that there "was no legal basis for the requisition made by the Central Government to Hong Kong" for extradition or surrender of More for the issue of the warrant by the Chief Presidency Magistrate; and that the demand made by the Government of India to the Government of Hong Kong by making a requisition to Hong Kong for the arrest of More "was not a political act, beyond the purview of law and judicial scrutiny," and being inconsistent with the law was liable to be rectified. He observed that the Central Government had the power under section 3 of the Extradition Act, 1962, to issue a notification for including Hong Kong in the list of countries from which offenders may be extradited, but since the Government had not issued any notification under that clause in exercise of the executive power, the Government could not attempt in violation of the statutory procedure seek extradition which the law of India did not permit. The learned Judge accordingly ordered that the warrant of arrest dated 30th July, 1965 issued by the Chief Presidency Magistrate, Calcutta, against More and all subsequent proceedings taken by the Chief Presidency Magistrate and the other respondents be quashed. The State of West Bengal has appealed to this Court with Special Leave.

Extradition is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the Courts of the other State. Surrender of a person within the State to another State—whether a citizen or an alien—is a political act done in pursuance of a treaty or an arrangement *ad hoc*. It is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to extradition between independent States is based on treaties. But the law has operation—national as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law.

As observed in Wheaton's International Law, Vol. I, 6th Edition, page 213 :

"The constitutional doctrine in England is that the Crown may make treaties with foreign States for the extradition of criminals, but those treaties can only be carried into effect by Act of Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign power."

Sanction behind an order of extradition is therefore, the international commitment of the State under which the Court functions, but Courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender. The Courts of the country which make a requisition for surrender deal with the *prima facie* proof of the offence and leave it to the State to make a requisition upon the other State in which the offender has taken refuge. Requisition for surrender is not the function of the Courts but of the State. A warrant issued by a Court for an offence committed in a country from its very nature has no extra-territorial operation. It is only a command by the Court in the name of the sovereign to its officer to arrest an offender and to bring him before the Court. By making a requisition is pursuance of a warrant issued by a Court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with extra-territorial operation. If the other State requested agrees to lend its aid to arrest the fugitive the arrest is made either by the issue of an independent warrant or endorsement or authentication of the warrant of the Court which issued it. By endorsement or authentication of a warrant the country in which an offender has taken refuge signifies its willingness to lend its assistance, in implementation of the treaties or international commitments and to secure the arrest of the offender. The offender arrested pursuant to the warrant or an endorsement is brought before the Court of the country to which the requisition is made, and the Court holds an inquiry to determine whether the offender may be extradited. International commitment or treaty will be effective only if the Court of a country in which the offender is arrested after enquiry is of the view that the offender should be surrendered.

The functions which the Courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is *prima facie* evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid the requisition is transmitted to the Police authorities, and the Courts of that country consider, according to their own laws, whether the offender should be surrendered—the enquiry is in the absence of express provisions to the contrary relating to the *prima facie* evidence of the commission of the offence which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence.

Prior to 26th January, 1950, there was in force in India the Indian Extradition Act XV of 1903, which as the Preamble expressly enacted was intended to provide for the more convenient administration of the Extradition Acts of 1870 and 1873, and the Foreign Jurisdiction Act of 1881—both enacted by the British Parliament. The Act enacted machinery in Chapter II for the surrender of fugitive criminals in case of Foreign States i.e., States to which the Extradition Act of 1870 and 1873 applied and in Chapter II for surrender of fugitive offenders in case of "His Majesty's Dominions." The Extradition Acts of 1870 and 1873 sought to give effect to arrangements made with foreign States with respect to the surrender to such States of any fugitive criminals Her Majesty may by Order in Council, direct and to prescribe the procedure for extraditing fugitive offenders to such foreign states.

As observed in Halsbury's Laws of England, Volume 16, 3rd edition, 1161 at page 567:

"When a treaty has been made with a foreign State and the Extradition Acts have been applied by Order in Council, one of Her Majesty's principal Secretaries of State may, upon a requisition made to him by some person recognised by him as a diplomatic representative of that foreign State, by order under his hand and seal, signify to a police magistrate that such a requisition has been made and require him to issue his warrant for the apprehension of the fugitive criminal if the criminal is in, or is suspected of being in, the United Kingdom."

The warrant may then be issued by a police magistrate on receipt of the order of the Secretary of State and upon such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England.

The procedure for extradition of fugitive offenders from "British possessions" was less complicated. When the Extradition Act was applied by Order in Council unless it was otherwise provided by such Order, the Act extended to every "British possession" in the same manner as if throughout the Act the "British possession" were substituted for the United Kingdom but with certain modifications in procedure.

Under Part I of the Fugitive Offenders Act, 1881 a warrant issued in one part of the Crown's Dominion for apprehension of a fugitive offender, could be endorsed for execution in another Dominion. After the fugitive was apprehended he was brought before the Magistrate who heard the case in the same manner and had the same jurisdiction and powers as if the fugitive was charged with an offence committed within the Magistrate's jurisdiction. If the Magistrate was satisfied, after expiry of 15 days from the date on which the fugitive was committed to prison, he could make an order for surrender of the fugitive on the warrant issued by the Secretary of State or an appropriate officer. There was also provision for "inter-Colonial backing of warrants" within groups of "British possessions" to which Part I of the Fugitive Offenders Act, 1881 had been applied by Order in Council. In such groups a more rapid procedure for the return of fugitive offenders between possessions of the same group was in force. Where in a "British possession," of a group to which Part II of the Act applied, a warrant was issued for the apprehension of a person accused of an offence punishable in that possession and such term is or was suspected of being, in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, was bound to endorse such warrant, and the warrant so endorsed was sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and to bring him before the endorsing magistrate or some other magistrate in the same possession. If the magistrate before whom a person apprehended was brought was satisfied that the warrant was duly authenticated and was issued by a person having lawful authority to issue it, and the identity of the prisoner was established he could order the prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to deliver into the custody of the persons to whom the warrant was addressed or of any one or more of them, and to be held in custody and conveyed to that possession, there to be dealt with according to law as if he had been there apprehended. This was in brief the procedure prior to 26th January, 1950.

The President of India adapted the Extradition Act, 1903, in certain particulars. The Fugitive Offenders Act, 1881 and the Extradition Act, 1870, in their application to India were however not repealed by the Indian Parliament and to the extent they were consistent with the constitutional scheme they remained applicable. In order to maintain the continued application of laws the British Parliament, notwithstanding India becoming a Republic, the British Parliament, enacted the India (Consequential Provisions) Act, 1949 which by section 1 provided:—

"(1) On and after the date of India's becoming a republic, all existing law, that is to say, all law which, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that date or has been passed or made before that date and comes into force thereafter, shall, until provision to the contrary is made by the authority having power to alter that law and subject to the provisions of sub-section (3) of this section, have the same operation in relation to India, and to persons and things in any way belonging to or connected with India, as it would have had if India had not become a republic.

(3) His Majesty may by Order in Council make provision for such satisfaction of any existing law to which this Act extends as may appear to him to be necessary or expedient in view of India's becoming a republic while remaining a member of the Commonwealth, and sub-section (1) of this section shall have effect in relation to any such laws as modified by such an order in so far as the contrary intention appears in the order. An Order in Council under this section:—

(a) may be made either before or after India becomes a republic, and may be revoked or varied by a subsequent Order in Council; and

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament."

In 1954 this Court was called upon to decide a case relating to extradition to Singapore, a British Colony, of a person alleged to be a fugitive offender. *The State of Madras v. G. G. Menon and another*¹. In that case Menon and his wife were apprehended and produced before the Chief Presidency Magistrate, Madras, pursuant to warrants of arrest issued under the provisions of the Fugitive Offenders Act, 1881. Arrests were made in pursuance of requisition made by the Colonial Secretary of Singapore requesting the assistance of the Government of India to arrest and return to the Colony of Singapore Menons under warrants issued by the Police Magistrate of Singapore. Menons pleaded that the Fugitive Act, 1881, under which the action was sought to be taken against them was repugnant to the Constitution of India and was void and unenforceable. The Chief Presidency Magistrate referred two questions of law for decision of the High Court of Madras :

(1) Whether the Fugitive Offenders Act, 1881, applies to India after 26th January, 1950, when India became a Sovereign Democratic Republic; and

(2) Whether, even if it applied, it or any of its provisions, particularly Part II thereof, is repugnant to the Constitution of India, and is therefore void and or inoperative.

The High Court held that the Fugitive Offenders Act was inconsistent with the fundamental right of equal protection of the laws guaranteed by Article 14 of the Constitution and was void to that extent and unenforceable against the petitioners. In appeal brought to this Court it was observed:

"It is plain from the * * * provisions of the Fugitive Offenders Act as well as from the Order in Council that British Possessions which were contiguous to one another and between whom there was frequent inter-communication were treated for purposes of the Fugitive Offenders Act as one integrated territory and a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these integrated territories. As the laws prevailing in those possessions were substantially the same, the requirement that no fugitive will be surrendered unless a *prima facie* case was made against him was dispensed with. Under the India Extradition Act, 1903, also a similar requirement is insisted upon before a person can be extradited.

The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and the coming into force of the new Constitution by no strength of imagination could India be described as a British Possession and it could not be grouped by an Order in Council amongst those Possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned and the extradition of person taking asylum in India, having committed offences in British Possessions, could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation. The Union Parliament has not so far enacted any law on the subject and it was not suggested that any arrangement has been arrived at between these two

1. (1954) S.C.J. 621 : (1954) 2 M.L.J. 197 : (1955) 1 S.C.R. 280.

Governments. The Indian Extradition Act, 1903, has been adapted but the Fugitive Offenders Act, 1881, which was an Act of the British Parliament has been left severely alone. The provisions of that Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on those lines, it seems difficult to hold that section 12 or section 14 of the Fugitive Offenders Act has force in India by reason of the provisions of Article 372 of the Constitution. The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone: India is no longer a British Possession and no Order in Council can be made to group it with other British Possessions. * * * * The political background and shape of things when Part II of the Fugitive Offenders Act, 1881, was enacted and envisaged by that Act having completely changed, it is not possible without radical legislative changes to adapt that Act to the changed conditions. That being so, in our opinion the tentative view expressed by the Presidency Magistrate was right * * * *."

After this judgment was delivered, the Government of India, Ministry of External Affairs, issued a notification on 21st May, 1955, to all State Governments of Part A, B, C & D States. It was stated in the notification that:

".....in a certain case of extradition of an offender, the Supreme Court of India recently ruled that in the changed circumstances, the English Fugitive Offenders Act, 1881, is no longer applicable to India. There can, therefore, be no question of issuing a warrant of arrest, addressed to a foreign police or a foreign Court, in respect of persons who are residing outside India except in accordance with the Code of Criminal Procedure, 1898.

(2) In the circumstances, to obtain a fugitive offender from the United Kingdom and other Commonwealth countries, the following procedure may be adopted as long as the new Indian Extradition law is not enacted and the Commonwealth countries continued to honour our requests for the surrender of the fugitive offenders notwithstanding decisions of the Supreme Court;

(a) The Magistrate concerned will issue a warrant for the arrest of the fugitive offender to Police officials of India in the usual form prescribed under the Code of Criminal Procedure, 1898.

(b) The warrant for arrest, accompanied by all such documents as would enable a *prima facie* case to be established against the accused will be submitted by the Magistrate to the Government of India in the Ministry of External Affairs, through the State Government concerned.

3. This Ministry, in consultation with the Ministries of Home Affairs, and Law, will make a requisition for the surrender of a fugitive offender in the form of a letter, requesting the Secretary of State (in the case of Dominions, the appropriate authority in the Dominion) to get the warrant endorsed in accordance with law. This letter will be addressed to the Secretary of State (or other appropriate authority in case of Dominions) through the High Commissioner for India in the United Kingdom/Dominion concerned and will be accompanied by the warrant issued by the Magistrate at (a) of para 2 above and other documents received therewith."

The Chief Presidency Magistrate, Calcutta made out the warrant for the arrest of More pursuant to that notification and sent the warrant to the Secretary, Home (Political) Department, Government of West Bengal. Validity of the steps taken in accordance with the notification by the Chief Presidency Magistrate is questioned in this appeal.

To complete the narrative, it is necessary to refer to the Extradition Act XXXIV of 1962. The Parliament has enacted Act XXXIV of 1962 to consolidate and amend the law relating to the extradition of fugitive criminals. It makes provisions by

Chapter II for extradition of fugitive criminals to foreign States and to Commonwealth countries to which Chapter III does not apply. Chapter III deals with the return of fugitive criminals to Commonwealth countries with extradition arrangements. By section 12 it is provided:

“(1) This Chapter shall apply only to any such Commonwealth country to which, by reason of an extradition arrangement entered into with that country, it may seem expedient to the Central Government to apply the same.

(2) every such application shall be by notified order, and the Central Government may, by the same or any subsequent notified order, direct that this Chapter and Chapters I, IV and V shall, in relation to any such Commonwealth country, apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement.”

Section 13 provides that the fugitive criminals from Commonwealth countries may be apprehended and returned. Chapter IV deals with the surrender or return of accused or convicted persons from foreign States or Commonwealth countries. By section 19 it was provided that:—

“(1) A requisition for the surrender of a person accused or convicted of an extradition offence committed in India and who is or is suspected to be, in any foreign State or a Commonwealth country to which Chapter III does not apply, may be made by the Central Government :—

(a) to a diplomatic representative of that State or country at Delhi; or

(b) to the Government of that State or country through the diplomatic representative of India in that State or country;

and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of India with that State or country.

(2) A warrant issued by a Magistrate in India for the apprehension of any person who is, or is suspected to be, in any Commonwealth country to which Chapter III applies shall be in such form as may be prescribed.”

By clause (a) of section 2 the expression “Commonwealth country” means “a Commonwealth country specified in the First Schedule and such other Commonwealth country as may be added to that Schedule by the Central Government by notification in the Official Gazette, and includes every constituent part, colony or dependency of any Commonwealth country so specified or added.” But in the Schedule to the Act “Hong Kong” is not specified as one of the Commonwealth countries and no notification has been issued by the Government of India under section 2 (a) adding to the First Schedule “Hong Kong” as a Commonwealth country. It is common ground between the parties that the provisions of the Extradition Act, 1962, could not be resorted to for making the requisition for surrender of the fugitive offender from Hong Kong and no attempt was made in that behalf.

Validity of the action taken by the Chief Presidency Magistrate must, therefore, be adjudged in the light of the action taken pursuant to the notification issued by the Government of India on 21st May, 1955. Counsel for the respondent More urged that the warrant issued by the Chief Presidency Magistrate was intended to be and could in its very nature be a legal warrant enforceable within India : it had no extra-territorial operation and could not be enforced outside India, and when the Central Magistrate, Hong Kong, purported to endorse that warrant for enforcement within Hong Kong he had no authority to do so. But this Court has no authority to sit in judgment over the order passed by the Hong Kong Central Magistrate. The Magistrate acted in accordance with the municipal law of Hong Kong and agreed to the surrender of the offender : his action cannot be challenged in this Court.

It may also be pointed out that Form II of the warrant prescribed in Schedule V of the Code of Criminal Procedure only issues a direction under the authority of the Magistrature to a Police Officer to arrest a named person and to produce him before the Court. It does not state that the warrant shall be executed in any designated place or area. By section 82 of the Code of Criminal Procedure a warrant of arrest may be executed at any place in India. That provision does not impose any restriction upon the power of the Police Officer. The section only declares, in that, every warrant issued by any Magistrate in India may be executed at any place in India : execution of the warrant is not restricted to the local limits of the jurisdiction of the Magistrate issuing the warrant or of the Court to which he is subordinate.

In *Emberor v. Vineyck Damodar Savarkar and others*¹, the Bombay High Court considered the question whether a person who was brought to the country and was charged before a Magistrate with an offence under the Indian Penal Code was entitled to challenge the manner in which he was brought into the country from a foreign country. Savarkar was charged with conspiracy under sections 121, 121-A, 122 and 123 of the Indian Penal Code. He was arrested in the United Kingdom and brought to India after arrest under the Fugitive Offenders Act, 1881. When the ship in which he was being brought to India was near French territory Savarkar escaped from Police custody and set foot on French territory at Marseilles. He was arrested by the Police Officers without reference to the French Police Authorities and brought to India. It was contended at the trial of Savarkar that he was not liable to be tried in India, since arrest by the Indian Police Officers in a foreign territory was without jurisdiction. Scott, C.J., who delivered the principal judgment of the Court rejected the contention. He observed :

“Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country.”

It is true that Savarkar was produced before the Court and he raised an objection about the validity of the trial on the plea that he was illegally brought to India, after unlawful arrest in foreign territory. In the present case we are concerned with a stage anterior to that. The respondent More though arrested in a foreign country lawfully by the order of the Central Magistrate, Hong Kong, had not been surrendered and the invalidity of the warrant issued by the Chief Presidency Magistrate is set up as a ground for refusing to obtain extradition of the offender. But on the principle of *Vineyck Damodar Savarkar's case*¹, the contention about the invalidity of the arrest cannot affect the jurisdiction of the Courts in India to try More if and when he is brought here.

The Indian Extradition Act XV of 1903 which was enacted to provide for the more convenient administration of the English Extradition Act, 1870 and 1873 and the Fugitive Offenders Act, 1881, remained in operation. But after 26th January, 1950, India is no longer a “British Possession.” In *C.G. Menon's case*², it was decided by this Court that application of sections 12 and 14 of the Fugitive Offenders Act, 1881, for surrendering an offender to a Commonwealth country in pursuance of a requisition under the Fugitive Offenders Act, 1881, is inconsistent with the political status of India. It is somewhat unfortunate that the Court hearing that case was not invited to say anything about the operation of the India (Consequential Provision) Act, 1949.

But *C. G. Menon's case*², was a reverse case, in that, the Colonial Secretary of Singapore had made a requisition for surrender of the offender for trial for offences of criminal breach of trust in Singapore. Whether having regard to the political status of India since 26th January, 1950, the Fugitive Offenders Act, 1881, in so far as it purported to treat India as a “British Possession” imposed an obligation to deliver offenders in pursuance of the India (Consequential Provision) Act, 1949 is a question

1. (1911) I.L.R. 35 Bom. 225.

2. (1954) S.C.J. 621 : (1954) 2 M.L.J. 197.

on which it is not necessary to express an opinion. By the declaration of the status of India as a Republic, India has not ceased to be a part of the Commonwealth and the United Kingdom and several Colonies have treated the Fugitive Offenders Act, 1881, as applicable to them for the purpose of honouring the requisition made by the Republic of India from time to time. In *Re. Government of India and Mubarak Ali Ahmed*¹ an attempt to resist in the High Court in England the requisition by the republic of India to surrender an offender who had committed offences in India and had fled justice failed. Mubarak Ali a native of Pakistan was being tried in the Courts in India on charges of forgery and fraud. He broke his bail and fled to Pakistan and thereafter to England. He was arrested on a provisional warrant issued by the London Metropolitan Magistrate on the application of the Government of India. After hearing legal submissions the Metropolitan Magistrate made an order under section 5 of the Fugitive Offenders Act, 1881, for Mubarak Ali's detention in custody pending his return to India to answer the charges made against him. Mubarak Ali then filed a petition for a writ of *habeas corpus* before the Queen's Bench of the High Court. It was held that the Fugitive Offenders Act, 1881, was in force between India and Great Britain on 26th January, 1950, when India became a republic and it was continued to apply by virtue of section 1 (1) of the India (Consequential Provision) Act, 1949, and, therefore, the Magistrate had jurisdiction to make the order for the applicant's return. Pursuant to the requisition made by the Government of India, Mubarak Ali was surrendered by the British Government. Mubarak Ali was then brought to India and was tried and convicted. One on the offences for which he was tried resulted in his conviction and an appeal was brought to this Court in *Mubarak Ali Ahmed v. The State of Bombay*².

There are other cases as well, in which orders were made by the British Courts complying with the requisitions made by the Governments of Republics within the Commonwealth, for extradition of offenders under the Fugitive Offenders Act, 1881. An offender from Ghana was ordered to be extradited pursuant to the Ghana (Consequential Provision) Act, 1960, even after Ghana became a republic. *Re. Kwesi Armah*³. On 1st July, 1960, Ghana while remaining by virtue of the Ghana (Consequential Provision) Act, 1960, a member of the Commonwealth became Republic. Kwesi Armah who was a Minister in Ghana fled the country in 1966 and took refuge in the United Kingdom. He was arrested under a provisional warrant issued under the Fugitive Offenders Act, 1881. The Metropolitan Magistrate being satisfied that the Act of 1881 still applied to Ghana and that a *prima facie* case had been made out against the applicant in respect of two alleged contraventions of the Ghana Criminal Code, 1960, by corruption and extortion when he was a public officer, committed Kwesi Armah to prison pending his return to Ghana to undergo trial. A petition for a writ of *habeas corpus* before the Queen's Bench Division of the High Court was refused. Edmund Davies, J., was of the view that the Act of 1881 applied to the Republic of Ghana, in its new form, just as it did before the *coup d'état* of February, 1966. The case was then carried to the House of Lords: *Armah v. Government of Ghana and another*⁴. The questions decided by the House of Lords have no relevance in this case. But it was not even argued that a fugitive offender from a republic which was a member of the Commonwealth could not be extradited under the Fugitive Offenders Act, 1881.

There is yet another recent judgment of the House of Lords dealing with repatriation of a citizen of the Republic of Cyprus: *Zacharia v. Republic of Cyprus and another*⁵. Warrants were issued against Zacharia on charges before the Courts in Cyprus of offences of abduction, demanding money with menaces and murder. Under the orders issued by a Bow Street Magistrate under section 5 of the Fugitive Offenders Act, 1881, Zacharia was committed to prison pending his return to Cyprus. An application for a writ of *habeas corpus* on the ground that the offences alleged against him were political and that the application for the return of the

1. (1952) 1 All E.R. 1060.

2. (1958) S.C.R. 328 : (1958) S.C.J. 111 : (1958) M.L.J. (Cr.) 42.

3. (1966) All E.R. 1006.

4. (1966) 3 All E.R. 177.

5. (1962) All E.R. 438.

fugitive was made out of motive for revenge was rejected by the Queen's Bench Division, and it was ordered that Zacharia be repatriated. The order was confirmed in appeal to the House of Lords.

Merely because for the purpose of the extradition procedure, in a statute passed before the attainment of independence by the former Colonies and dependencies, certain territories continue to be referred to as "British Possessions", the statute does not become inapplicable to those territories. The expression "British Possession" in the old statutes merely survives as an artificial mode of reference, undoubtedly not consistent with political realities, and but does not imply for the purpose of the statute or otherwise political dependence of the Government of the territories referred to. It is not for the Courts of India to take umbrage at expressions used in statutes of other countries and to refuse to give effect to Indian Laws which govern the problems arising before them. It is interesting to note that by express enactment the Fugitive Offenders Act, 1881, remains in force as a part of the law of the Republic of Ireland : see Ireland Act, 1949 (12, 13 & 14 Geo. 6. c. 41). In Halsbury's Laws of England, 3rd Edition, Volume 5, Article 987, page 433—in dealing with the expression "Her Majesty's Dominions" in old statutes, it is observed :

"The term 'Her Majesty's Dominions' means all the territories under the sovereignty of the Crown, and the territorial waters adjacent thereto. In special cases it may include territories under the protection of the Crown and mandated and trust territories. References to Her Majesty's dominions contained in statutes passed before India became a republic are still to be construed as including India; it is usual to name India separately from Her Majesty's dominions in statutes passed since India became a republic."

In foot-note (1) on page 433 it is stated, British India, which included the whole of India except the Princely States; and the Government of India Act, 1935 as amended by section 8 of the India and Burma (Miscellaneous Amendments) Act, 1940, formed part of Her Majesty's dominions and was a British possession, although it was not included within the definition of "colony". The territory comprised in British India was partitioned between the Dominions of India and Pakistan (Indian Independence Act, 1947), but the law relating to the definition of Her Majesty's dominions was not thereby changed, and it was continued in being by the India (Consequential Provision) Act, 1949 (12, 13 and 14 Geo. 6 c. 92), passed in contemplation of the adoption of a republican constitution by India. India is now a sovereign republic, but that by itself does not render the Fugitive Offenders Act, 1881, inapplicable to India.

If the question were a live question, we would have thought it necessary to refer the case to a larger Bench for considering the true effect of the judgment in *C.G. Menon's case*¹. But by the Extradition Act XXXIV of 1962 the Extradition Act, 1870 and the latter Acts and also the Fugitive Offenders Act, 1881, have been repealed and the question about extradition by India of fugitive offenders under those Acts will not hereafter arise.

We are not called upon to consider whether in exercise of the power under the Fugitive Offenders Act a Magistrate in India may direct extradition of a fugitive offender from a "British Possession", who has taken refuge in India. It is sufficient to observe that the Colonial Secretary of Hong Kong was according to the law applicable in Hong Kong competent to give effect to the warrant issued by the Chief Presidency Magistrate, Calcutta, and the Central Magistrate, Hong Kong, had jurisdiction under the Fugitive Offenders Act, and, after holding inquiry, to direct that More be surrendered to India. The order of surrender was valid according to the law in force in Hong Kong, and we are unable to appreciate the grounds on which invalidity can be attributed to the warrant issued by the Chief Presidency Magistrate, Calcutta, for the arrest of More. That the Chief Presidency Magistrate was competent to issue a warrant for the arrest of More against whom there was

prima facie evidence to show that he had committed an offence in India is not denied. If the Chief Presidency Magistrate had issued the warrant to the Commissioner of Police and the Commissioner of Police had approached the Ministry of External Affairs, Government of India, either through the local Government or directly with a view to secure the assistance of the Government of Hong Kong for facilitating extradition of More, no fault can be found. But Gupta, J., and Mukherji, J., thought that the notification issued by the Government of India setting out the procedure to be followed by a Magistrate, where the offender is not in Indian territory and his extradition is to be secured, amounted to an invasion on the authority of the Courts. We do not think that any such affront is intended by issuing the notification. The Fugitive Offenders Act, 1881, had not been expressly repealed even after 26th January, 1950. It had a limited operation: the other countries of the Commonwealth were apparently willing to honour the international commitments which arose out of the provisions of that Act. But this Court on the view that since India had become a Republic, held that the Fugitive Offenders Act could not be enforced in this country, that decision presented to the Government of India a problem which had to be resolved by devising machinery for securing the presence of a offenders who were fugitives from justice. The notification issued was only in the nature of advice about the procedure to be followed and did not in any manner seek to impose any executive will upon the Courts in matters judicial. Observations made by Mukherji, J., that the notification issued by the Central Government authorising the Chief Presidency Magistrate to issue the warrant in the manner he had done, came "nowhere near the law" and "to a Court of law it is waste paper beneath its notice" appear to proceed upon an incorrect view of the object of the notification.

The Chief Presidency Magistrate had the power to issue the warrant for the arrest of More, because there was *prima facie* evidence before him that More had committed certain offences which he was competent to try. The warrant was in Form II of Schedule V of the Code of Criminal Procedure. If the warrant was to be successfully executed against More who was not in India, assistance of the executive Government had to be obtained. It is not an invasion upon the authority of the Courts when they are informed that certain procedure may be followed for obtaining the assistance of the executive Department of the State in securing through diplomatic channels extradition of fugitive offenders. In pursuance of that warrant, on the endorsement made by the Central Magistrate, Hong Kong, More was arrested. The warrant was issued with the knowledge that it could not be enforced within India and undoubtedly to secure the extradition of More. Pursuant to the warrant the Ministry of External Affairs, Government of India, moved through diplomatic channels, and persuaded the Colonial Secretary of Hong Kong to arrest and deliver More. Issue of the warrant and the procedure followed in transmitting the warrant were not illegal, not even irregular.

One more argument remains to be noticed. It is true that under the Extradition Act XXXIV of 1962 no notification has been issued including Hong Kong in the list of the Commonwealth countries from which extradition of fugitives from justice may be secured. The provisions of the Extradition Act, 1962, cannot be availed of for securing the presence of More for trial in India. But that did not, in our judgment, operate as a bar to the requisition made by the Ministry of External Affairs, Government of India, if they were able to persuade the Colonial Secretary of Hong Kong, to deliver More for trial in this country. If the Colonial Secretary of Hong Kong was willing to hand over More for trial in this country, it cannot be said that the warrant issued by the Chief Presidency Magistrate for the arrest of More with the aid of which requisition for securing his presence from Hong Kong was to be made, was illegal.

We are unable to agree with the High Court that because of the enactment of the Extradition Act XXXIV of 1962 the Government of India is prohibited from securing through diplomatic channels the extradition of an offender for trial of an offence committed within India. There was, in our judgment no illegality com-

mitted by the Chief Presidency Magistrate, Calcutta, in sending the warrant to the Secretary, Home (Political) Department, Government of West Bengal, for transmission to the Government of India, Ministry of External Affairs, for taking further steps for securing the presence of More in India to undergo trial.

The appeal must therefore be allowed and the order passed by the High Court set aside. The writ petition filed by More must be dismissed.

V.M.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

V. D. M. Rm. M. Rm. Muthiah Chettiar

.. Appellant*

v.

Commissioner of Income-tax, Madras

.. Respondent.

Income-tax Act (XI of 1922), sections 16 (3) (a) (ii), 22 (2), 22 (5), 34 (1) (a), 34 (1) (b) and 40—Return of income—Individual—Partnership particulars—Non-disclosure of share incomes of wife and minor children—Whether amounts to failure to disclose “necessary” information—Validity of reassessment beyond four years—Inclusion of share incomes of wife and minor children—Duty of the Income-tax Officer—No obligation on the taxpayer—Minor—Separate assessment on minor—Whether bars inclusion of minor’s share income in father’s assessment.

The assessee was a partner in a firm to the benefits of which his three minor sons had been admitted. For the assessment years 1952-53, 1953-54 and 1954-55 the assessee returned, among other income, his share income from the firm. The assessee, however, omitted to disclose in his returns the share incomes of his three minor sons. In Part III of the Form of Return the assessee disclosed the shares of the other partners and the minors in the firm, but did not disclose the relationship of the minors as his sons. The Income-tax Officer initially made assessments, merely on the basis of the assessee’s returns for the three years in question. The minors represented by their mother as guardian had also filed with the same Income-tax Officer their individual returns disclosing their respective share incomes from the firm for the same three assessment years. The Income-tax Officer, acting on these returns, made separate assessments on the minors.

Later, however, the Officer initiated proceedings against the assessee under section 34 (1) (a) of the Indian Income-tax Act, 1922 for the assessment years 1952-53 and 1953-54 and under section 34 (1) (b) for the assessment year 1954-55, on the score that the minors’ share incomes which had to be included in the assessee’s total income under section 16 (3) (a) (ii) of the Act had escaped assessment. The Officer held that the information furnished by the assessee in his returns was not full in the sense that he had not stated that the minors were his sons, which information came to the Officer’s possession only later. The Officer accordingly, made reassessments including the minors’ share incomes in the assessee’s total income for all the three years.

The assessee appealed against the assessments on two grounds: (i) that the reassessments under section 34 were not valid and (ii) that the direct assessments already made on the minors precluded the clubbing of their share incomes in the hands of the assessee under section 16 (3) (a) (ii). Both the contentions were rejected in appeal. The Tribunal held that section 34 (1) (a) was properly invoked for 1952-53 and 1953-54 and the reassessment under section 34 (1) (b) was made on information received. On a case stated by the Tribunal at the assessee’s instance, the High Court answered both the questions against the assessee. On further appeal to the Supreme Court,

Held, that the notice of reassessment for 1954-55 under section 34 (1) (b) of the Income-tax Act, 1922 was competently issued by the Income-tax Officer against the assessee and there was no basis for the argument that the Officer had only changed the opinion in reopening the assessment.

As for 1952-53 and 1953-54, the re-assessments made under section 34 (1) (a) was not valid in law.

The assessee is bound to disclose under section 22 (5) the names and addresses of his partners, if any, engaged in business, profession or vocation, together with the location and style of the principal place and branches thereof and the extent of the shares of all such partners in the profits of the business, profession or vocation and any branches thereof. But the assessee was not required, in making the return, to disclose that any income was received by his wife or minor child admitted to the benefits of partnership of a firm of which he was a partner.

Assuming that there were instructions in the Forms of Return in the relevant years instructing the assessee to disclose the income received by his wife and minor children from a firm of which the assessee was a partner, in the absence of any head under which the income of the wife or minor children could be shown, by not showing that income the taxpayer cannot be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment.

Section 16 (3) imposes an obligation upon the Income-tax Officer to compute the total income of any individual for the purpose of assessment by including the items of income set out in clauses (a) (i) to (iv) and (b), but thereby no obligation is imposed upon the taxpayer to disclose the income liable to be included in his assessment under section 16 (3).

Section 34 (1) (a) sets out the conditions in which the power may be exercised by the Income-tax Officer; it did not give rise to an obligation on the part of the taxpayer to disclose information which enabled the Income-tax Officer to exercise the power under section 16 (3) (a) (ii).

Also held: that the inclusion of the share income of the minor in the hands of the assessee by invoking section 16 (3) of the Act is valid in law notwithstanding that an assessment is made on the minor represented by his guardian.

Appeals from the Judgment and Order, dated the 21st August, 1964, of the Madras High Court in T.C. No. 75 of 1962 (Reference No. 50 of 1962)*.

M. C. Chagla, Senior Advocate (*T. A. Ramachandran*, Advocate, with him), for Appellant (In all the Appeals).

S.K. Aiyar and *B.D. Sharma*, Advocates, for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Shah, J.—Ramanathan Chettiar, his son Muthiah Chettiar—called hereinafter for the sake of brevity, Muthiah—and Ramanathan, Annamalai and Alagappan, sons of Muthiah, constituted a Hindu undivided family. The family owned a 3/5th share in M.R.M.S. Firm, Seramban in Malaya. The firm was assessed under the Indian Income-tax Act, 1922, in the status of a firm resident within the taxable territories. On 16th September, 1950, Muthiah separated from the family taking his 1/5th share in the M.R.M.S. Firm. On 13th April, 1951 the status of the family became completely disrupted and the three sons of Muthiah took in equal shares the remaining 2/5th share—the grandfather Ramanathan taking no share in the M. R.M.S. Firm.

For the assessment year 1952-53 Muthiah submitted a return of his income as an individual and stated under the head business income “Kindly ascertain his (assessee’s) share of profit and remittances from the Income-tax Officer, Second Additional Circle—I, Karaigudi, in F. No. 6098-m/1952-53.” In Part III of the return Muthiah supplied the following information about his partners :

<i>Name and address of the firm.</i>	<i>Name of each partner including assessee.</i>	<i>Share.</i>
Messrs. R. RM. S. Firm Seramban, F.M.S.	1. Assessee (Muthiah Chettiar)	60/303
	2. VD. M. RM. M. RM.M. Ramanathan Chettiar (minor)	40/303
	3. VD. M. RM. M. RM. M. Alagappan Chettiar (minor).	40/303
	4. VD. M. RM. M. RM. M. Annamalai Chettiar (minor).	40/303
	5. C.P.R.	60/303
	6. M.S.S.	60/303
	7. Charity.	3/303.

For the assessment year 1953-54 in column 3 in section B of the return Muthiah stated: "Kindly ascertain the remittances from the Income-tax Officer, Fifth Additional, Karaikudi in F. No. 6098-m." and at page 3 of the return in column 3 of section F, it was stated:

"Assessee has 60/303 share in Messrs. R. RM. S. Joint Seramban (Malaya). Kindly ascertain share of profit or loss from the Income-tax Officer, Fifth Additional, Karaikudi in F. No. 6098."

In Part III of the return he set out the names of the partners as were mentioned in the return for 1952-53. Against the names of Ramanathan Chettiar, Alagappan Chettiar and Annamalai Chettiar it was not disclosed that they were minors.

For the assessment year 1954-55 at the foot of page 1 of the return Muthiah stated:

"The assessee has a remittance of Rs. 6,188-12-0, from R. RM. S. Firm. Seramban. His share of income may be taken from the firm's file."

and in Part III the names of seven partners as mentioned in 1952-53 return were set out—Ramanathan, Alagappan, Annamalai were not shown as minors.

Ramanathan, Alagappan and Annamalai—the three minor sons of Muthiah represented by their mother and guardian also filed returns of their respective income for the years 1952-53, 1953-54 and 1954-55 and disclosed therein their shares in the profit from the 2/5th share in the M. RM.S. Firm.

For the assessment years 1952-53, 1953-54, and 1954-55 the Income-tax Officer completed the assessments separately on the firm, on Muthiah as an individual and on the three minors represented by their mother and guardian. Muthiah was assessed in respect of his share in the income of the firm and from other sources. In his returns Muthiah had not disclosed the shares received by his minor sons and the Income-tax Officer did not in making the assessments include shares of the minors from the firm under section 16 (3) (a) (ii) of the Indian Income-tax Act, 1922. The Income-tax Officer issued notices of re-assessment to Muthiah under section 34 (1) (a) of the Income-tax Act, 1922, for the years, 1952-53 and 1953-54 and under section 34 (1) (b) for the year 1954-55. Muthiah filed returns under protest declaring the same income as originally assessed. In the view of the Income-tax Officer, Muthiah had not furnished in Part III, clause (c) of the return full facts regarding the other parties and in column 2 he had merely disclosed that Ramanathan, Alagappan and Annamalai were minors: that "information was not full in the sense that he had not stated that they were minor sons" of Muthiah. Accordingly the Income-tax Officer held that the income of the sons of Muthiah which should have been included under section 16 (3) (a) (ii) of the Income-tax Act had escaped assessment in Muthiah's hands and he brought that income to tax.

The Appellate Assistant Commissioner confirmed the order made by the Income-tax Officer. In appeal to the Tribunal it was contended by Muthiah that he had fully and truly disclosed all the particulars he was required to disclose in the

returns of his income for the three years in question, and "section 34 (1) (a) had no application to the assessment years 1952-53 and 1953-54 and for 1954-55 the re-opening was based only on a change of opinion." Muthiah also contended that section 40 of the Income-tax Act was mandatory and since the Income-tax Officer had made separate assessments on the minors represented by their mother, no further assessment under section 16 (3) could be made, the two sections being mutually exclusive.

The Tribunal observed that for the first two years section 34 (1) (a) applied, that in respect of the year 1954-55 there was no change of opinion but the assessment was made on information received within the meaning of section 34 (1) (b) of the Income-tax Act and that separate assessment of the minors did not stop the Income-tax Officer from assessing the income received by the minor sons in the hands of Muthiah. The Appellate Tribunal accordingly confirmed the order of the Appellate Assistant Commissioner.

At the instance of Muthiah the following questions were referred to the High Court of Madras:

"(i) Whether on the facts and in the circumstances of the case, the re-assessment made on the assessee under section 34 of the Act is valid in law for 1952-53 to 1954-55 ?

(ii) Whether on the facts and in the circumstances of the case, the inclusion of the share income of the minor in the hands of the assessee by invoking the provisions of section 16 (3) of the Act is valid in law notwithstanding that an assessment is made on the minor represented by his guardian."

The answer to the second question must, in view of the recent judgment of this Court in *C. R. Nagappa v. The Commissioner of Income-tax, Mysore*¹, be in the affirmative.

In considering the first question it is necessary to refer to certain provisions of the Income-tax Act, 1922. By section 3 the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually was charged to tax for that year in accordance with, and subject to the provisions of the Act at any rate or rates prescribed by the Finance Act. "Total income" was defined in section 2 (15) as meaning "total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in this Act." Section 4 (1) set out the method of computation of total income ; it enacted :

"(1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

(a) are received or are deemed to be received in the taxable territories in such year by or on behalf of such person, or

(b) if such person is resident in the taxable territories during such year,—

(i) accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year, or

Section 22 by sub-section (1) required the Income-tax Officer to give notice by publication in the press in the prescribed manner, requiring every person whose total income during the previous year exceeds the maximum exempt from tax, to furnish a return in the prescribed form setting forth his total income. Sub-section (2) authorised the Income-tax Officer to serve a notice upon a person whose income in the opinion of the Income-tax Officer exceeded the minimum free from tax. Section 23 dealt with the assessment. It conferred power upon the Income-tax Officer to assess the total income of the assessee and to determine the sum payable by him on the basis of such return, submitted by him. Rule 19 framed under section 59 of the Income-tax Act, 1922, required the assessee to make a return in the form prescribed thereunder, and in Form A applicable to an individual or a Hindu undivided family or an association of persons there was no clause which

required disclosure of income of any person other than the income of the assessee, which was liable to be included in his total income. The Act and the Rules accordingly imposed no obligation upon the assessee to disclose to the Income-tax Officer in his return information relating to income of any other person by law taxable in his hands.

But section 16, sub-section (3) provided that in computing the total income of any individual for the purpose of assessment there shall be included the classes of income mentioned in clauses (a) and (b). Sub-section (3) (a) (ii) in so far as it is material, provided:

"In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(i) * * * *

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner."

The assessee was bound to disclose under section 22 (5) the names and addresses of his partners, if any, engaged in business, profession or vocation together with location and style of the principal place and branches thereof and the extent shares of all such partners in the profits of the business, profession or vocation and any branches thereof, but the assessee was not required, in making a return to disclose that any income was received by his wife or minor child admitted to the benefits of partnership of a firm of which he was a partner.

Counsel for the Commissioner contended that in the forms of returns prescribed in the "Notes of Guidance" for drawing up the return were printed, and thereby the assessee was informed that he had to disclose the income received by his wife and minor children from a firm of which the assessee was a partner. Counsel has however not placed before the Court the forms of return in vogue in the relevant year of assessment. In the Income-tax Manual published under the authority of the Central Government in 1945 under clause (3) printed at page 185 the assessee is advised to include in the return, under the appropriate head, certain classes of income which are liable to be included in the assessment of an individual under section 16, and income liable to be taxed under sections 41-D, 44-E and 44-F. This instruction was repeated in the Manual Parts II and III at pages 344 and 345 in the 10th Edition published in 1950. But in the 11th Edition of the Manual published in 1954 no such instructions were printed. About the date on which the instructions were deleted Counsel for the Commissioner was unable to give any information. Assuming that there were instructions printed in the Forms of return in the relevant years, in the absence of any head under which the income of the wife or minor child of a partner whose wife or a minor child was a partner in the same firm, could be shown, by not showing that income the taxpayer cannot be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment. Section 16 (3) imposes an obligation upon the Income-tax Officer to compute the total income of any individual for the purpose of assessment by including the items of income set out in clauses (a) (i) to (iv) and (b), but thereby no obligation is imposed upon the taxpayer to disclose the income liable to be included in his assessment under section 16 (3). For failing or omitting to disclose that income, proceedings for reassessment cannot therefore be commenced under section 34 (1) (a). Section 22 (5) required the assessee to furnish particulars of the names and shares of his partners, but imposed no obligation to mention or set out the income of the nature mentioned in section 16 (3). In the relevant years there was no head in the form under which income liable to be assessed to tax under section 16 (3) (a) and (b) could be disclosed.

We are in the circumstances unable to agree with the High Court that section 34 imposed an obligation upon the assessee to disclose all income includible in his assessment by reason of section 16 (3) (a) (ii). Section 34 (1) (a) sets out the conditions in which the power may be exercised; it did not give rise to an obligation to

disclose information which enabled the income-tax Officer to exercise the power under section 16 (3) (a) (ii), nor had the use of the expression "necessary for his assessment" in section 34 (1) (a) that effect.

The High Court did not consider the question whether in the year 1954-55 the notice under section 34 (1) (b) was properly issued against Muthiah. The Tribunal in their Judgment observed:

"There is no basis for the argument that the Income-tax Officer had only changed his opinion and re-opened the assessment."

We agree with that view. The order of re-assessment was made well within four years from the date of the last day of the year of assessment 1954-55. The notice was therefore competently issued by the Income-tax Officer.

The order passed by the High Court, insofar as it relates to the years 1952-53 and 1953-54 is set aside and the answer in the negative is recorded. For the year 1954-55 the answer recorded by the High Court is confirmed. There will be no order as to costs throughout.

V.B.

Ordered accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

Commissioner of Income-tax, West Bengal I, and another ... *Appellants**

v.

Allahabad Bank Ltd.

... *Respondent.*

Company—Super-tax—Rebate under Finance Acts of years 1956 and 1957—Reduction of rebate on distribution of dividend over six per cent. of paid up capital—Computation of paid-up capital—Share premiums received to be included—Separate share premium account need not be maintained—But must be identifiable as such.

Finance Acts, 1956 and 1957—Paragraph D of Part II, First Schedule.

Companies Act, 1956 (Central Act I of 1956), section 78.

In proceedings for assessment for each of the assessment years 1956-57 and 1957-58 the Income-tax Officer reduced the rebate in super-tax admissible under the Finance Acts of 1956 and 1957 on the view that the assessee had distributed dividend exceeding 6 per cent. of the paid up capital. In reducing the rebate the officer did not take into consideration the share premium received by the assessee. The Appellate Commissioner and the Tribunal held that the assessee's share premium was liable to be added to the paid-up capital in computing the reduction in the rebate in super tax. The High Court in reference agreed with the Tribunal. The Revenue appealed.

Held, that the amount of share premium received should be added to the paid-up capital of the assessee for the purpose of computing reduction in rebate to the super tax under the Finance Acts of 1956 and 1957.

The Explanation to paragraph D Part II of the Finance Act, 1957 does not require that the share premium account must be maintained as an account outside the reserves. Under the Companies Act of 1956 there is an express provision that the share premium account shall be maintained in a separate account. It is true that in the balance-sheet in Schedule VI of the Act the share premium has to be shown under the head "liabilities" as part of the share capital and not of reserves. But it cannot be assumed on that account that if the share premium is maintained as a separate account within the reserves, reduction in the rebate in super-tax is liable to be computed after excluding share premium. The Explanation does not make maintenance of an account outside the reserve a condition of its inclusion in the paid-up capital.

If under the Finance Act, 1956, the expression "standing to the credit of the share premium account" did not mean that the share premiums shall be maintained in a separate account apart from the reserve, there is no reason why, under an identical scheme of reducing rebate in super-tax in the year 1957-58, it should have a different meaning.

The object of the Parliament in enacting Paragraph D of the Finance Act was that profits earned by a company should be available for being ploughed back into the business and should not be distributed to the shareholders by way of dividend in excess of the rate prescribed. To secure that object the Parliament gave an incentive to the company of substantial rebate in payment of super-tax which would be liable to be forfeited if part of dividend exceeding 6 per cent. was distributed to the shareholders.

Share premium account is accordingly liable to be included in the paid-up capital for the purpose of computing rebate if it is maintained as a separate account. The Explanation does not contemplate that the account must be kept apart from the reserves. If within the reserves it is an identifiable separate account, the share premium will qualify for inclusion in the paid-up capital in computing the reduction in rebate of super-tax.

The Companies Act came into force on 1st April, 1956; it had no retrospective operation. Since there was no obligation upon the company to maintain a separate share premium account in the previous year corresponding to the assessment year 1956-57, the share premium account maintained as an identifiable account within the reserves qualified for being included in the 'paid up capital' within the meaning of this expression in the Explanation to Paragraph D Part II of the Finance Act, 1956.

Appeals from the Judgments and Orders, dated the 17th December, 1963 and 6th April, 1965, of the Calcutta High Court in Income-tax References Nos. 87 of 1960 and 30 of 1962 respectively.

S. T. Desai and *S. C. Manchanda*, Senior Advocates, (*B. D. Sharma*, Advocate, with them), for Appellants (In both the Appeals).

Sachin Choudhuri and *Sukumar Mitra*, Senior Advocates, (*D. N. Mukherjee*, Advocate, with them), for Respondent (In both the Appeals.)

The Judgment of the Court was delivered by

Shah, J.—The Allahabad Bank Ltd. is a public limited company. The paid up share capital of the company other than capital entitled to a dividend at a fixed rate was at the relevant time Rs. 30,50,000. The company had issued before 1st January, 1954, shares at premium and the premium received in cash aggregated to Rs. 45,50,000. In each of the account years 1955 and 1956 the company distributed Rs. 5,49,000 as dividend.

In proceedings for assessment for each of the assessment years 1956-57 and 1957-58 the Income-tax Officer reduced by Rs. 61,000 the rebate in super-tax admissible under the Finance Act, 1956 on the view that the company had distributed dividend exceeding 6 per cent. of its paid-up capital. In reducing the rebate the Income-tax Officer did not take into consideration share premium amounting to Rs. 45,50,000 received by the company.

The Appellate Assistant Commissioner held that the company's share premium was liable to be added to the capital of Rs. 30,50,000 in computing the reduction in the rebate in super-tax, and directed modification of the order of assessment. The Appellate Tribunal agreed with the Appellate Assistant Commissioner.

The Tribunal then submitted a statement of the case and submitted the following question in respect of the year 1956-57 to the High Court of Calcutta :

"Whether on the facts and in the circumstances of the case, the amount of Rs. 45,50,000 should be added to the paid-up capital of the assessee as on 1st January, 1955, for the purpose of allowing rebate to the assessee under Paragraph D of Part II of the First Schedule to the Indian Finance Act 1956."

A similar question relating to the assessment year 1957-58 was also referred by the Tribunal. The High Court of Calcutta agreed with the Tribunal and held that in determining the reduction in rebate in super-tax admissible to the company the share premium maintained by the company within the reserve was liable to be included in the paid-up capital.

The Finance Act, 1956 prescribed the rate of super-tax in Part II, paragraph D (in so far as it is relevant) enacted:

"In the case of every company—

	Rate
On the whole of total income.	Six annas and nine pies in the rupee :

Provided that—

(i) a rebate at the rate of five annas per rupee of the total income shall be allowed in the case of any company which—

(a) in respect of its profits liable to tax under the Income-tax Act for the year ending on the 31st March, 1957, has made the prescribed arrangements for the declaration and payment within the territory of India of the dividends payable out of such profits and for the deductions of super-tax from dividends in accordance with the provisions of such-section (3-D) of section 18 of that Act and

(b) * * * * *

(ii) a rebate at the rate of four annas per rupee of the total income shall be allowed in the case of any company which satisfied condition (a) but not condition (b) of the preceding clause ;

Provided further that—

(i) the amount of the rebate under clause (i) or * * * of the preceding proviso shall be reduced by the sum, if any, equal to the amount or the aggregate of the amounts as the case may be, computed as hereunder :—

(a) * * * *

(b) in addition, in the case of a company referred to in clause (ii) of the preceding proviso which has distributed to its shareholders during the previous year dividends in excess of six per cent. of its paid-up capital, not being dividends payable at a fixed rate—

on that part of the said dividends which exceeds 6 per cent but does not exceed 10 per cent. of the paid-up capital ; at the rate of two annas per rupee

on that part of the said dividends which exceeds 10 per cent of the paid-up capital ; at the rate of three annas per rupee ;

(ii) * * * *

Provided further that

*Explanation :—*For the purposes of Paragraph D of this Part—

(i) the expression 'paid-up capital' means the paid-up capital (other than capital entitled to a dividend at a fixed rate) of the company as on the first day of the previous year relevant to the assessment for the year ending on 31st day of March, 1957, increased by any premiums received in cash by the company on the issue of its shares, standing to the credit of the share premium account as on the first day of the previous year

In the Finance Act of 1957 also a similar scheme of granting rebate of super-tax and reduction therein the condition set out in the Act, was adopted.

The reduction in rebate in super-tax depended upon the proportion which the dividend distributed bore to the paid up capital. If the company distributed dividends exceeding 6 per cent. of its paid up capital as defined in the Explanation, the rebate was liable to be reduced to the extent provided in the second proviso. In the relevant years of account the share premium formed an identifiable part of the reserves of the company but was not shown in a separate share premium account apart from the reserves.

The Commissioner contends :

(1) that the expression "share premium account" in the definition of "paid-up capital" in the Explanation to Paragraph D of Part II of the Finance Acts 1956 and 1957 means an account apart from the reserves maintained by the company ; and

1]

(2) that in any event since the enactment of the Companies Act, 1956 "share premium" not maintained as a separate account cannot be taken into consideration in dealing with the claim for rebate in the payment of super-tax and reduction in the rate thereof.

Counsel for the Commissioner relied upon section 78 (3) read with section 78 (1) of the Companies Act I of 1956, and submitted that the company was bound to maintain a separate share premium account outside the reserves and transfer into that account the share premium and since the company failed to do so in determining the paid up capital within the meaning of the Explanation to Paragraph D of the Finance Acts 1956 and 1957 the share premium within the reserve could not be taken into account. The relevant clauses of section 78 of the Companies Act I of 1956 provide:—

"(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called 'the share premium account' and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if share premium account were paid-up share capital of the company.

(2)

(3) Where a company has passed a resolution authorising the issue of any shares at a premium this section shall apply as if the shares had been issued after the commencement of this Act :

Provided that any part of the premiums which has been so applied that it does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of Schedule VI, shall be disregarded in determining the sum to be included in the share premium account."

Clause (1) is in terms prospective : it requires a company to transfer premiums received in cash or otherwise on shares to the share premium account. By clause (3) any premium received prior to the coming into force of the Companies Act, 1956 less that part of the premium which had been so applied so that it did not, at the commencement of the Act, form an identifiable part of the company's reserves, had also to be transferred to the share premium account as if the shares had been issued after the commencement of the Act. Section 78 was apparently borrowed from section 56 of the English Companies 1948 (11 and 12 Geo. 6 ch. 38). Before the Companies Act I of 1956 there was no provision in the Indian Companies Act, 1913 which required a company to maintain a separate share premium account. After the coming into force of the Companies Act I of 1956 a share premium account had to be maintained and the share premium could not be used otherwise than for the specific purposes mentioned in section 78 (2).

The plea raised by the Commissioner that the company failed to comply with the statutory injunction contained in clause (1) of section 78 and on that account the premiums received were not "standing to the credit of the share premium account" within the meaning of the Explanation to Paragraph D in the Finance Act, 1956, may be rejected on a simple ground.

In the assessment year 1956-57 the company was being assessed to tax in respect of the previous year of the company ending on 31st December, 1955. In the calendar year 1955, the company was governed by the Indian Companies Act VII of 1913 which contained no provision analogous to section 78 of the Companies Act I of 1956. The Companies Act was before the Parliament during the year 1955, but the company was on that account not obliged to transfer to a separate share premium account independent of the reserve the premiums received prior to 1st January, 1955. The Companies Act came into force on 1st April, 1956 : it had no retrospective operation. Since there was no obligation upon the company to maintain a separate share premium account in the previous year corresponding to the assessment year 1956-57, the share premium account maintained as an identifiable account within the reserves qualified for being included in the paid up capital within the meaning of this expression in the Explanation to Paragraph D Part II of the Finance Act, 1956.

For the assessment year 1956-57, therefore rebate in super-tax was liable to be reduced, if the company had distributed dividend exceeding six per cent of the paid-up capital inclusive of share premiums maintained as an identifiable account. The con-

tention raised by the Commissioner must therefore fail in respect of the assessment year 1956-57.

Counsel for the Commissioner contends that in any event in the Finance Act II of 1957 the expression "share premium account" has only the meaning ascribed thereto in the Companies Act, 1956, and in respect of the assessment year 1957-58, reduction in the rebate must be computed without taking into account the share premium which was maintained by the company, in the year of account 1956 within the reserve.

Under the Finance Act II of 1957 rebate in super-tax is liable to be reduced in the case of companies which have *inter alia*, distributed to the shareholders in the previous year dividends in excess of 6 per cent. of the paid up capital not being dividend payable at a fixed rate. The expression "paid up capital" is also defined in substantially the same terms as under the Finance Act, 1956.

For the assessment year 1957-58 the Tribunal found that the share premium was liable to be included in the paid up capital because it was an identifiable part of the reserves. In our judgment the Tribunal was right in so holding. The Explanation to Paragraph D Part II of the Finance Act, 1957, does not require that the share premium account must be maintained as an account outside the reserves. Under the Companies Act of 1956 there was an express provision that the share premium account shall be maintained in a separate account. It is true that in the balance-sheet in Schedule VI of the Act the share premium has to be shown under the head "liabilities" as part of the share capital and not of reserves. But it cannot be assumed on that account that if the share premium is maintained as a separate account within the reserves, reduction in the rebate in super tax is liable to be computed after excluding share premium. The Explanation requires that in determining the paid-up capital for the purpose of rebate in super-tax, share premium standing to the credit of a share premium account shall be excluded (included?) : it does not make maintenance of an account outside the reserve a condition of its inclusion in the paid-up capital.

Again if under the Finance Act, 1956, the expression "standing to the credit of the share premium account" did not mean that the share premiums shall be maintained in a separate account apart from the reserve, is there any reason why, under an identical scheme of reducing rebate in super-tax in the year 1957-58, it should have a different meaning? In the absence of any compelling grounds, we would not be justified in holding that the Parliament attributed to the expression "standing to the credit of the share premium account" as used in the Explanation to Paragraph D Part II of the Finance Act II of 1957, a meaning different from the one which it had under the Finance Act, 1956. The object of the Parliament in enacting Paragraph D of the Finance Act was that profits earned by a company should be available for being ploughed back into the business and should not be distributed to the shareholders by way of dividend in excess of the rate prescribed. To secure that object the Parliament gave an incentive to the company of substantial rebate in payment of super-tax which would be liable to be forfeited, if part of dividend exceeding 6 per cent. was distributed to the shareholders.

Share premium account is accordingly liable to be included in the paid up capital for the purpose of computing rebate if it is maintained as a separate account. The Explanation does not contemplate that the account must be kept apart from the reserves. If within the reserves it is an identifiable separate account, the share premium will qualify for inclusion in the paid up capital in computing the reduction in rebate of super-tax.

The appeals fail and are dismissed with costs. One hearing fee.

K.G.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

Raghunath and others

.. Appellants *

v.

Kedar Nath

.. Respondent.

Transfer of Property Act (IV of 1882), sections 4 and 54 Registration Act (XVI of 1908), sections 17 and 49—Document requiring registration under section 54—Transfer of Property Act (IV of 1882), not registered—Effect of—Whether admissible in evidence in view of section 49, Registration Act (XVI of 1908).

Exhibit A-26 was required to be registered under section 54 of the Transfer of Property Act. In the absence of such registration this document cannot be received in evidence of any transaction affecting the property in view of section 49 of the Registration Act.

The inclusion of the words “by any provision of the Transfer of Property Act, 1882” by the amending Act, 1929, settled in doubt entertained as to whether the documents of which the registration was compulsory under the Transfer of Property Act, but not under section 17 of the Registration Act, were affected by section 49 of the Registration Act. In view of section 4 of the Transfer of Property Act, it was previously supposed that the effect of this section was merely to add to the list of documents of which the registration was compulsory and not to include them in section 17 so as to bring them within the scope of section 49.

The enactment of Act (XXI of 1929) by inserting in section 49 of the Registration Act the words “or by any provision of the Transfer of Property Act, 1882” has made it clear that the documents in the supplemental list *i.e.*, the documents of which registration is necessary under the Transfer of Property Act, but not under the Registration Act, fall within the scope of section 49 of the Registration Act, and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property held on facts, Exhibit A-26, being unregistered is not admissible in evidence and that Exhibit A-4 was a mortgage deed and not a sale-deed.

Appeals by Special Leave from the Judgment and Order dated the 27th April, 1964 of the Allahabad High Court in Second Appeals Nos. 1940 and 3660 of 1961.

S. P. Sinha, Senior Advocate (*S. Shaukat Hussain*, Advocate with him), for the Appellants (In both the Appeals).

J. P. Goyal and *G. Nabi Untoo*, Advocate for the Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Ramaswami, J.—In the suit which is the subject-matter of these appeals the plaintiff alleged that one Dwarka Prasad took a loan of Rs. 1,700 from Madho Ram, father of the defendants, and that on 27th July, 1922, Dwarka Prasad along with one Mst. Kunta, his maternal grandmother, executed a possessory mortgage deed of the disputed house for Rs. 1,700 in favour of Madho Ram. The terms of the mortgage deed were that the mortgagor was to pay interest of Rs. 12-12-0 per month, out of which the rent amounting to Rs. 6 which was the agreed usufruct of the house in suit was to be adjusted and the mortgagor was to pay Rs. 6-12-0, per month in cash towards the balance of the interest. The parties

agreed that the mortgage would be redeemable within twenty years after paying the principal amount and that portion of interest which was not discharged by the usufruct and other amounts. When Dwarka Prasad was unable to pay the amount of Rs. 6-12-0 per month, he delivered possession of the house to Madho Ram, who let out the house on a monthly rent of Rs. 25. The mortgagors Dwarka Prasad and Mst. Kunta, died leaving Mst. Radha Bai as Dwarka Prasad's heir. Radha Bai sold the house in dispute to the plaintiff on 2nd February, 1953, and executed a sale-deed. The plaintiff, therefore, became entitled to redeem the mortgage and asked the defendants to render accounts. The defendants contested the suit on the ground that Madho Ram was not the mortgagor nor were the defendants mortgagees. It was alleged that in the locality where the house was situated, there was a custom of paying *Hage-chaharum* and to avoid that payment, the original deed dated 27th July, 1922, was drafted and executed in the form of a mortgage though it was actually an out-right sale. According to the defendants, the house was actually sold to Madho Ram and was not mortgaged. The defendants also pleaded that if the deed dated 27th July, 1922, was held to be a mortgage, the mortgagees were entitled to get the payment of Rs. 6,442-8-0, as interest, Rs. 2,315, as costs of repairs, etc. The trial Court held that the deed dated 27th July, 1922, was a mortgage deed, that Dwarka Prasad did not sell the house to Madho Ram, and that the plaintiff was entitled to redeem the mortgage on payment of Rs. 1,709-14-0. The trial Court accordingly decreed the plaintiff's suit for redemption on payment of Rs. 1,709-14-0. Against the judgment of the trial Court the defendants preferred an appeal before the District Judge, Varanasi, who allowed the appeal and dismissed the plaintiff's suit. The plaintiff took the matter in second appeal to the High Court which framed an issue and remanded the case back to the lower appellate Court for a fresh decision. The issue framed by the High Court was "Have the defendants become the owners of the property in dispute by adverse possession?" The High Court also directed the lower appellate Court to decide the question of admissibility of Exhibits A-25 and A-26. After remand the lower appellate Court held that the deed dated 27th July, 1922, was a mortgage deed and not a sale-deed, and, therefore, the plaintiff was entitled to redeem the mortgage. The lower appellate Court further held that the defendants had failed to prove that they had acquired title by adverse possession. The lower appellate Court made the following order;—

"The appeal is allowed with half costs in this way that the suit is decreed for the redemption of the mortgage in question if the plaintiff pays within six months Rs. 1,700 as principal, Rs. 9,87nP. *Prajawat* paid before this suit and any *Prajawat* paid by the defendants during the pendency of this suit till the plaintiff deposits the entire sum due under this decree and the interest at the rate of Rs. 6-12-0, per month from 27th July, 1922, till the plaintiff deposits the entire sum due under this decree. The costs of the trial Court are made easy. Let the preliminary decree under Order 34, rule 7, Civil Procedure Code, be modified accordingly."

Against the judgment and decree of the lower appellate Court both the plaintiff and the defendants filed appeals before the High Court. The plaintiff prayed that the decree of the lower appellate Court should be set aside and the decree of the trial Court should be restored. The defendants, on the other hand, prayed that the decree of the lower Courts should be set aside and the plaintiff's suit should be dismissed with costs. By its judgment dated 27th April, 1964, the High Court dismissed the second appeal preferred by the defendants but allowed the plaintiff's appeal and set aside the judgment of the lower appellate Court and restored the judgment of the trial Court. The High Court further remanded the case to the lower appellate Court with the direction that "the defendants be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage." The present appeals are brought by Special Leave against the judgment of the Allahabad High Court dated 27th April, 1964, in Second Appeals Nos. 4940 and 3660 of 1961.

In support of these appeals it was contended by Mr. Sinha that the deed Exhibit 4, dated 27th July, 1922 was a sale deed and not a mortgage deed. It was pointed out that there was a subsequent deed of sale dated 8th October, 1922 Exhibit A-26 which is named '*Tilumma Bainama*.' The contention was that the document Exhibit 4 dated 27th July, 1922 must be construed along with Exhibit A-26 which forms part of the same transaction and so construed the transaction was not a usufructuary mortgage but was an outright sale. We are unable to accept the argument put forward on behalf of the appellant. Exhibit A-26, dated 8th October, 1922 is not a registered document, and is hence not admissible in evidence to prove the nature of the transaction covered by the registered mortgage deed Exhibit 4, dated 27th July, 1922. If Exhibit 4 is taken by itself, there is no doubt that the transaction is one of mortgage. The document Exhibit 4 recites that in consideration of money advanced the executants "mortgage the said house 'Bhog Bhandak' bearing No. 64/71 situate in Mohalla Gola Dina Nath." Clause 2 provides a period of twenty years for redemption of the mortgage. Clause 6 of the document stipulates that the cost of repairs will be borne by the mortgagors. Clause 1 states:

"That the said sum of Rupees seventeen hundred half of which is Rupees eight hundred and fifty will carry interest at the rate of twelve annas per cent monthly. The sum of Rupees six will be deducted towards rent monthly from the interest which will accrue. The possession of the house has been delivered to the said mortgagee Mahajan (money-lender). The mortgagors will pay the balance of Rupees six annas twelve month by month to the said mortgagee after deducting the rent of Rupees six after giving the possession of the said house and shop."

Clause 4 provides:

"That we will go on paying the said Mahajan the sum of Rupees six twelve annas the balance of the interest monthly. If the whole or part of the interest remains unpaid we will pay at the time of redemption. If this amount of interest is not paid the said house shall not be redeemed."

The reading of these terms clearly show that Exhibit 4 was a mortgage deed and not a sale deed. It was contended on behalf of the appellants that in order to avoid the payment of *Haqe-chaharum*, the original deed, dated 27th July, 1922 was drafted and executed in the form of a mortgage but it was actually meant to be an outright sale. In support of this argument reference was made to Exhibit A-26, dated 8th October, 1922. As we have already said Exhibit A-26 was required to be registered under section 54 of the Transfer of Property Act. In the absence of such registration this document cannot be received in evidence of any transaction affecting the property in view of section 49 of the Registration Act. It was, however, urged on behalf of the appellants that the effect of section 4 of the Transfer of Property Act was not to make section 49 of the Registration Act applicable to documents which are compulsorily registrable by the provisions of section 54, paragraph 2 of the Transfer of Property Act. In support of this contention reliance was placed on the decision of the Full Bench of the Allahabad High Court in *Sohan Lal and others v. Mohan Lal and others*¹.

Section 4 of the Transfer of Property Act states:

"The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Registration Act, 1872.

And section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908."

Section 54 of the Transfer of Property Act reads:

"Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

1. (1928) I.L.R. 50 All. 986 (F.B.).

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property."

Section 17 of the Registration Act states:

"17. (1) The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864 or the Indian Registration Act, 1866 or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :

(a) instruments of gift of immoveable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property.

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property."

Section 49 of the Registration Act prior to its amendment in 1929 read:

"No document required by section 17 to be registered shall—

(a) affect any immoveable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

By section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, section 49 was amended as follows :—

"No document required by section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall—

(a) affect any immoveable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered.

Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

The inclusion of the words "by any provision of the Transfer of Property Act, 1882" by the Amending Act, 1929 settled the doubt entertained as to whether

the documents of which the registration was compulsory under the Transfer of Property Act, but not under section 17 of the Registration Act were affected by section 49 of the Registration Act. Section 4 of the Transfer of Property Act enacts that "section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908." It was previously supposed that the effect of this section was merely to add to the list of documents of which the registration was compulsory and not to include them in section 17 so as to bring them within the scope of section 49. This was the view taken by the Full Bench of the Allahabad High Court in *Sohan Lal's case*¹. The same view was expressed in a Madras Case *Rama Sahu v. Gowro Ratho*², and by MacLeod, C.J., in a Bombay case *Dawal v. Dharma*³. We are however absolved in the present case from examining the correctness of these decisions. For these decisions have been superseded by subsequent legislation i.e., by the enactment of Act XXI of 1929 which by inserting in section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882" had made it clear that the documents in the supplemental list i.e., the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act fall within the scope of section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immoveable property comprised therein, and do not affect any such immoveable property. We are accordingly of the opinion that Exhibit A-26 being unregistered is not admissible in evidence. In our opinion, Mr. Sinha is unable to make good his argument on this aspect of the case.

Mr. Sinha contended that in any event the High Court should not have remanded the case to the lower appellate Court with a direction that the defendants should be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage. It was pointed out that the plaintiff did not file an appeal against the decree of the trial Court and in the absence of such an appeal the High Court was not legally justified in giving further relief to the plaintiff than that granted by the trial Court. In our opinion, there is justification for this argument. We accordingly set aside that portion of the decree of the High Court remanding the case to the lower appellate Court with a direction that the defendants should be asked to render accounts. Otherwise we affirm the decree of the High Court allowing the plaintiff's appeal with costs and setting aside the judgment and decree of the lower appellate Court and restoring judgment and decree of the trial Court, dated 31st October, 1956.

Subject to this modification we dismiss these appeals. There will be no order as to costs in this Court.

S.V.J.

Order accordingly.

1. (1928) I.L.R. 50 All. 986 (F.B.).

2. I.L.R. (1921) 44 Mad. 55 : 39 M.L.J. 639.

3. I.L.R. (1918) 41 Bom. 450.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A.N. GROVER, JJ.

Ganesh Prasad Dixit

... Appellant*

v.

The Commissioner of Sales Tax, Madhya Pradesh

... Respondent.

Madhya Pradesh General Sales Tax Act (II of 1959), section 18 (5) and rule 33 of the Rules, 1959—Terms of Rule 33 not mandatory—Notice, not giving a clear Period of 15 days to show cause—No suggestion of prejudice on account of insufficiency of time—Notice not invalid.

Madhya Pradesh General Sales Tax Act (II of 1959), section 2 (d) and section 7—‘Registered dealer’, a firm of building contractors—Purchase of building materials—Liability to Purchase Tax.

Rule 33 of the Madhya Pradesh General Tax Rules, 1959, is not intended to be “either invariable or rigid”, and “unless prejudice has resulted to the tax payer the proceedings are not liable to be set aside”. The terms of rule 33 are plainly not mandatory (It was not even suggested that because of the insufficiency of time the appellants were unable to submit their explanation for failure to make their returns of turnover). *Held*, notices served on the appellants, not giving them a clear period of 15 days to show cause, were not invalid.

Merely because, in respect of the periods the appellant’s turnover in respect of sales was assessed as “nil” on that account they did not cease to be registered dealers within the meaning of the Act.

A person to be a dealer within the meaning of the Act need not both purchase and sell goods ; a person who carries on the business of buying is by the express definition of the term in section 2 (d) a dealer.

Where no tax is payable under section 6 on the sale price of the goods, purchase-tax is payable by a dealer who lays taxable goods in the course of his business, and (1) either consumes such goods in the manufacture of other goods for sale, or (2) consumes such goods otherwise; or (3) disposes of such goods in any manner other than by way of sale in the State, or (4) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce. The assessee is registered as dealer and they have purchased building materials in the course of their business : the building materials are taxable under the Act, and the appellants have consumed the materials otherwise than in the manufacture of goods for sale and for profit-motive. *Held*, on plain words of section 7 the purchase price is taxable.

The integration that the price paid for buying goods consumed in the manufacture of other goods, intended to be sold or otherwise disposed of, alone is taxable is not a reasonable interpretation of the expression “either consumes such goods in the manufacture of other goods for sale or otherwise”. It is intended by the Legislature that consumption of goods renders the price paid for their purchase taxable, if the goods are used in the manufacture of other goods for sale or if the goods are consumed otherwise.

Whether in a particular set of circumstances a person may be said to carrying on business in a commodity must depend upon the facts of that case and no general test may be applied for determining that question.

Appeals by Special Leave from the Judgments and Orders, dated the 31st August, 1965 of the Madhya Pradesh High Court in Misc. Civil Cases Nos. 321 and 331 of 1964.

M.G. Chagla, Senior Advocate (*B.L. Neema* and *Mrs. Anjali K. Varma*, Advocates, and *J.B. Dadachanji*, Advocate of *Messrs. J.B. Dadachanji & Co.*, with him), for Appellant (In both the Appeals).

I.N. Shreff, Advocate, for Respondent. (In both the Appeals).

The Judgment of the Court was delivered by

Shah, J.—In respect of assessment to sales-tax for two accounting periods 1st April, 1961 to 30th June, 1961 and 1st July, 1961 to 30th September, 1961, the Board of Revenue, Madhya Pradesh, referred the following questions to the High Court of Madhya Pradesh for opinion :

“(1) Whether in the facts and circumstances of the case the notice in Form XVI that was served on the applicant was invalid and therefore the assessment of the applicant on the basis of that notice was bad in law ?

(2) Whether in the facts and circumstances of the case the applicant was a dealer during the assessment period under the Act and the imposition of purchase tax on him under section 7 of the Act was in order ?”

The High Court answered the first question in the negative, and the second in the affirmative. These appeals are preferred with Special Leave granted by this Court.

The appellants are a firm of building contractors and are registered as dealers under the Madhya Pradesh General Sales Tax Act II of 1959. The appellants purchased building materials in the two account periods and used the materials in the course of their business. The Sales Tax Officer, Jabalpur Circle, served notices under section 18 (5) of the Act calling upon the appellants to show cause why “best judgment” assessments should not be made, and by order dated 30th November, 1961, he assessed the appellants to tax in respect of goods purchased by the appellants for use in their construction business and imposed a penalty of Rs. 200 in each case. Appeals against the orders imposing tax and penalty were dismissed by the Assistant Commissioner of Sales Tax and the Board of Revenue.

Rule 33 of the Madhya Pradesh General Sales Tax Rules, 1959, provides that a notice of assessment under section 18 (5) shall be in Form XVI, and *ordinarily* it shall give not less than 15 days from the date of the service to the assessee to show cause why he should not be assessed or reassessed to tax and/or to pay penalty”. The notices served upon the appellants did not give them a clear period of 15 days to show cause. But we are unable to hold on that account that the notices and the assessments were invalid. We agree with the High Court that the rule is not intended to be “either invariable or rigid”, and “unless prejudice has resulted to the taxpayer the proceedings are not liable to be set aside”. It is not even suggested that because of the insufficiency of time the appellants were unable to submit their explanation to failure to make their returns of turnover. Two cases on which reliance was placed by Counsel for the appellants in support of the plea that the notices were invalid have, in our judgment, no bearing. In *Messrs. Kajorimal Kalyanmal v. The Commissioner of Income-tax, U.P.*¹, it was held that a notice under section 22 (2) of the Income-tax Act, 1922, giving the assessee 29 days for filing the return was “entirely illegal”. In *Jamna Dhar Potdar and Co., Lyallpur v. Commissioner of Income-tax, Punjab*², it was held, following the judgment in *Kajorimal Kalyanmal's case*¹, that a notice which does not give to a tax-payer under section 22 (2) of the Income-tax Act, 1922, clear notice for furnishing a return, of thirty days from the date of service is illegal. But these cases were decided under section 22 (2) of the Income-tax Act, 1922, before it was amended by the Income-tax (Amendment) Act (VII of 1939). Under the section as it then stood, it was enacted that the Income-tax Officer *shall* serve a notice upon any person whose total income is in the opinion of the Income-tax Officer of such an amount as to render that person liable to pay income-tax. The section was held to be mandatory. But the terms of rule 33 of the Madhya Pradesh General Sales Tax Rules are plainly not mandatory. The answer given by the High Court on the first question must be accepted.

1. (1930) 3 I.T.C. 451.

2. (1935) 3 I.T.R. 112.

To appreciate the scope of the enquiry under the second question, the relevant provisions of the Act may be summarised. By section 2 (d) of the Act, in so far as it is relevant, the expression "dealer" is defined as meaning, amongst others, "any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise". By section 4 (2) every dealer is liable to tax in respect of sales or supplies of goods effected in Madhya Pradesh with effect from the date on which his turnover calculated during a period of twelve months immediately preceding such date first exceeds the limits specified in sub-section (5). Section 6 provides that the tax payable by a dealer under the Act shall be levied on his taxable turnover relating to the goods specified in Schedule II. Section 7 provides:

"Every dealer who in the course of his business purchases any taxable goods, in circumstances in which no tax under section 6 is payable on the sale price of such goods and either consumes such goods in the manufacture of other goods for sale or otherwise or disposes of such goods in any manner other than by way of sale in the State or despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce, shall be liable to pay tax on the purchase price of such goods at the same rate at which it would have been leviable on the sale price of such goods under section 6 ;

Provided

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Counsel for the appellants submitted that the appellants were not "dealers" within the meaning of the Act because they did not carry on the business of buying goods, and that in any event, the goods purchased by them for use in their construction business were not liable to tax under section 7.

The appellants are registered dealers under the Madhya Pradesh General Sales Tax Act, 1958 (II of 1959). It is true that in respect of the periods their turnover in respect of sales was assessed as "nil". But on that account they did not cease to be registered dealers within the meaning of the Act. A person to be a dealer within the meaning of the Act need not both purchase and sell goods ; a person who carries on the business of buying is by the express definition of the term in section 2 (d) a "dealer". This Court held in *The State of Andhra Pradesh v. H. Abdul Bakshi and Brothers*¹, that it is not predicted of a dealer that he must carry on the business of buying and selling the same goods. A person who buys goods for consumption in the process of manufacture of articles to be sold by him is a dealer within the meaning of the Hyderabad General Sales Tax Act (XIV of 1950). In *H. Abdul Bakshi and Brothers' case*¹, the assessee sold skins, after tanning hides and skins purchased by them. In the process of tanning, they had to use tanning bark purchased by them. This Court held that the turnover arising out of the tanning bark purchased by the assessee for consumption in the process of tanning was liable to tax on the footing that the assessee was carrying on the business of buying goods, even though the goods bought were consumed in the process of tanning. In dealing with the question whether an activity of purchase of goods required for consumption in a manufacturing process may be regarded as a business, the Court observed (at page 647):

"A person to be a dealer must be engaged in the business of buying or selling or supplying goods. The expression "business" though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. But to be a dealer a person need not follow the activity of buying, selling and supplying the same commodity. Mere buying for personal consumption, i.e., without a profit motive, will not make a person dealer within the meaning of the Act, but a person who consumes a commodity bought by him in the course of his trade, or use in manu-

facturing another commodity for sale, would be regarded as a dealer. The Legislature has not made sale of the very article bought by a person a condition for treating him as a dealer; the definition merely requires that the buying of the commodity mentioned in rule 5 (2) must be in the course of business, *i.e.*, must be for sale or use with a view to make profit out of the integrated activity of buying and disposal. The commodity may itself be converted into another saleable commodity, or it may be used as an ingredient or in aid of a manufacturing process leading to the production of such saleable commodity."

This Court agreed with the view expressed in *L. M. S. Sadak Thamby & Co. v. The State of Madras*¹, in which a similar question was decided by the High Court of Madras. In that case the assessee had purchased tanning bark and had consumed it in tanning raw hides. The Madras High Court held that the buying of goods was in the course of business since it was associated with the business of tanning of hides carried on with a profit-making motive. These decisions support the contention of the State that price paid for goods bought for consumption in manufacturing an article for sale is exigible to purchase-tax even if the goods purchased are either destroyed or transformed into another species of goods.

Counsel for the appellants urged that in the case of *H. Abdul Bakshi and Brothers*² and *L.M.S. Sadak Thamby & Company*¹, the assesseees were carrying on the business of selling goods manufactured by them and for the purpose of manufacturing those goods certain other goods were purchased and consumed in the process of manufacture, but here the goods are not consumed in producing another commodity for sale, and on that account the two cases are distinguishable. The answer to that argument must be sought in the terms of section 7. The phraseology used in that section is somewhat involved, but the meaning of the section is fairly plain. Where no sales tax is payable under section 6 on the sale price of the goods, purchase-tax is payable by a dealer who buys taxable goods in the course of his business, and (1) either consumes such goods in the manufacture of other goods for sale, or (2) consumes such goods otherwise; or (3) disposes of such goods in any manner other than by way of sale in the State, or (4) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce. The assesseees are registered as dealers and they have purchased building materials in the course of their business: the building materials are taxable under the Act, and the appellants have consumed the materials otherwise than in the manufacture of goods for sale and for a profit-motive. On the plain words of section 7 the purchase price is taxable.

Mr. Chagla for the appellants urged that the expression "or otherwise" is intended to denote a conjunctive introducing a specific alternative to the words "for sale" immediately preceding. The clause in which it occurs means, says Mr. Chagla, that by section 7 the price paid for buying goods consumed in the manufacture of other goods, intended to be sold or otherwise disposed of, alone is taxable. We do not think that that is a reasonable interpretation of the expression "either consumes such goods in the manufacture of other goods for sale or otherwise". It is intended by the Legislature that consumption of goods renders the price paid for their purchase taxable, if the goods are used in the manufacture of other goods for sale or if the goods are consumed otherwise.

The decision in *Versova Koil Sahakari Vahatuk Sangh Ltd. v. The State of Maharashtra*³, on which reliance was placed by Mr. Chagla has, in our judgment, no application. In that case a society registered under the Bombay Co-operative Societies Act, 1925, carried on the business of transporting fish belonging to its members from fishing centres to the markets and *vice versa*. For preserving fish in the course of transport, the society used to purchase ice, and the members, whose fish was transported, were charged for the quantity of ice required in respect of their baskets of fish. The difference between the price paid by the society for ice purchased

1. (1963) 14 S.T.C. 753.

2. (1964) 15 S.T.C. 644.

3. (1958) 22 S.T. C. 116.

and the charge made by the society for ice supplied was brought to tax by the Sale Tax Officer under the Bombay Sales Tax Act, 1959. The High Court of Bombay held that the society was not supplying ice with the intention of carrying on business in ice, and on that account the society was not a "dealer" within the definition of that term in section 2 (11) of the Act in regard to the supply of ice by it to its members. In that case the taxing authority did not seek to impose purchase-tax: he sought to bring to tax the difference between the price paid by the society for purchasing ice and the charges which it made from its members for supplying ice, and the High Court held that in supplying ice the society was not carrying on business in ice, and on that account was not a "dealer". Whether in a particular set of circumstances a person may be said to be carrying on business in a commodity must depend upon the facts of that case and no general test may be applied for determining that question.

The appeals fail and are dismissed with costs. One hearing fee.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

The State of Rajasthan and another

.. *Appellants**

v.

M/s. Man Industrial Corporation Ltd., Jaipur

.. *Respondent.*

Sales Tax—Contract whether for sale of goods or for service—Depends upon the main object of the parties gathered from terms of contract, circumstances of transaction and custom of the trade—Contract for providing and fixing "windows," of certain sizes in accordance with specifications, designs and drawing etc.—Whether works contract or contract for sale of goods—Test.

Whether a particular contract is one for sale of goods or is a contract for service depends upon the main object of the parties gathered from the terms of the contract, the circumstances of the transaction, and custom of the trade and no universal rule applicable to all transactions may be evolved. The test in each case is whether the object of the party sought to be taxed is that the chattel as chattel passes to the other party and the services rendered in connection with the installation are under a separate contract or are incidental to the execution of the contract of sale.

Held on facts, the object of the respondent was to enter into a works contract. The specifications of the windows were set out in the contract. The primary undertaking of the respondent was not merely to supply the windows but to "fix" the windows. This service is not rendered under a separate contract, nor is the service shown to be rendered customarily or normally as incidental to the sale by the person who supplies window-leaves. The 'fixing' of windows in the manner stipulated required special skill. If the windows were not properly "fixed" the contract would not be complete and the respondent could not claim the amount agreed to be paid to it. It was only upon the "fixing" of the window leaves and when the window leaves had become a part of the building construction that the property in the goods passed under the terms of the contract.

Appeal by Special Leave from the Judgment and Order, dated the 13th May, 1965 of the Rajasthan High Court in D. B. Civil Reference No. 18 of 1963.

M. G. Chagla, Senior Advocate (K. Baldeva Mehta, Advocate, with him), for Appellants.

Sanat P. Mehta and O. P. Malhotra, Advocates, and J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji & Co., for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The respondent carries on the business of fabricating “steel doors, windows, sashes and other goods.” On 20th April, 1957, the respondent submitted in pursuance of an invitation by the Executive Engineer, Ajmer, Central Division, its tender for providing and fixing “S. H. Windows ‘W’ Type,” “S. H. Windows ‘W-1’ Type,” “T.H. Windows” and “Composite Windows” of certain sizes “in accordance with the specifications, designs, drawing and instructions.” The tender was accepted and the respondent carried out the contract.

The Sales Tax Officer ‘B’ Circle, Jaipur City, included in the taxable turnover of the respondent Rs. 23,480 received under the contract. He held that the contract with the Executive Engineer was one of sale of goods and the respondent had with a view to promote sales of goods manufactured by it “voluntarily offered to fit” the goods, and had made no separate charge for that service. The Deputy Commissioner, Excise and Taxation, in appeal held that from the acceptance of the tender, two contracts resulted: one for providing doors and windows and another for “fixing” those doors and windows in a specified building, and that the price of the goods supplied, but not the charge for service, was taxable. He accordingly remanded the case with a direction to assess tax on the price for sale of materials only. The Board of Revenue exercising revisional power confirmed the order passed by the Deputy Commissioner observing that the contract undertaken by the respondent was not a contract of service.

The following question was referred by the Board of Revenue to the High Court of Rajasthan :

“Whether on the proper interpretation of the contract between the applicant and the Executive Engineer, C.P.W.D., Ajmer, regarding the providing and fixing of the steel windows to the Accountant General’s Office, Jaipur, and looking to the terms of the transaction of the type undertaken by the applicant the Board were justified in holding that the contract was divisible between two parts representing the sale of the windows and the labour charges in fixing the same and thus partly liable to sales-tax?”

The High Court held that the contract between the respondent and the Executive Engineer was a “building contract” and the amount received by the respondent was not taxable.

The relevant terms of the tender which was accepted by the Executive Engineer were;

“Item Rate-tender for Works

I/We hereby tender for the execution for the President of India of the work specified in the under-written memorandum within the time specified in such memorandum at the rates specified therein, and in accordance in all respects with the specifications, designs, drawing, and instructions in writing referred to in Rule 1 hereof and in Class II of the conditions of contract and with such materials as are provided for, by and in all other respects in accordance with such conditions so far as applicable.”

This recital was followed by a memorandum setting out the “general description” of the building in respect of which the window-leaves were to be supplied, the estimated cost of the contract and the description and the number of items of work offered to be done. The items of work offered to be done were “providing and fixing” four different types of windows. The relevant conditions were:

- “1. The work shall be executed as per the specifications attached.
2. The work is to be completed in 6 months from the date of award of works.

3. *

4. The windows are to be fitted with rawl plugs in cut stone works.

5. Work will be executed either by plain glass or ground glass as may be decided by the Engineer in Charge.

Note.—

1. * * * * *

2. We are offering windows which will be glazed with plain glass only. If at a later date it is desired to have windows glazed with ground glass, the difference in cost of glass will have to be paid by you.

3. * * * * *

4. * * * * *

5. The question is based on the current prices of mild steel billets fixed by the Government. Should there be any change in the controlled price of billets supplied to us, proportionate revision in the cost of rolled sections used in the fabrication will be made in the quotation.

6. Sales tax or any other tax is applicable will be extra.

7. Work will be completed in 6 months from the date of order."

These were followed by specifications relating to the steel to be used in the fabrication, glazing, fittings and finish of the windows.

The respondent offered to execute and complete the "work" mentioned in the written memorandum according to the specifications and conditions. In the view of the High Court the contract was for work, in the execution of which some movable property passed; it was not a contract for sale of windows and for rendering service in connection with the fixing of those windows.

Counsel for the State of Rajasthan contends that the respondent carried on the business of fabricating and selling window and door leaves and sashes etc. and entered into a contract for "sale of windows," and to promote sale of its manufactured goods, undertook to fix the windows without demanding any charge for that service, and the High Court was in error in holding that the contract was one of service in the execution of which property in the materials supplied by the respondent passed. Counsel urged that the terms of the tender were not decisive and the Court was entitled to ascertain the true effect of the contract as disclosed by the nature of the work, and the "invoice" for payment made out by the respondent. Counsel submitted that it is usual for manufacturers or dealers in specialised articles to arrange to "fix and service" the articles sold by them and on that account the contract does not acquire the character of a contract of service. He gave instances of sale of motor-types, luggage carriers, air conditioning units, refrigerators and contended that in undertaking to instal or fix these units or articles the sellers do not enter into a works contract merely because they undertake to instal or for the articles sold so as to make them fit for immediate service. But whether a particular contract is one for sale of goods or is a contract for service depends upon the main object of the parties gathered from the terms of the contract, the circumstances of the transaction, and custom of the trade and no universal rule applicable to all transactions may be evolved.

As observed in Halsbury's Laws of England, 3rd edition, Vol. 34, Article 3 at page 6:

"A contract of sale of goods must be distinguished from a contract for work and labour. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel *qua* chattel, the contract, is one for work and labour. The test is whether or not the work and labour bestowed and in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials is conclusive, although such matters may be taken into consideration in deter-

mining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

What did the respondent agree to do when it offered its tender? Did the respondent agree to sell the window-leaves as described in the tender or did it, as part of a works contract, agree to "fix" windows of certain specifications in the building intended to be used for the offices of the Accountant-General? On a consideration of all the circumstances, we are of the view that the object of the respondent was to enter into a works contract. That clearly appears from the terms of the tender and its acceptance. The windows were to be fabricated according to the specifications with glass plain or ground—as decided by the Engineer in Charge, and were to be "fixed" within six months from the date of its acceptance "to the building with rawl plugs in cut stone-work." The rate quoted by the respondent was based on the current price of mild steel billets, and the price was to be revised in the light of cost revision of the controlled price of steel supplied to the respondent.

The contract undertaken by the respondent was to prepare the window-leaves according to the specifications and to fix them to the building. There were not two contracts—one of sale and another of service. "Fixing" the windows to the building was also not incidental or subsidiary to the sale, but was an essential term of the contract. The window-leaves did not pass to the Union of India under the terms of the contract as window-leaves. Only on the fixing of the windows as stipulated, the contract could be fully executed and the property in the windows passed on the completion of the work and not before.

It was said by this Court in *The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*¹, that in a building contract which is one, entire and indivisible there is no sale of goods. In the case of a building contract the property in materials used does not pass to the other party to the contract as movable property. In the absence of an agreement to the contrary, the materials in the construction of a building become the property of the other party to the contract only on the theory of accretion.

In *The Government of Andhra Pradesh v. Guntur Tobaccos Ltd.*², this Court pointed out (at page 255):

"A contract for work in the execution of which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work; or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances; if it is of the first, it is a composite contract for work and sale of goods; where it is of the second category, it is a contract for execution of work not involving sale of goods."

The contract in question in this case is of the second variety.

Counsel relied upon *Patnaik and Company v. State of Orissa*³, and *McKenzie Ltd. v. The State of Maharashtra*⁴. But in both these cases the Court held on a consideration of the terms of the contract and the circumstances that the assesses had agreed to and did supply "motor-bus bodies" and the contract being one for sale of chattels, they were liable to pay sales-tax.

Our attention was also invited to *Commissioner of Sales Tax, Maharashtra State v. Arun Electrics*⁵. In that case a firm of electrical contractors undertook the job of installing electrical fittings in the houses of their customers, which invol-

1. (1951) 2 S.T.C. 353.

2. (1965) 16 S.T.C. 240 (S.C.).

3. (1965) 16 S.T.C. 364 (S.C.); (1966) 1 An.W.R. (S.C.) 14; (1966) 1 M.L.J. (S.C.) 14;

(1966) 1 S.C.J. 90.

4. (1965) 16 S.T.C. 518 (S.C.).

5. (1965) 16 S.T.C. 385.

ved the supply and fixing of goods, such as wire, brass clips, wall brackets and tube lights with accessories. The assessee charged their customers consolidated rates for the materials consumed and labour involved, in carrying out the contracts. The Sales Tax Officer charged to tax under the Bombay Sales Tax Act, 1959, the value of materials supplied in carrying out the contracts. It was held by the High Court of Bombay that the transaction of the assessee with their customers was not a pure works contract, but a combination of two distinct and separate contracts, one for the supply or the sale of goods for consideration, and the other for the supply of work and labour, and only that part of the contract, which consisted of supply of goods for consideration, was liable to tax under the Sales Tax Act. That case was brought in appeal to this Court at the instance of the assessee. This Court in *Arun Electrics, Bombay v. Commissioner of Sales Tax, Maharashtra State*¹, discharged the answer recorded by the High Court, holding that the conclusions recorded by the Deputy Commissioner and the Tribunal were based on no evidence, and the High Court could not record, on the facts found, an answer to the question referred. The Deputy Commissioner had proceeded only upon the terms of the invoice in which a charge was made for supplying and "fixing" the materials and providing light points complete with 1/8 GTS. wire, brass clips, tapes and all approved accessories. The conclusion of the departmental authorities was not based on any intention of the parties as disclosed by the evidence, but plainly on the terms of the invoice which was ambiguous.

In *The State of Madras v. Richardson and Gruddas Ltd.*², the assessee without a formal contract agreed to supply fabricate and erect steel structures for a sugar factory. The assessee completed the contract. A bill was submitted by the assessee for charges for fabrication, supply and erection of steel structures at certain rates. The High Court of Madras on a consideration of the evidence held that there was a stipulation for a consolidated lump-sum payment of Rs. 1,160 per ton for fabricating, supplying and erecting at site all steel work etc.; there was no stipulation for passing of property in the goods to the factory before actual completion of the erection work; there the contract did not contemplate dissecting the value of the goods supplied and the value of work and labour bestowed in the execution of the work; and the predominant idea underlying the contract was the bestowing of special skill and labour by the experienced engineers and mechanics of the assessee. This Court agreed with the High Court and held that the contract was a works contract and not a contract for sale.

Our attention was invited to a judgment of the Court of Appeal in *Love v. Norman Wright (Builders) Ltd.*³. In that case the respondents contracted with the Secretary of State for War to do the work and supply the material mentioned in the Schedules to the contract, including the supply of black-out curtains, curtain rails and battens and their erection at a number of Police Stations. It was held by the Court of Appeal that the respondents were liable to pay purchase-tax. Reliance was placed upon the observations made by Goddard, L.J., at page 482:

"If one orders another to make and fix curtains at his house the contract is one of sale though work and labour are involved in the making and fixing, nor does it matter that ultimately the property was to pass to the War Office under the head contract. As between the plaintiff and the defendants the former passed the property in the goods to the defendants who passed it on to the War Office."

We do not think that these observations furnish a universal test that whenever there is a contract to "fix" certain articles made by a manufacturer the contract must be deemed one for sale and not of service. The test in each case is whether the object of the party sought to be taxed is that the chattel as chattel passes to the other party and the services rendered in connection with the installation are under a separate contract or are incidental to the execution of the contract of sale.

1. (1966) 17 S.T.C. 576.

2. (1968) 21 S.T.C. 245.

3. L.R. (1944) 1 K.B. 484.

In the present case, the specifications of the windows were set out in the contract. The primary undertaking of the respondent was not merely to supply the windows but to "fix" the windows. This service is not rendered under a separate contract, nor is the service shown to be rendered customarily or normally as incidental to the sale by the person who supplies window-leaves. The "fixing" of windows in the manner stipulated required special technical skill. If the windows were not properly "fixed," the contract would not be complete, and the respondent could not claim the amount agreed to be paid to it. We agree with the High Court that it was only upon the "fixing" of the window-leaves and when the window leaves had become a part of the building construction that the property in the goods passed under the terms of the contract.

The appeal fails and is dismissed with costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—V. RAMASWAMI AND A. N. GROVER, JJ.

National and Grindlays Bank Ltd.

.. *Appellant**

v.

The Municipal Corporation for Greater Bombay

.. *Respondents.*

Bombay Municipal Corporation Act (III of 1888), sections 146, 147, 154, 155 and 156— Interpretation—Property tax—Levy of—Lease of the land—Lessee building upon the land—Composite assessment of tax upon the land and building taken together—Primary liability on the lessor of the land if warranted under section 146 (2) (a).

Interpretation of Statutes—Contemporanea expositio—Meaning of the enactment obscure—Construction put upon it by authorities for a long time—Court, if may resort to contemporary construction.

Has primary liability been imposed on the appellant under the Bombay Municipal Corporation Act (III of 1888) to pay property taxes to the respondent, i.e., the Municipal Corporation of Greater Bombay in respect of land owned by the appellant and let on a monthly basis to a third party who has constructed a building thereon?

Held that, The language of section 146 (2) indicates that the Legislature contemplated that in a case where the land and the building are owned by different persons there should be a composite assessment of property tax. The reason is that in section 146 (1) and (2) the word 'premises' is used in contrast to section 146 (3) where the words 'land and building' are separately mentioned. In section 154 (1) of the Act again, the Legislature uses the expression 'building or land.' Then section 155 provides for the right of the Commissioner to call information from the owner or the occupier in order to enable him to determine the rateable value of any building or land and the person primarily liable for the payment of any property tax levied in respect thereof. Section 156 provides that the Commissioner shall maintain a book to be called the assessment book which book is to contain among other things a list of all lands and buildings. Therefore, the scheme of section 146 is that when the land is let and the tenant has built upon the land, there should be a composite assessment of tax upon the land and building taken together. In the case of such a composite unit the primary liability of assessment of tax is intended to be on the lessor of the land under section 146 (2) (a) of the Act. Section 146 (3) of the Act furnishes the key to the interpretation of section 146 (2) (a). In the context of section 146 (3) the lessor of the premises as mentioned in section 146 (2) (a) must be construed as to mean the lessor of the land on which the building has been constructed by the tenant.

In this connection, reference should be made to section 147 which provides for an apportionment of responsibility for property tax when the premises assessed are let or sub-let. The language of sub-section suggests that the lessor of the land has the right of recovering from his tenant the amount of tax which he has paid in excess of the tax which the property is liable to pay on the basis of the rent recovered by the lessor. It is also clear that the intention of the Legislature in fixing the primary liability of property tax upon the owner of the land in a case not falling under section 146 (3) of the Act is to facilitate the collection of property. In the case of a monthly tenant who puts up a temporary shack or asbestos shed on the land and who may at any time terminate the lease at a short notice, it is not always possible for the Corporation to keep track of the lessee and to collect the property tax from him. It is not unreasonable therefore that in a case of this description the Legislature should impose the primary liability for the payment of the property tax upon the lessor of the land and to give him the right of recoupment under section 147.

Assuming that the meaning of section 146 (2) of the Act is obscure and that it is possible to interpret it as throwing the primary liability for payment of property tax upon the lessee who has constructed a building on the land, the Court may resort to contemporary construction, that is the construction which the authorities have put upon it by their usage and conduct for a long time. The principle applicable is "*optima legum interpres est consuetudo*". The Act was passed in the year 1888 and there appears to be a practice followed by the Bombay Municipal Corporation for a very long time of treating the land and the building constructed upon it as single unit and charging the property tax upon the owner of the land in a case where the land is let for a period of less than one year to a tenant who has constructed a building thereon.

Appeal by Special Leave from the Order dated the 25th March, 1964 of the Bombay High Court in Letters Patent Appeal No. 28 of 1964.

S.V. Gupte, Senior Advocate (*P.P. Khambatta*, *D.P. Mehta* and *Miss Bhuvnesh Kumari*, Advocates, and *O.C. Mathur*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

M. G. Chagla, Senior Advocate (*I.N. Shroff*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by *

Ramaswami, J.—The question of law involved in this appeal is whether the primary liability is imposed on the appellant under the Bombay Municipal Corporation Act, 1888 (Act No. III of 1888) to pay property taxes to the respondent, *i.e.*, the Municipal Corporation of Greater Bombay in respect of land owned by the appellant and let on a monthly basis to a third party who has constructed a building thereon.

The appellant is a banking company incorporated in the United Kingdom and has established places of business in India. The appellant is the sole trustee of the estate of the late Mr. F.E. Dinshaw and in that capacity is the owner of a plot of land at Manjubhai Road, Malad, Greater Bombay in the State of Maharashtra, bearing No. P-Ward No. 6418, Street No. 299-B. The said plot of land had been leased by the former trustee of the estate to one Mr. R.R. Pande (hereinafter referred to as the lessee) since a number of years at a monthly rent of Rs. 12-50. The lessee had constructed at his own cost a tiled house on the said plot of land. The Malad area merged into Greater Bombay on 1st February, 1957. Up to the date of the merger the Malad District Municipality was assessing and levying taxes on the land and the structure separately and recovering the same from the landlord and the tenant. After the merger, the Bombay Municipal Corporation issued a notice to the appellant under section 167 of the Act informing him that the assessment book had been amended by inserting the name of the appellant and that the rateable value of the house had been fixed at Rs. 430. Being aggrieved by this order the appellant preferred an appeal to the Chief Judge, Small Causes Court, Bombay

under section 217 of the Act. The appeal was dismissed by the Chief Judge, Small Causes Court by his order dated 3rd August, 1960. The appellant took the matter in further appeal to the Bombay High Court. The appeal was heard by Mr. Justice Patel and was dismissed on the 14th January, 1964. The learned Judge felt that he was bound by the decision of Chagla, C.J., and Shah, J., in *Ramji Keshavji v. Municipal Corporation for Greater Bombay*¹. The appellant thereafter preferred a Letters Patent Appeal No. 28 of 1964 which was summarily dismissed by Chief Justice H.K. Chainani and Mr. Justice Gokhale on 25th March, 1964. The present appeal is brought by Special Leave from the judgment of the Bombay High Court, dated 25th March, 1964.

Section 3 (r) of the Bombay Municipal Corporation Act, 1888 (Act No. 3 of 1888) (hereinafter called the Act) defines 'land' as including land which is being built upon or is built upon or covered with water.....". Section 3 (s) defines 'building' as including a house, out-house, stable, shed, but and every other such structure, whether of masonry bricks, wood, mud, metal or any other material whatever. Section 3 (gg) defines 'premises' as including messuages, buildings and lands of any tenure, whether open or enclosed, whether built on or not and whether public or private. Section 140 states :

"140. The following taxes shall be levied on buildings and lands in Greater Bombay and shall be called "property taxes", namely :—

(a) a water tax of so many per centum of their rateable value as the corporation shall deem reasonable for providing a water-supply for Greater Bombay;

(b) a halalkhor-tax of so many per centum, not exceeding five of their rateable value as will, in the opinion of the corporation, suffice to provide for the collection, removal and disposal, by municipal agency, of all excrementitious and polluted matter from privies, urinals and cesspools and for efficiently maintaining and repairing the municipal drains constructed or used for the receptions or conveyance of such matter, subject however, to the provisions that the minimum amount of such tax to be levied in respect of any one separate holding of land, or of any one building or of any one portion of a building which is let as a separate holding, shall be six annas per month, and that the amount of such tax to be levied in respect of any hotel, club or other large premises may be specially fixed under section 172;

(c) a general tax of not less than eight and not more than twenty-six per centum of their rateable value, together with not less than one-eighth and not more than three-quarters per centum of their rateable value added thereto in order to provide for the expense necessary for fulfilling the duties of the corporation arising under clause (k) of section 61 and Chapter XIV;

(ca) the education cess leviable under section 195-E;

(d) betterment charges leviable under Chapter XII-A".

Section 146 provides :—

"146. (1) Property-taxes shall be leviable primarily from the actual occupier of the premises upon which the said taxes are assessed, if such occupier holds the said premises immediately from the Government or from the corporation or from a fazendar :

Provided that the property taxes due in respect of any premises owned by or vested in the Government and occupied by a Government servant or any other person on behalf of the Government for residential purposes shall be leviable primarily from the Government and not the occupier thereof.

(2) Otherwise the said taxes shall be primarily leviable as follows, namely :—

(a) if the premises are let, from the lessor ;

(b) if the premises are sub-let, from the superior lessor ; and

(c) if the premises are unlet, from the person in whom the right to let the same vests.

(3) But if any land has been let for any term exceeding one year to a tenant and such tenant or any person deriving title howsoever from such tenant has built upon the land, the property taxes assessed upon the said land and upon the building erected thereon shall be leviable primarily from the said tenant or such person, whether or not the premises be in the occupation of the said tenant or such person”.

Section 147 states :

“147. (1) If any premises assessed to any property tax are let, and their rateable value exceeds the amount of rent payable in respect thereof to the person from whom, under the provisions of the last preceding section, the said tax is leviable, the said person shall be entitled to receive from his tenant the difference between the amount of the property tax levied from him, and the amount which would be leviable from him if the said tax were calculated on the amount of rent payable to him.

(2) If the premises are sub-let and their rateable value exceeds the amount of rent payable in respect thereof to the tenant by his sub-tenant, or the amount of rent payable in respect thereof to a sub-tenant by the person holding under him the said tenant shall be entitled to receive from his sub-tenant or the said sub-tenant shall be entitled to receive from the person holding under him, as the case may be, the difference between any sum recovered under this section from such tenant or sub-tenant and the amount of property-tax which would be leviable in respect of the said premises if the rateable value thereof were equal to the difference between the amount of rent which such tenant or sub-tenant receives and the amount of rent which he pays.

(3) Any person entitled to receive any sum under this section shall have, for the recovery thereof, the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to receive the same.”

Section 154 (1) enacts as follows :

“In order to fix the rateable value of any building or land assessable to a property-tax, there shall be deducted from the amount of the annual rent for which such land or building might reasonably be expected to let from year to year a sum equal to ten per centum of the said annual rent and the said deduction shall be in lieu of all allowances for repairs or on any other account whatever”.

Section 155 enacts :

“155. (1) To enable him to determine the rateable value of any building or land and the person primarily liable for the payment of any property tax leviable in respect thereof the Commissioner may require the owner or occupier of such building or land, or of any portion thereof, to furnish him, within such reasonable period as the Commissioner prescribes in this behalf, with information or with a written return signed by such owner or occupier—

(a) as to the name and place of abode of the owner or occupier, or of both the owner and occupier of such building or land ; and

(b) as to the dimensions of such building or land, or of any portion thereof, and the rent, if any, obtained for such building, or land, or any portion thereof.

(2) Every owner or occupier on whom any such requisition is made shall be bound to comply with the same and to give true information or to make a true return to the best of his knowledge or belief.

(3) The Commissioner may also for the purpose aforesaid make an inspection of any such building or land”.

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(Continued in cover page 3)

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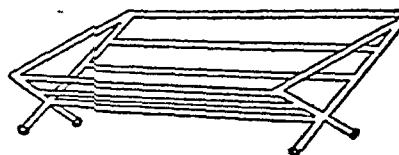
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THE SUPREME COURT JOURNAL

I]

JANUARY

[1970

NOTES OF CASES OF SUPREME COURT

[S.C. N.C. 1.]

*J.C. Shah and
K.S. Hegde, JJ.*
1-12-1969.

*Hindustan Commercial Bank Ltd. v.
Punnu Sahu (dead) through L.Rs.*
Civil Appeal No. 1694 of 1966.

Civil Procedure Code (V of 1908), Order 21, rule 90, Proviso clause (b) (as amended by Allahabad High Court)—‘Entertain’ meaning of—Power of Court is discretionary—Court to give opportunity to the applicant to comply with clause (b).

Words and Phrases—“Entertain” meaning of.

“Entertain” means adjudicate upon or proceed to consider on merits.

From the language of the proviso, it is clear that the power conferred on the Court is discretionary power. It is expected that the Court would ordinarily give an opportunity to the applicant to comply with clause (b) of the proviso and could reject the application if the same were still not complied with. That should be particularly so in an application made before clause (b) was incorporated into the proviso.

On facts, *held* that in the interest of justice the High Court should have remanded the case to the executing Court leaving it to that Court to exercise its discretion under clause (b).

S.V.J.

— *Appeal allowed and remanded.*

[S.C. N.C. 2.]

*J.C. Shah and
K.S. Hegde, JJ.*
1-12-1969.

*State of Orissa v.
Maharaja Shri B.P. Singh Deo*
Civil Appeals Nos. 2258 and 2259 of 1966.

Orissa Agricultural Income-tax Act, section 29 (iii)—Assessments on the basis of ‘best judgment’—Enhancement of assessment by assistant Collector, rejecting materials placed before him by assessee as unreliable—Order not disclosing the basis for enhancement—Confirmation by Tribunal without giving reasons—Interference by High Court—Whether justified.

The Assistant Collector’s order does not disclose the basis on which he has enhanced the assessment. The mere fact that the material placed by the assessee before the assessing authorities is unreliable does not empower those authorities to make an arbitrary order. The power to levy assessment on the basis of best judgment is not an arbitrary power, it is an assessment on the basis of best judgment. In other words that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure of the concerned authorities.

The Agricultural Income-tax Tribunal gave no reasons in its order for affirming the decision of the Assistant Collector. It appears to have been of the view that once the assessing authorities reject the material placed before them as being unreliable those authorities can proceed to levy whatever tax they may levy. It failed to bear in mind the scope of the power of the assessing authorities to levy assessment

on the basis of best judgment. Therefore the tribunal was clearly in error in confirming the decision of the Assistant Collector.

Held, the High Court was justified in interfering with the order of the Tribunal.
S.V.J. *Appeal dismissed.*

[S.C. N.C. 3.]
J.C. Shah and
K.S. Hegde, JJ.
2-12-1969.

State of M.P. v.
Shardul Singh.
Civil Appeal No. 2554 of 1966.

Constitution of India (1950), Articles 309, 310 (1) and 311 (1) and Central Provinces and Bihar Police Regulations 228 and 229—Scope of Article 311 (1)—Whether power conferred on Superintendent of Police under Regulations *ultra vires*.

Words and Phrases—"Conditions of Service."

Article 311 (1) does not in terms require that the authority empowered under that provision to dismiss or remove an official, should itself initiate or conduct the enquiry preceding the dismissal or removal of the officer or even that that enquiry should be done at its instance. The only right guaranteed to a civil servant under that provision is that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed.

The expression "conditions of service" in the Proviso to Article 309 is an expression of wide import. The dismissal of an official is a matter which falls within "conditions of service" of public servants. The expression means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension, etc. But for the incorporation of Article 311 in the Constitution even in respect of matters provided therein, rules could have been framed under Article 309. The provisions in Article 311 confer additional rights on the civil servants.

Held, the guarantee given under Article 311 (1) does not include within itself a further guarantee that the disciplinary proceedings resulting in dismissal or removal of a civil servant should also be initiated and conducted by the authorities mentioned in the Article.

S.V.J.

Appeal allowed.

[S.C. N.C. 4.]
M. Hidayatullah, C.J.
A.N. Grover,
A.N. Ray and
I.D. Dua, JJ.
2-12-1969.

Arun Ghosh v.
State of W.B.
W.P. No. 287 of 1969.

Preventive Detention Act (IV of 1950), section 3 (2)—Acts of detenu, such as molestation and assault, directed against individuals—Whether amount to breach of public order or likelihood of breach of public order—Detention, whether justified.

Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. An act by itself is not determinative of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. A large number of acts directed against persons or individuals may total up into a breach of public order. The question to ask is ; Does it lead to

disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another.

On facts *held*, all acts of molestation were directed against the family of Phanindra C. Das and were not directed against women in general from the locality. Assaults also were on individual. The conduct may be reprehensible but it does not add up to the situation where it may said that the community at large was being disturbed or in other words there was breach of public order or likelihood of breach of public order.

S.V.J.

Petitioner released.

[S.C. N.C. 5]

J.C. Shah and
K.S. Hegde, JJ.

Champalal Binani v.
C.I.T., West Bengal.

4-12-1969.

Civil Appeal No. 2379 of 1966.

Income-tax Act (XI of 1922), section 33-B—Show cause notice to revise assessment order—Assessee served—Assessee absenting himself on the date of hearing—Income-tax Officer directing fresh assessment—Appeal to Tribunal not filed—Petition for writ of certiorari—Interference.

Constitution of India (1950), Article 226 and Income-tax Act—Writ of certiorari—Adequate alternative remedy available—Failure to avail—Interference in writ—Scope of.

The Income-tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action. The assessee had an adequate remedy under the Income-tax Act which he could have availed of; he, however, did not move the Income-tax Appellate Tribunal which was competent to decide all questions of fact and law which the assessee could have raised in the appeal including the grievance that he had no adequate opportunity of making his representation and invoked the extraordinary jurisdiction of the High Court. *Held*, no adequate ground was made out for entertaining the petition.

A writ of *certiorari* is discretionary; it is not issued merely because it is lawful to do so. Where the party feeling aggrieved by an order of an authority under the Income-tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority which is *ex-facie* with jurisdiction. A petition for a writ of *certiorari* may lie to the High Court, where the orders are on the face of it erroneous or raises question of jurisdiction or of an infringement of fundamental rights of the petitioner. The present case was one in which the jurisdiction of the High Court could not be invoked.

On facts, *held*, that there was proper service of the notice and that the High Court was right in holding that the order under section 33-B of the Act was properly made.

S.V.J.

Appeal dismissed.

[S.C. N.C. 6]

J. C. Shah and
K. S. Hegde, JJ.
4-12-1969.

Shauqin Singh v.
Desa Singh.

Civil Appeal No. 155 of 1967.

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954), section 24 (2) and Constitution of India (1950), Article 226—Power of Settlement Commissioner to cancel an allotment—Nature of—Competency of the High Court to interfere with the order of the Commissioner.

The Chief Settlement Commissioner has power under sub-section (2) of section 24 to cancel an allotment if he is satisfied that the order of allotment of land had been obtained by means of fraud, false representation or concealment of any material fact. The power is judicial and by the use of the expression 'is satisfied' the Chief Settlement Commissioner is not made the final arbiter of the facts on which the conclusion is reached. The jurisdiction of the Chief Settlement Commissioner arises only if an allotment is obtained by means of fraud, false representation or concealment of material facts. The relevant satisfaction is a jurisdictional fact on the existence of which alone the power may be exercised. A superior authority or the High Court in a writ petition would, therefore, be entitled to consider whether there was due satisfaction by the Settlement Commissioner on materials placed before him and that the order was made not arbitrarily, capriciously or perversely.

On facts *held*, the order of the Chief Settlement Commissioner being quasi-judicial in character and his satisfaction not being decisive of the matter, the High Court was justified in holding that the conclusion of the Chief Settlement Commissioner, that the respondents 1 to 3 were guilty of fraud, was based on no evidence and the Court was competent to set aside the order of the Chief Settlement Commissioner.

S.V.J.

Appeal dismissed.

[S.C. N.C. 7]

J. C. Shah and
K. S. Hegde, JJ.
4-12-1969.

Mohammad Ibrahim v.
State of A.P.

Civil Appeal No. 1185 (N) of 1969.

Constitution of India (1950), Articles 226 and 311—Writ Petition to quash order of reversion—Serious allegations made in the petition that the order of reversion was due to malice—No reply by State—High Court's failure to consider this plea—No fair trial of the petition by the High Court.

A number of serious allegations were made by the appellant in his petition, in support of his plea that the order passed against him was made out of malice, and, practically, no reply was submitted to that by the State. Apparently the plea was urged before the High Court. The High Court observed in the course of the judgment that the appellant had challenged the order on the "ground of *malu fide*" but did not proceed to consider that plea. *Held*, that there has been no fair trial of the petition filed by the appellant. (The case was remanded for trial according to law).

S.V.J.

Appeal allowed and remanded.

[S.C. N.C. 8]

J. C. Shah and
K. S. Hegde, JJ.
4-12-1969.

State of Punjab v.
Sant Singh Kanwarjit Singh.
Civil Appeal No. 2159 of 1966.

Punjab General Sales Tax Act (XLVI of 1948)—Periodical assessments—Validity of.

Under the Act sales-tax is an yearly tax, but the provisions relating to assessment contemplate assessments for periods shorter than a complete year, and for that

purpose the taxpayers are required by the Act to submit periodical returns of their turnover and to pay tax due thereon.

The assessment proceeding under the Punjab General Sales Tax Act may be started even before the expiry of the year where provision is made for submission of periodical returns, and such assessments are not provisional.

S.V.J.

Appeal allowed.

[S.C. N.C. 9.]

J. C. Shah and
K. S. Hegde, JJ.
4-12-1969.

Smt. Gunwant Kaur v.
Municipal Committee, Bhatinda.
C.A. No. 1337 of 1969.

Land Acquisition Act (I of 1894), sections 4 and 6—Section 4 notification for construction of road—Parts of survey numbers sought to be acquired not set out with precision—No plans demarcating the land to be acquired published or made available to the owners of the land—Notification under section 6—Parties purchasing lands subsequent to notification dates, constructing houses after obtaining sanction from Municipality—Right to challenge notification.

Constitution of India (1950), Article 226—Writ—Dismissal *in limine* when justified—Jurisdiction to deal with questions of fact.

The pleas raised by the petitioners about the infirmity in the notification and the proceedings for compulsory acquisition were serious.

The High Court observed that they will not deal with disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition *in limine*. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition *in limine* will normally be justified where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

On facts *held*, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed questions of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit in reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.

If the notification under section 4 was vague the three appellants who are purchasers of the land had title thereto may challenge the validity of the notification. The appellants have spent in putting up substantial structures considerable sums of money and merely because they had purchased the lands after the issue of the notification under section 4 they are not debarred from challenging the validity of the notification, or from contending that it did not apply to their lands.

S.V.J.

Appeal allowed and remanded.

[s.c. N.C. 10.]

J. C. Shah, Acting C.J. and

K. S. Hegde, J.

9-12-1969.

M/s. Bengal Enamel Works Ltd. v.

C.I.T.

C.A. Nos. 2143 to 2145 of 1968.

Income-tax Act (XI of 1922), sections 10 (2) (xv) and 66—Business—Computation of taxable income—Expenditure claimed whether wholly and exclusively laid out or expended for business—Determination—Remuneration actually paid to an employee—If may be partially disallowed on the ground that 'extra-commercial considerations' influenced its fixation—Inference of Tribunal from facts that expenditure is wholly laid out for business—Interference with by High Court under section 66.

In computing the taxable income of an assessee, whether an amount claimed as expenditure was laid out or expended wholly and exclusively for the purpose of the business, profession or vocation of the assessee must be decided on the facts and in the light of the circumstances of each case. Resolution of the assessee fixing the remuneration to be paid to an employee and production of vouchers for payment together with proof of rendering service do not exclude an enquiry whether the expenditure was laid out wholly and exclusively for the purpose of the assessee's business. It is open to the tax officers to hold, agreement to pay and payment notwithstanding, that the expenditure was not laid out wholly and exclusively for the purpose of the business.

Where an amount paid to an employee pursuant to an agreement is excessive because of "extra-commercial considerations", the taxing authority has jurisdiction to disallow a part of the amount as expenditure not incurred wholly and exclusively for the purpose of the business.

An inference from the facts found that the expenditure was wholly and exclusively laid out for the purpose of the business is one of law and not of fact, and the High Court in a reference under section 66 of the Income-tax Act is competent to decide that the inference raised by the Tribunal is erroneous in law.

V.K.

Appeals dismissed.

[s.c. N.C. 11.]

J. C. Shah, Acting C.J. and

K. S. Hegde, J.

9-12-1969.

Sidramappa v.

Rajashetty.

C.A. No. 1953 of 1969.

Civil Procedure Code (V of 1908), Order 2, rule 2—Bar under—When attracted—

The requirement of Order 2, rule 2 is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance in independent proceedings.

In the instant case, the cause of action on the basis of which the previous suit was brought does not form the foundation of the present suit. The cause of action mentioned in the earlier suit, assuming the same afforded a basis for a valid claim, did not enable the plaintiff to ask for any relief other than those he prayed for in that suit. In that suit he could not have claimed the relief which he seeks in this suit. Hence the trial Court and the High Court were not right in holding that the plaintiff's suit is barred by Order 2, rule 2, Civil Procedure Code.

Quaere : Order 2, rule 2 whether applicable to a suit under section 42 of the Specific Relief Act.

V.K.

Appeal allowed.

C.I.T. v.

Income-tax Act (XI of 1922), section 2 (11) (i) (a) Proviso—Scope—“Previous year”—Meaning of the expressions “assessed” and “assessee” in the proviso.

It is necessary to note that section 2 (11) (i) (a) does not refer to the income of the assessee generally but to his "separate sources of income, profits and gains." Hence it is possible for an assessee to have a different "previous year" for each "separate source of income, profits and gains." In *Rhodesia Metals Ltd. v. Commissioner of Taxes*, (1941) I.T.R. Supp. 45, the Judicial Committee observed that "source" means not a legal concept but which a practical man would regard as a real source of income.

The words "assessed", "assessment" and "assessee" have different meanings in different contexts. The word "assessment" is used in the Act as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes, the procedure laid down in the Act for imposing liability upon the taxpayer. Similarly the word "assessee" connotes different meanings in different contexts.

The expression "where in respect of a particular source of income, profits and gains" in the proviso to section 2 (11) (i) (a) means the income from a particular source which has been brought to tax under the Act and not which has been taken into consideration for computing the total world income of the assessee. In the context the word "assessee" in the proviso to section 2 (11) (i) (a) refers to the person whose income, profits or gains, in respect of a particular source had been once assessed to tax. The word "assessed" in that proviso means subject to levy or imposition and not "compute".

V.K.

Appeal dismissed.

[S.C. N.C. 13.]

S. M. Sikri and
G. K. Mitter, JJ.
16-12-1969.

**Mohan Lal Sethia v.
Chiranjivlal Harsola.**

C.A. No. 273 (N.C.E.) of 1969.

Representation of the People Act (XLIII of 1951), section 123 (2)—Scope.

Under section 123 (2) any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent with the free exercise of any electoral right would amount to undue influence and a corrupt practice within the meaning of the Act. The proviso to this sub-section shows that any person who induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure would be deemed to interfere in the free exercise of the electoral right of such candidate or elector within the meaning of this clause.

Once it is established that the appellant (returned candidate) had asked the Swamiji of Bhandura, who was a man of considerable influence in the locality, to make a speech supporting his cause, that he followed it up by taking the Swamiji to the meeting and made an introductory speech which was followed by the Swamiji using his eloquence to induce the electorate to support the Jan Sangh candidate as against the Congress nominees on the ground that the Congress Party had failed to protect the cow and was in fact allowing cow slaughter on a large scale, a vote for that party would be tantamount to committing sin of Gohatya, the case clearly falls within section 123 (2) of the Act so as to amount to a corrupt practice sufficient to set aside the election.

Y.K.

Appeal dismissed.

[S.C. N.C. 14.]

S. M. Sikri,
J. M. Shelat,
V. Bhargava,
G. K. Mitter and
C. A. Vaidialingam, JJ.
18-12-1969.

Hari Vishnu Kamath v.
Gopal Swarup Pathak.
Elec. P. No. 6 of 1969.

Presidential and Vice-Presidential Elections Act (XXXI of 1952), sections 4 and 18—Presidential and Vice-Presidential Elections Rules (1952), rule 4—Election of Vice-President—Nomination paper sent by post—Validity—Rejection of invalid nomination paper—Returning Officer if can reject as soon as it is received or should wait till date of scrutiny.

It will be noticed that rule 4 of the Presidential and Vice-Presidential Election Rules provides only one manner of presentation of nomination paper, i.e., delivery either in person by the candidate or by his proposer or seconder. Further it mentions the time within which it can be delivered, i.e., between the hours of eleven in the forenoon and three in the afternoon. If the nomination paper is not presented in person either by the candidate or by the proposer or the seconder it cannot be deemed to have been presented at all.

If a nomination paper is received by post it would be difficult to say that it has been presented and received before 3 o'clock on the last date appointed under clause (a) of section 4 (1) of the Act. Such a nomination paper could not be treated to have been received within the meaning of sub-rule (2) of rule 4 of the Presidential and Vice-Presidential Election Rules and the Returning Officer is entitled to reject it.

As soon as the Returning Officer finds that a nomination paper has not been duly presented and received he must reject it outright at the time it is handed over to him and it is not necessary for him to wait till the date of scrutiny.

The Rules contemplate only one method of presentation of nomination paper and if that method is not followed the nomination paper cannot be held to be validly presented and must be rejected outright. To hold otherwise would lead to utter confusion and delay in the completion of the election.

In the result, the challenge to the election of Sri G. S. Pathak to the office of the Vice-President of India, on the ground that the nomination paper of Dr. Ram Sharan Das, which was sent by post, was wrongly rejected, must fail.

V.K.

Petition dismissed.

[S.C. N.C. 15.]

J. C. Shah, Acting C.J. and
I. D. Dua, J.
18-12-1969.

Methar v.
State of W.B.
W.P. Nos. 339 to 342 of 1969.

Preventive Detention Act (IV of 1950), section 7—Detention under the Act—Communication of ground to the detainee—Necessity—"Communication"—What is.

Section 7 of the Preventive Detention Act, 1950, *inter alia* provides that the authority making the order of detention shall, as soon as may be, communicate to the person detained the ground on which the order of detention is made. The use of the word "communicate" is significant. The person detained must be made to understand the ground on which the order of his detention has been made because the object of this communication is to enable him to make a representation against that order. An effective representation can be possible only if the detainee fully understands the ground of his detention.

Where, therefore, the persons detained were illiterate, the mere fact that they were served with the ground of detention in English with a vernacular translation thereof, would not amount to compliance with the requirements of law.

V.K.

Petitions allowed.

Section 156 states ;

“ The Commissioner shall keep a book, to be called “ the assessment book ” in which shall be entered every official year—

(a) a list of all buildings and lands in Greater Bombay distinguishing each either by name or number, as he shall think fit ;

(b) the rateable value of each such building and land determined in accordance with the foregoing provisions of this Act ;

(c) the name of the person primarily liable for the payment of the property taxes, if any, leviable on each such building or land.....

* * * * *

It was contended by Mr. Khambatta that on a proper construction of section 146 (2) of the Act there should have been separate assessments in respect of the building and the land in the present case. It was argued in the alternative that even if section 146 (2) of the Act contemplates a composite assessment of the building and the land, the primary liability should be imposed upon the owner of the building and not on the owner of the land. It was said that the right to let the building vests in the lessee of the land and not in the appellant, and so, the primary liability was upon the lessee under section 146 (2) of the Act. The argument was pressed that the appellant cannot be treated as a lessor under section 146 (2) of the Act, because the appellant has not let the land with the building thereon as one unit to the lessee. The opposite view point was presented on behalf of the respondent. It was argued, in the first place, that section 146 (2) of the Act contemplates that there should be a composite assessment of the land and the building taken as one unit. In the case of such a composite assessment, the primary liability of the payment of tax was on the landlord under sub-section (2) (a) of section 146 except in the case referred to in sub-section (3) where the primary liability was upon the tenant and not upon the landlord. Admittedly, the present case did not fall under section 146 (3), and, therefore, the primary liability was placed upon the appellant. In our opinion, the argument put forward on behalf of the respondent is well-founded and must be accepted as correct. In the first place, the language of section 146 (2) indicates that the Legislature contemplated that in a case where the land and the building are owned by different persons there should be a composite assessment of property tax. The reason is that in section 146 (1) and (2) the word ‘ premises ’ is used in contrast to section 146 (3) where the words ‘ land and building ’ are separately mentioned. In section 154 (1) of the Act again, the Legislature uses the expression “ building or land ”. The section 155 provides for the right of the Commissioner to call information from the owner or the occupier in order to enable him to determine the rateable value of any building or land and the person primarily liable for the payment of any property tax levied in respect thereof. Section 156 provides that the Commissioner shall maintain a book to be called ‘ the assessment book ’ which book is to contain along other things a list of all lands and buildings. Therefore, the scheme of section 146 is that when the land is let and the tenant has built upon the land, there should be a composite assessment of tax upon the land and building taken together. We are further of opinion that in the case of such a composite unit the primary liability of assessment of tax is intended to be on the lessor of the land under section 146 (2) (a) of the Act. It was objected by Mr. Khambatta that the appellant was only the lessor of the land and not of the building and so, the appellant cannot be held to be the lessor within the meaning of section 146 (2) (a). We do not think that there is any merit in this objection. Section 146 (3) of the Act furnishes the key to the interpretation of section 146 (2) (a). In the context of section 146 (3) the lessor of the premises as mentioned in section 146 (2) (a) must be construed as to mean the lessor of the land on which the building has been constructed by the tenant. In this connection, reference should be made to section 147 which provides for an apportionment of responsibility for property tax when the premises assessed are let or sub-let. The language of this sub-section suggests that the lessor of the land has the right of recovering from his tenant the amount of tax which he has paid in excess of the tax which the property is liable to

pay on the basis of the rent recovered by the lessor. It is also clear that the intention of the Legislature in fixing the primary liability of property tax upon the owner of the land in a case not falling under section 146 (3) of the Act is to facilitate the collection of property tax. In the case of a monthly tenant who puts up a temporary shack or asbestos shed on the land and who may at any time terminate the lease at a short notice, it is not always possible for the Corporation to keep track of the lessee and to collect the property tax from him. It is not unreasonable therefore that in a case of this description the Legislature should impose the primary liability for the payment of the property tax upon the lessor of the land and to give him the right of recoupment under section 147. A similar view with regard to the interpretation of section 146 of the Act was expressed by a Division Bench of the Bombay High Court consisting of Chagla, C.J., and Shah, J. in *Ramji Kesahuji's case*¹. It was held by the learned judges in that case that where the owner of a land had leased it to a tenant for a period of one year and the tenant had put up a structure upon the land, the owner of the land was primarily liable to pay property tax together with the structure constructed thereon. Counsel on behalf of the appellant challenged the correctness of this decision, but for the reasons already expressed we hold that the *ratio* of this decision is correct.

We shall, however, assume in favour of the appellant that the meaning of section 146 (2) of the Act is obscure and that it is possible to interpret it as throwing the primary liability for payment of property tax upon the lessee who has constructed a building on the land. Even upon that assumption we think that the view of the law expressed by the Bombay High Court in this case ought not to be interfered with. The reason is that in a case where the meaning of an enactment is obscure, the Court may resort to contemporary construction, that is the construction which the authorities have put upon it by their usage and conduct for a long period of time. The principle applicable is "*optima legum interpret est consuetudo*"². In *Chilson's case*³, in dealing with the interpretation of section 39 of the Pawnbrokers Act, 1872, Stephen, J., said

"What weighs with me very greatly in coming to the present conclusion is the practice of the Inland Revenue Commissioners for the past sixteen years. So long ago as 1874 this very point was decided by Sir Thomas Henry, for whose decisions we all have very great respect; and the least that can be said with regard to the case before him is that he pointedly called the attention of the commissioners to the case—the learned magistrate having offered to state a case—an offer refused by the commissioner who by their refusal must be taken to have acquiesced in the decision. That is a very strong contemporaneous exposition of the meaning of the Act."

The same principle was referred to by Lord Blackburn in *Clyde Navigation Trustees v. Laird*⁴. The question in dispute in that case was whether the Clyde Navigation Consolidation Act, 1858 (repealing eight prior Acts) imposed navigation dues on timber floated up the Clyde in logs chained together. From 1858 to 1882 dues had been levied on this class of timber without resistance from the owners, and some judges in the Court of Session suggested that this non-resistance might be considered in construing the statute. On this point Lord Blackburn said:

"I think that submission raises a strong *prima facie* ground for thinking that there must exist some legal ground on which they (the owners) could not resist. And I think a Court should be cautious, and not decide unnecessarily that there is no such ground. If the Lord President (Inglis) means no more than this when he calls it *contemporanea expositio* of the statutes which is almost irresistible. I agree with him. I do not think that he means that enjoyment at least for any period short of that which gives rise to prescription, if founded on a mistaken construction of a statute, binds the Court so as to prevent it from giving the true

1. (1954) 56 Bom.L.R. 1132.
2. 2 Co.Rep. 81.

3. (1891) 1 Q.B. 485, 489.
4. 8 A.C. 658, 670.

construction. If he did, I should not agree with him, for whom I know of no authority, and I am not aware of any principle, for so saying."

In our opinion, the principle of *contemporanea expositio* applies to the present case. The Act was passed in the year 1888 and there appears to be a practice followed by the Bombay Municipal Corporation for a very long time of treating the land and the building constructed upon it as single unit and charging the property tax upon the owner of the land in a case where the land is let for a period of less than one year to a tenant who has constructed a building thereon (See *Ramji Kesahuji's case*¹).

For the reasons expressed, we hold that there is no merit in this appeal which is accordingly dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.

Sheikh Abdul Rehman

.. Appellant*

v.

Jagat Ram Aryan

.. Respondent.

J. & K. Constitution, section 51 (a) and J. & K. Representation of the People Act (IV of 1957), section 47 (2) (2)—Scope requirement of making and subscribing an oath—Filing of signed oath forms, if amounts to subscribing the oath or affirmation before the Returning officer.

The requirement of making and subscribing of oath or affirmation was inserted in section 51 (a) of the J. & K. Constitution by the Constitution Sixth Amendment Act, 1965. There is ground for believing that Narain Dass and Nikka Ram were not aware of this provision and for this reason they omitted to make or subscribe any oath or affirmation before the Assistant Returning Officer.

Kahan Singh the Assistant Returning Officer was not conversant with these instructions. He did not ask either Narain Dass or Nikka Ram to read the oath or to sign the oath form in his presence. But the breach of these instructions does not entitle them to say that they had made and subscribed the oath before the Assistant Returning Officer when in fact they did not make or subscribe the oath before him.

In the present case signed oath forms along with nomination papers were filed with the Assistant Returning Officer on 23rd January, 1967 before the date fixed for scrutiny. But this fact makes no difference. They neither made nor subscribed the oath or affirmation before the Assistant Returning Officer as required by section 51 (a). On the date fixed for the scrutiny of nominations they were not qualified to be chosen to fill the seat in the Legislature under section 51 (a) of the J. & K. Constitution and their nomination papers were liable to be rejected under section 47 (2) (a) of the J. & K. Representation of the People Act, 1957.

Appeal under section 123 of the Jammu and Kashmir Representation of the People Act, 1957 from the Judgment and Order dated the 29th April, 1968 of the Jammu and Kashmir High Court in Election Petition No. 33 of 1967.

R. N. Bhalgotra and S. S. Khanduja, Advocates, for Appellant.

R. K. Garg, S. G. Agarwal and D. P. Singh, Advocates of *M/s. Ramamurthi & Co.*, and *Miss S. Chakrawarti*, Advocate, for Respondent.

The Judgment of the Court was delivered by

Bachawat, J.—This appeal is directed against a judgment of a Single Judge of the High Court of Jammu and Kashmir dismissing an election petition for setting

1. (1954) 56 Bom L.R. 1132.

aside the election of the respondent Jagat Ram Aryan to the Legislative Assembly of the State of Jammu & Kashmir from the Bahderwah Scheduled Caste Assembly constituency.

The last date for filing the nomination papers was 20th January, 1967. The date of scrutiny of nomination papers was 23rd January, 1967. The date of poll was 21st February, 1967. The date of counting and declaration of result was 1st March, 1967. Several candidates filed their nomination papers from this constituency. The candidates were (1) Jagat Ram Aryan, (2) Faquir Chand, (3) Narain Dass, (4) Nikka Ram, (5) Bhagat Ram, (6) Om Parkash and (7) Swami Raj. The first five filed their nomination papers on 23rd January, 1967 before the Assistant Returning Officer, Kahan Singh, a Tahsildar of Bahderwah. On scrutiny of the nomination papers, the Returning Officer Abdul Gani accepted as valid the nomination papers of Jagat Ram and Faquir Chand and rejected the nomination papers of the remaining candidates for various reasons. At the poll the contest was between Jagat Ram, the congress candidate and Faquir Chand, the National Conference candidate. Respondent Jagat Ram having secured larger number of votes was declared elected.

The appellant, a voter in the constituency, filed the election petition for setting aside the respondent's election on the ground that the nomination papers of Narain Dass, Nikka Ram and Bhagat Ram were improperly rejected. The High Court found that the nomination paper of Bhagat Ram was properly rejected and this finding is no longer challenged.

The nomination paper of Nikka Ram was rejected on three grounds (1) he did not make and subscribe the oath or affirmation as required by section 51 (a) of the Jammu & Kashmir Constitution; (2) he was not a member of a Scheduled Caste and (3) his father's name was not correctly shown in the electoral rolls. The nomination paper of Narain Dass was rejected on two grounds: (1) he did not make and subscribe the oath or affirmation as required by section 51 (a) and (2) he was not a member of a Scheduled Caste. The High Court found that both Narain Dass and Nikka Ram were members of the Scheduled Caste "Megh." It also held that the error in the electoral roll with regard to the name of Nikka Ram's father was not a ground for rejecting his nomination paper having regard to section 44 (4) of the J. & K. Representation of the People Act, 1957. The High Court also rejected the additional contention that Narain Dass had not made a deposit of Rs. 125 in conformity with section 45 (2) of the Act. All these findings are no longer challenged.

The only point now in issue is whether Narain Dass and Nikka Ram made and subscribed the oath or affirmation as required by section 51 (a) of the J. & K. Constitution. Section 51 (a) provides :

"A person shall not be qualified to be chosen to fill a seat in the Legislature unless he—

(a) is a permanent resident of the State, and makes and subscribes before some person authorised in that behalf by the Election Commission of India an oath or affirmation according to the form set out for the purpose in the fifth Schedule."

The Returning Officer and the Assistant Returning Officer were authorised in this behalf by the Election Commission of India by Notification No. 3/4 J. & K. 65 as the persons before whom the oath or affirmation could be made and subscribed. The prescribed form of oath or affirmation to be made by a candidate of the State Legislature is :—

"I, A. B., having been nominated as a candidate to fill a seat in the Legislative Assembly, (or Legislative Council) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established and that I will uphold the sovereignty and integrity of India."

Section 44 of the J. & K. Representation of the People Act, 1957 provides for presentation of nomination papers and prescribes certain requirements for a valid

nomination. Section 45 provides for deposits. Section 46 deals with notice of nominations and the time and place for their scrutiny. Section 47 (2) (a) reads:—

“The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the provisions of sections 51 and 69 of the Constitution and Part VI of this Act....”

Form 2-A of the J. & K. Representation of the People (Conduct of election and election petition) Rules, 1957 prescribes the form of nomination paper for election to the legislative assembly.

It is common case that along with their nomination papers both Narain Das and Nikka Ram filed oath forms signed by them. The appellant's case is that at the time of the presentation of their nomination papers both Narain Dass and Nikka Ram made oaths and signed the oath forms in the presence of the Assistant Returning Officer. In support of this case, the appellant examined Narain Dass, Nikka Ram, Abdul Qayum and Abdul Rehman. The respondent's case is that Narain Dass and Nikka Ram did not make or subscribe any oath or affirmation before the Assistant Returning Officer, that the oath forms had been filled up and signed before they were presented to him and were not signed in his presence. In support of his case the respondent examined Kahan Singh, the Assistant Returning Officer, and Abdul Gani, the Returning Officer. The High Court accepted the respondent's case.

It should be remembered that the requirement of making and subscribing an oath or affirmation was inserted in section 51 (a) of the J. & K. Constitution by the Constitution Sixth Amendment Act, 1965. There is ground for believing that Narain Dass and Nikka Ram were not aware of this provision and for this reason they omitted to make or subscribe any oath or affirmation before the Assistant Returning Officer.

Our attention was drawn to Instruction No. 7 (7) in Chapter II at page 19 of the Handbook for Returning Officers, issued by the Election Commission, India, for General Elections, 1967. The aforesaid instruction was as follows:—

“The oath or affirmation has first to be made and then signed by the candidate before the authorised officer. It should be borne in mind that mere signing on the paper on which the form of oath is written out is not sufficient. The candidate must make the oath before the authorised officer. Accordingly he will ask the candidate to read aloud the oath or affirmation in English or the regional language and then to sign and date the paper on which the oath or affirmations written. In the case of illiterate persons who want to contest elections, and who cannot properly make and subscribe the oath or affirmation the authorised officer, should read out the prescribed oath and ask the candidate to repeat the same and thereafter take his thumb-impression on the form on which the oath is printed or cyclostyled in token of his having subscribed the oath. The authorised officer should endorse on this paper that the oath or affirmation has been made and subscribed before the candidate on that day. He will immediately furnish to the candidate a certified copy thereof keeping a copy for year record. The candidate will produce this copy as evidence before you at the time of scrutiny of nomination papers. This copy will be given to the candidate forthwith without his applying for it, nor any fee be charged for it.”

Kahan Singh the Assistant Returning Officer was not conversant with these instructions. He did not ask either Narain Dass or Nikka Ram to read the oath or to sign the oath form in his presence. But the breach of these instructions does not entitle them to say that they had made and subscribed the oath before the Assistant

Returning Officer when in fact they did not make or subscribe the oath before him.

It is admitted by the appellant that the oath forms filed by Narain Dass and Nikka Ram did not bear any endorsement of the Assistant Returning Officer stating that the oath or affirmation had been made and subscribed before him nor was any certificate of such endorsement furnished to them. The absence of the endorsement on the oath forms tend to suggest that no oath or affirmation was made and subscribed by them before the Assistant Returning Officer. Neither Narain Dass nor Nikka Ram could produce before the Returning Officer, Abdul Gani any evidence of their making and subscribing the oath or affirmation. Abdul Gani gave them an opportunity to produce affidavits in proof of this fact but they did not file any affidavit or any other evidence before him. The appellant examined witnesses to prove that attempts were made to file such affidavits, but the High Court rightly rejected the testimony of these witnesses. The materials on the record corroborate the testimony of Kahan Singh, the Assistant Returning Officer that Narain Dass and Nikka Ram did not sign the oath forms in his presence and did not make the oath or affirmation before him. Narain Dass and Nikka Ram were Jana Sangh Candidates. Abdul Qayum and Abdul Rehman were their party men. All of them were interested witnesses. Having regard to all the materials on the record it is impossible to prefer their testimony to that of Kahan Singh. In agreement with the High Court we hold that neither Narain Dass and Nikka Ram signed the oath forms before the Assistant Returning Officer nor did they make the oath or affirmation before him.

On 23rd, January, 1967 both Narain Dass and Nikka Ram filed with the Assistant Returning Officer signed and filled up oath forms along with their nomination papers. In our opinion, this was not sufficient compliance with the requirement of section 51 (a).

In *Pasupati Nath v. Harihar Prasad*¹, this Court held that the nomination paper was liable to be rejected under section 36 (2) (a) of the Representation of the People Act, 1951 corresponding to section 47 (2) (a) of the J. & K. Representation of the People Act, 1957 if the qualification required by Article 173 (a) of the Constitution corresponding to section 51 (a) of the J. & K. Constitution did not exist on the date of scrutiny of nominations. In that case no signed oath form was attached to the nomination paper or filed before the date fixed for scrutiny. In the present case signed oath forms along with nomination papers were filed with the Assistant Returning Officer on 23rd January, 1967 before the date fixed for scrutiny. But this fact makes no difference. They neither made nor subscribed the oath or affirmation before the Assistant Returning Officer as required by section 51 (a). On the date fixed for the scrutiny of nominations they were not qualified to be chosen to fill the seat in the Legislature under section 51 (a) of the J. & K. Constitution and their nomination papers were liable to be rejected under section 47 (2) (a) of the J. & K. Representation of the People Act, 1957.

In the result, the appeal is dismissed. There will be no order as to costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —MR. M. HIDAYATULLAH, *Chief Justice* AND G. K. MITTER, J.
 Patel Bhuder Mavji, etc. .. *Appellants**

v.

Jat Mamdaji Kalaji (dead) by his legal representatives etc. .. *Respondents.*

Saurashtra Land Reforms Act (XXV of 1951) and Saurashtra Agricultural Debtor's Relief Act (XXIII of 1954)—Object—Change in the relationship between the Girasdar and tenants—Rights of debtors and creditors—Scaling down of debts and restoration of property to debtors—Occupancy Certificates given to the mortgagees, if extinguish the title of the mortgagors (debtors).

The main question for determination is whether the debtors had lost all their interest in the lands mortgaged by reason of the operation of the Saurashtra Land Reforms Act XXV of 1951 and as such were not competent to make an application under the Saurashtra Agricultural Debtors Relief Act, 1954.

The object of the Land Reforms Act, as is the improvement of the land revenue administration and putting an end to the Girasdari system and granting of occupancy rights to the Girasdars and/or their tenants, whereas the Debtors Relief Act governs the rights of the debtors and creditors *inter se inter alia* by scaling down the debts and providing restoration of their property to debtors. The rights of the debtors in this case were not extinguished under the Land Reforms Act and it was open to the Court exercising jurisdiction under the Debtors Relief Act to scale down the debt and provide for restoration of the land in possession of the mortgagees to the mortgagors on taking fresh accounts between the parties and directing payments by one party to the other as has been done in this case. The fact that they had all along paid the revenue and other dues to the State, if any, would not clothe them with the right of the tenants. Under section 76 (c) of the Transfer of Property Act a mortgagee in possession must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession. But even if they could not meet the revenue and other State dues out of the income and paid the same out of their own pockets in order to save the security, the mortgagees were only entitled under section 72 (b) of the Transfer of Property Act to add the amount to the mortgage money. They could not by paying such rent or revenue acquire a title in derogation of the rights of the mortgagors and the payments, if any, are to be taken into account when the mortgagors seek to redeem the property. That apart it has not been shown that the debtors were awarded any compensation in respect of the *khalsa* lands given in mortgage to the appellants. The occupancy certificates, if any, given by the Special Mamlatdar to the appellants cannot under the provisions of the Land Reforms Act extinguish the title of the mortgagors.

Appeals by Special Leave from the Judgment and Order, dated the 28th April, 1965 of the Gujarat High Court in Civil Revision Applications Nos. 88 and 93 of 1961.

P.B. Patwari, Senior Advocate (*K.L. Hathi*, Advocate of *M/s. Hathi & Co.*, and *S.K. Begga* and *Shureshta Begga*, Advocates, with him), for Appellants.

P.M. Rawal, Advocate, and P.G. Bhartari, Advocate for *M/s. J.B. Dadachanji & Co.*, for Respondents.

The Judgment of the Court was delivered by

Mitter, J.—These are two appeals by Special Leave from judgments of the Gujarat High Court, dated 28th April, 1965 in Civil Revision Application Nos. 88

and 93 of 1961. As the questions involved in both the applications were the same, the High Court delivered the main judgment in Civil Revision Application No. 88 of 1961 and referred to the same in its judgment in Civil Revision Application No. 93 of 1961. The two applications in the High Court arose out of certain proceedings under the Saurashtra Agricultural Debtors Relief Act. The applicants before the High Court and the appellants before this Court were mortgagees in possession of certain lands belonging to the debtors who are now represented by the respondents. The main question before the High Court was and before us is, whether the debtors had lost all their interest in the lands mortgaged by reason of the operation of the Saurashtra Land Reforms Act XXV of 1951 and as such were not competent to make an application under the Saurashtra Agricultural Debtors Relief Act, 1954. Hereinafter the two Acts will be referred to as the Land Reforms Act and the Debtors Relief Act.

It is not necessary to deal separately with the facts in the two appeals as the course of proceedings in both cases were similar giving rise to common questions of law. We therefore propose to take note of the facts in Civil Revision Application No. 88 of 1961. The creditors, appellants before us, were in possession of the properties—the subject matter of litigation, under two mortgage deeds of a Samvat years 1907 and 1999. The first mortgage was for Rs. 991 and the second for Rs. 1,011. The mortgages were with possession and the mortgagees have been appropriating the income of the usufruct thereof for the last 50 years. There is nothing to show whether they were under a liability under the documents of mortgage to pay the revenue and other dues to the State but there is no dispute that they have been doing so for many years past. The lands were situate in Bajana State with its own peculiar land tenure system known as the Girasdari system.

The Land Reforms Act which came into force on 23rd July, 1951 purported to effect important and far reaching changes in the said system. The Preamble to the Act shows that its object was “the improvement of land revenue administration and for ultimately putting an end to the Girasdari system” and the regulation of the relationship between the Girasdari and their tenants, to enable the latter to become occupants of the land held by them and to provide for the payment of compensation to the Girasdars for the extinguishment of their rights. It will be noted at once that the Act aimed at regulating the relationship of persons in the position of landholders and their tenants and to enable the tenants to become the real owners of the soil under direct tenancy from the State. It was not meant to extinguish or affect the rights of the landholders as mortgagors unless the persons in occupation had become tenants either by contract or by operation of law.

The Act came into force in the whole of Saurashtra area of the State of Gujarat. Under section 2 (15) ‘Girasdar’ meant any talukdar, bhagdar, bhayat, cadet or mal girasia, etc. Under section 2 (13) ‘estate’ meant all land of whatever description held by a Girasdar including uncultivable waste whether used for the purpose of agriculture or not and ‘Gharkhod’ meant any land reserved by or allotted to a Girasdar before the 20th May, 1950 or for being cultivated personally and in his personal cultivation. A tenant under section 2 (30) meant an agriculturist who held land on lease from a Girasdar or a person claiming through him and included a person who was deemed to be a tenant under the provisions of the Act. Under section 3 the provisions of the Act were to have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 4 provided that “all land of whatever description held by a Girasdar is and shall continue to be liable to the payment of land revenue to the State of Gujarat.” Section 5 classified Girasdars according to the measure of their holding and under clause (c) thereof a Girasdar was to belong to class C if the total area of agricultural land comprised in his estate did not exceed Ac. 120-00. Section 6 (1) of the Act laid down that any person who was lawfully cultivating any land belonging to a Girasdar was to be deemed for the purposes of the Act to be the tenant if he was not a member of the Girasdar’s family or a servant on wages payable in cash or in kind, etc., or a mortgagee in possession. The *Explanation* to the sub-section however shows that a person who was otherwise

deemed to be a tenant was not to cease to be such only on the ground that he was a mortgagee in possession. Under section 19 it was open to any Girasdar to apply to the Mamlatdar for the allotment to him of land for personal cultivation within a certain fixed time. Such application had to be made in a specified form giving the prescribed particulars. The applicant had to show *inter alia*, the area and location of the land in respect of which the allotment was prayed for, the right under which he claimed the land and full particulars of his estate as also the area of *khalsa* land, if any in his possession. Under 20 of the Act it was for the Mamlatdar to issue notice to the tenant or tenants concerned on receipt of an application under section 19 and make an enquiry in the prescribed manner after giving the parties an opportunity of being heard. After such inquiry the Mamlatdar was required to pass an order making an allotment to the Girasdar of such land as may be specified in the order and this was to be followed by the issue of an occupancy certificate to a Girasdar in respect of his Gharkhed and the land, if any, allotted to him under the section. Under sub-section (4) no Girasdar was to obtain possession of any land held by a tenant except in accordance with the order under the section. Section 24 laid down the total area of the holding which a C class Girasdar could be allotted for personal cultivation. Sub-section (2) of the section provided that a C class Girasdar could *not be allotted any khalsa land if it was held by a tenant*. Chapter V containing sections 31 to 41 provided for acquisition of occupancy rights by tenants and section 31 laid down the consequences which were to ensue in the wake of grant of occupancy certificates. A tenant who was granted such a certificate was to be free of all relations and obligations as tenant to the Girasdar. The Girasdar in his turn was to be entitled to receive and be paid compensation as provided in the Act. Under section 36 the right, title and interest of the Girasdar in respect of an occupancy holding were to be deemed to have been extinguished on the payment by the Government of the last instalment of compensation. The functions of a Mamlatdar are laid down in section 46 of the Act. It was for him to decide *inter alia* what land should be allotted to a Girasdar for personal cultivation and to make such allotment to decide whether a person was or was not a tenant, to determine whether a tenancy shall be terminated under section 12 and many other matters. Under section 51 an appeal lay to the Collector against any order of the Mamlatdar.

The above analysis of the relevant provisions of the Land Reforms Act amply demonstrate the manner in which a change was to be brought about in the relationship between the Girasdar and his tenants and the rights which they were respectively to acquire under the orders of the Special Mamlatdar. The said officer had no jurisdiction to terminate any rights under mortgage.

The full text of the order of the Mamlatdar on the application of the Girasdars (the respondents to the appeal) is not before us. The copy of the order on the respondents' application marked Exhibit 8/1 bearing date 16th January, 1964 was handed over to us. It appears therefrom that the Girasdar was allowed to keep as Gharkhed certain lands by paying six times the assessment in the treasury but with regard to section Nos. 684 and 685 (the lands given to the mortgagees) the same were held by the Mamlatdar to be *khalsa* and full assessment thereof was ordered to be taken. The Mamlatdar further noted that there was no need to grant any occupancy rights.

On 2nd May, 1955 the respondents applied for adjustment of their debt to the Civil Judge exercising jurisdiction under the Debtors Relief Act. The creditors relied on the order of the Special Mamlatdar declaring the lands as *khalsa* as fortified by the decision of the Bhayati Court of Bajana State. It was contended that the lands having been declared *khalsa* the debtors had lost their rights therein. Reliance was also placed on Forms 7 and 8 by Counsel for the appellants to show that his clients had acquired proprietary rights in the said *khalsa* lands. According to the Civil Judge the judgment of the Bhayati Court had merely decided that the Bajana State had no title or interest in the land in question and that the Jats Mul-Girasdars were independent proprietors thereof. The Judge however remarked that

it was not for the Special Mamlatdar to decide any question as to title and he had merely ordered recovery of full assessment from the persons in actual possession and this in no way vested any title in the creditors. In the result the Civil Judge directed the restoration of the lands to the debtors subject to certain limitations and conditions.

The creditors went up in appeal to the Assistant Judge, Surendranagar. There it was contended on their behalf that the mortgages had been extinguished by the title of the paramount power and on the date of the application under the Debtors Relief Act there was no subsisting mortgage between them and the respondents. Reliance was placed on the decision of the Special Mamlatdar declaring the land to be *khalsa* land as extinguishing the mortgages by forfeiture of the land to the State. The Assistant Judge dealt with the question at some length and came to the conclusion that the mortgages had not been extinguished and not being tenants within the meaning of section 6 the creditors could not have got an occupancy certificate in respect of the lands in their possession. He further stressed on the decision of the Special Mamlatdar to show that only the liability for the full assessment of the lands was indicated without any disturbance to the rights *inter se* between the mortgagors and the mortgagees. Dealing with the question of the advances made and the amounts still due to the creditors, it was ordered that the debtors should pay Rs. 1,698 in twelve yearly instalments and the award was directed to be modified accordingly.

The matter was then taken up by way of Civil Revision to the High Court of Gujarat. The High Court arrived at the following conclusions :—

(a) The decision of the Bhayati Court merely declared that the State was entitled to recover taxes of various kinds from the lands in possession of tenants or mortgagors. There was no decision that the lands in possession of the mortgagees were confiscated to the State.

(b) The Special Mamlatdar rejected the application of the debtor and directed the lands in possession of the different creditors to be treated as Government lands as according to him the decision of the Bhayati Court amounted to a forfeiture of the lands by the Bajana State.

(c) It was not necessary to test the correctness of the decision of the Special Mamlatdar as in view of the provisions in the Debtors Relief Act which was an Act subsequent to the Land Reforms Act the provisions of the latter Act were to prevail.

In the result the High Court affirmed the order of the Assistant Judge in appeal directing possession to be handed over to the debtors.

Before us great stress was laid on the decision of the Special Mamlatdar and it was argued that subject to any appeal from his order his decision was binding on the parties and not having gone up in appeal from the order of the Special Mamlatdar the debtors could not be allowed to agitate their rights to the lands ignoring the said order. We have not before us the full text of the order of the Special Mamlatdar relied on by the appellants nor are we satisfied from copies of Form 7 prescribed under Rule 81 of the Rules promulgated under the Land Reforms Act that there was any adjudication of the rights of the debtors and the creditors *inter se*. In our view all that the Special Mamlatdar decided and had jurisdiction to decide under the Act was, whether the debtors could be given occupancy certificates or allotted any land. Gharkhed and the Special Mamlatdar merely ordered that the lands being *khalsa* full assessment had to be taken in respect of them and there was no need to grant occupancy rights. In order to get such occupancy rights the creditors had to show that they had become tenants which obviously they could not be under the provisions of section 6 of the Land Reforms Act. The fact that they had all along paid the revenue and other dues to the State, if any, would not clothe them with the right of the tenants. Under section 76 (c) of the Transfer of Property Act a mortgagee in possession must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other

charges of a public nature and all rent accruing due in respect thereof during such possession. We do not know whether there was a contract in the contrary and whether the mortgagors had covenanted to pay the rent and the revenue. But even if they could not meet the revenue and other State dues out of the income and paid the same out of their own pockets in order to save the security, the mortgagees were only entitled under section 72 (b) of the Transfer of Property Act to add the amount to the mortgage money. They could not by paying such rent or revenue acquire a title in derogation of the rights of the mortgagors and the payments, if any, are to be taken into account when the mortgagors seek to redeem the property.

That apart, it has not been shown to us that the debtors were awarded any compensation in respect of the *khalsa* lands given in mortgage to the appellants. The occupancy certificates, if any, given by the Special Mamlatdar to the appellants cannot under the provisions of the Land Reforms Act extinguish the title of the mortgagors. Whether the mortgagors as C class Girasdar can be allowed to retain land in excess of the limits specified in the Act and whether as a result of the restoration of the lands to them by the award such limit will be exceeded in this case, are not questions for us to consider. The right of the mortgagors not being extinguished under any provision of law to which our attention was drawn, no fault can be found with the award as finally modified by the judgment of the Assistant Judge and effect must be given thereto. In our view, it is not necessary to consider the point canvassed at length before the High Court and dealt with in the judgment of the said Court as to whether the provisions of the Debtors Relief Act over-ride those in the Land Reforms Act. The object of the two Acts are different. The object of the Land Reforms Act, as already noted is the improvement of the land revenue administration and putting an end to the Girasdari system and granting of occupancy rights to the Girasdar and/or their tenants, whereas the Debtors Relief Act governs the rights of the debtors and creditors *inter se inter alia* by scaling down the debts and providing for restoration of their property to debtors. In our view, the rights of the debtors in this case were not extinguished under the Land Reforms Act and it was open to the Court exercising jurisdiction under the Debtors Relief Act to scale down the debt and provide for restoration of the land in possession of the mortgagees to the mortgagors on taking fresh accounts between the parties and directing payments by one party to the other as has been done in this case.

The appeals therefore fail and are dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT AND V. BHARGAVA, JJ.

The Praga Tools Corporation

.. *Appellant**

v.

G. V. Imanual and others.

.. *Respondents.*

Constitution of India (1950), Article 226—Writ of mandamus—When can lie—Company non-statutory body incorporated under Companies Act—Whether writ of mandamus lies against the company—Agreement between company and its workmen—Court holding writ of mandamus against company not maintainable but declaring agreement to be illegal and void—Validity of—No relief by way of declaration as to invalidity of agreement can be granted.

No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of *habeas corpus mandamus*, etc. or any of them for the enforcement of any of the

*C.A. No. 612 of 1966.

rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a *mandamus* lies to secure the performance of a public or Statutory Body in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for *mandamus* will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any dispute. The condition precedent for the issue of *mandamus* is that there is one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of *mandamus* is, in form, a command directed to a person, corporation or/and inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A *mandamus* can be issued to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporation to carry out duties placed on them by the statute authorising their undertakings. A *mandamus* would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities.

On facts held, the company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor public duty imposed on it by a statute in respect of which enforcement could be sought by means of a *mandamus*, nor was therein its workmen any corresponding legal right for enforcement of any such statutory or public duty held. The High Court was right in holding that no writ petition for a *mandamus* or an order in the nature of *mandamus* could lie against the company.

Declaration of invalidity can be issued against a person or an authority or a Corporation where the impugned act is in violation of or contrary to a statute under which it is set up or governed or a public duty or responsibility imposed on such person, authority or body by such a statute.

Once the writ petition was held to be misconceived on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such declaration against a company registered under the Companies Act and not set up under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it and its workmen. Held, The High Court was in error in granting the said declaration.

Appeal by Special Leave from the Judgment and Order dated the 16th April, 1965 of the Andhra Pradesh High Court in Writ Appeal No. 37 of 1964.*

S. V. Gupte, Senior Advocate (R. *Thaiagarajan*, Advocate of *M/s. Aiyar & Aiyar*, with him), for Appellant.

Janardan Sharma, for Respondents Nos. 1 to 3.

The Judgment of the Court was delivered by

Shelat, J.—The Praga Tools Corporation (hereinafter referred to as the company) is a company incorporated under the Indian Companies Act, 1913. At the material time, however, the Union Government and the Government of Andhra Pradesh between them held 56 per cent and 32 per cent of its shares respectively and the balance of 12 per cent shares were held by private individuals. Begin the

largest shareholder, the Union Government had the power to nominate the company's directors. Even so, being registered under the Companies Act and governed by the provisions of that Act, the company is a separate legal entity and cannot be said to be either a Government Corporation or an industry run by or under the authority of the Union Government.

At the material time there were two rival workmen's unions in the company, the Praga Tools Employees' Union and the Praga Tools Corporation Mazdoor Sabha (hereinafter referred to as the union and the sabha respectively). On 1st July, 1961 a settlement was arrived at between the company and the said union under which the workmen *inter alia* agreed to observed industrial truce for a period of three years and not to resort to strikes, stoppage of work or go-slow tactics. On 10th December, 1962 the company and the said union entered into a supplementary settlement under which the company agreed not to retrench or lay-off any of the workmen during the said period of truce on an assurance from the said union of co-operation and willingness of the workmen to carry out alternative tasks assigned to them even if they were in a slightly lower cadre without loss of emoluments. The said two settlements were arrived at and recorded in the presence of the Commissioner of Labour under sections 2 (j) and 18 (1) of the Industrial Disputes Act, 1947 and were to be in force as aforesaid until 1st July, 1964. On 20th December, 1963, however, the company entered into an agreement with the said union to which the said sabha was not a party. The agreement recited that there were several disputes between the company and the union and that some of them were the subject-matter of conciliation proceedings and some were pending arbitration or adjudication. Clause (1) provided that the said agreements dated 1st July, 1961 and 10th December, 1962 to the extent that they were inconsistent with this agreement would stand automatically repealed or modified by this agreement. Clause (6) stated that there was an immediate, unavoidable need for reducing substantially the overhead expenditure of the company and for effecting economy and therefore notwithstanding the agreement dated 10th December, 1962 "both the parties have prepared a list of the categories and persons who would be retrenched after careful consideration." The said list was attached to the agreement as Annexure VI. Clause (6) also provided that the agreement dated 10th December, 1962 stood modified so as to allow the said retrenchment to take place immediately in accordance with law. The clause further provided that in order to mitigate the consequences of the proposed retrenchment the company had evolved a scheme of voluntary retirement with terminal benefits superior to those provided under the Industrial Disputes Act, but the scheme of voluntary retirement would be available to the workmen only for a period of 10 days from the date of the agreement. It further provided that the company and the said union had agreed that an attempt would be made to rehabilitate the retrenched persons by helping them to obtain alternative employment and the company had for the purpose contacted public sector and other industries and in particular the Heavy Engineering Corporation, Ranchi for absorption as far as possible of the retrenched personnel. The effect of this agreement was to enable the company, notwithstanding the two earlier settlements, to carry out retrenchment of 92 workmen mentioned in Annexure VI thereto with effect from 1st January, 1964.

Respondent 1 and 40 other workmen thereupon filed a writ petition under Article 226 in the High Court of Andhra Pradesh challenging the validity of the said agreement impeaching therein the company, the said union and the Regional Assistant Commissioner as respondents. The petition claimed a writ of *mandamus* or an order in the nature of *mandamus* or any other order or direction restraining the respondents to implement or enforce the said agreement. The writ petition was in the first instance heard by a learned Single Judge of the High Court before whom the workmen raised the following contentions; (1) that the said agreement dated 20th December, 1963 was invalid as it was entered into by the union in collusion with the company and was in violation of the said two earlier settlements, (2) that there could be no industrial dispute within the meaning of section 2 (k) of the Act as the said two earlier settlements, not having been terminated under section

19 (2), were in force, that therefore there could not be a valid conciliation under section 12 and accordingly the fact of the Conciliation Officer having signed the impugned agreement gave no binding force to it, (3) that the retrenchment of the 92 workmen was illegal and void as it was in breach of section 25 (f) inasmuch as no notice thereof was given to the appropriate Government, and (4) that the company being under the management of the Union Government, the appropriate Government in regard to the dispute was the Central Government and not the State Government and consequently the impugned agreement which was signed by the Conciliation Officer appointed by the State Government was not valid and no retrenchment could validly be effected under the force of such agreement.

The learned Single Judge negatived these contentions holding that the company was neither an industry run by or under the authority of the Union Government nor under its management but being a company registered under the Companies Act the appropriate Government was the State Government. He also held that there was no proof of the said union having entered into the impugned agreement in collusion with the company. He further held that the union by its letter dated 5th April, 1963, had raised an industrial dispute and had thereby requested that the question of retrenchment should be settled between the parties, that the said dispute with the consent of the company and the union was brought for conciliation before the Conciliation Officer and that the impugned agreement, having been brought about in the course of the said conciliation proceedings, was binding on all workmen including the petitioners in the writ petition despite the fact that they were members of the Sabha and not of the Union. In this view the learned Single Judge held that it was not necessary for him to decide the preliminary objection raised by the company that no writ petition for a *mandamus* could lie against it. He dismissed the writ petition on merits on the basis of the aforesaid findings given by him. 28 out of the said 41 workmen who had filed the writ petition filed a Letters Patent Appeal against the said judgment. The Division Bench of the High Court which heard the appeal held; (1) that since the dispute relating to the company's right to retrenchment was already settled under section 18 (1) by the said supplementary settlement of 10th December, 1962, no industrial dispute could be said to exist or arise until the said settlement was duly terminated under section 19 (2), that therefore there could be no valid conciliation proceedings in respect of the question of retrenchment and that the impugned agreement permitting the company to retrench, though it bore the signature of the Conciliation Officer, was not a valid agreement; (2) that so long as the earlier settlements were not terminated they held the field, and (3) that the said letter dated 5th April, 1963 relied on by the learned Single Judge as having raised an industrial dispute regarding retrenchment did not in fact contain or raise any such question. The Division Bench held that the said letter raised only the question of revision of wage-structure and other demands but not the question of retrenchment. The letter of 29th July, 1963 of the Conciliation Officer to the company relied on by the company also referred to the demands contained in the said letter of 5th April, 1963, namely, the revision of wage-structure dearness allowance, promotion and other matters, but not the question of the company's right to retrenchment. The Division Bench therefore held that there was nothing on record to show that retrenchment was the subject-matter of any conciliation before the conciliation officer and therefore any agreement conferring on the company the right to retrench so long as the said earlier settlements were not terminated was invalid in spite of the Conciliation Officer having given his assent to and affixed his signature on it. The learned Judges, however, held that the company being one registered under the Companies Act and not having any statutory duty or function to perform was not one against which a writ petition for a *mandamus* or any other writ could lie. No such petition could also lie against the conciliation officer as on the facts of the case that officer did not have to implement the impugned agreement. The Division Bench, however, held that though the writ petition was not maintainable it could grant a declaration in favour of three workmen, namely, appellants 6, 16 and 25 before it, that the impugned agreement was illegal and void and dismissed the writ petition subject to the said declaration. The company chal-

lenges in this appeal by Special Leave the validity of this judgment making such a declaration.

Thus the only question which arises in this appeal is whether in the view that it took that the writ petition was not maintainable against the company the High Court could still grant the said declaration.

In our view the High Court was correct in holding that the writ petition filed under Article 226 claiming against the company *mandamus* or an order in the nature of *mandamus* was misconceived and not maintainable. The writ obviously was claimed against the company and not against the Conciliation Officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of *habeas corpus*, *mandamus*, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a *mandamus* lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for *mandamus* will not lie for an order of re-instatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. [See *Sohan Lal v. Union of India*¹]. In *Regina v. Industrial Court and others*², *mandamus* was refused against the Industrial Court though set up under the Industrial Courts Act, 1919 on the ground that the reference for arbitration made to it by a Minister was not one under the Act but a private reference. "This Court has never exercised a general power" said Bruce, J. in *R. v. Lewisham Union*³, "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a *mandamus*. It has always required that the applicant for a *mandamus* should have a legal and a specific right to enforce the performance of those duties". Therefore, the condition precedent for the issue of *mandamus* is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of *mandamus* is, in form, a command directed to a person, Corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A *mandamus* can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or Corporations to carry out duties placed on them by the statutes authorising their undertakings. A *mandamus* would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities Cf. *Halsbury's Laws of England* (3rd Edn.), Vol. II, page 52 and onwards].

The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a *mandamus*, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court therefore, was right in holding that no writ petition for a *mandamus* or an order in the nature of *mandamus* could lie against the company.

The grievance of the company, however, is that though the High Court held rightly that no such petition was maintainable, it nevertheless granted a declaration in favour of three of the said workmen, a declaration which it could not issue once it held that the said writ petition was misconceived. The argument was that such a declaration, if at all, could only issue against public bodies or companies or

1. (1957) S.C.J. 489 : (1957) 2 An.W.R. (S.C.) 50 : (1957) 2 M.L.J. (S.C.) 50 : (1957) S.C.R. 738.

2. (1965) 1 Q.B. 377.

3. (1897) 1 Q.B. 498, 501.

Corporations set up or controlled by statutes in respect of acts done by them contrary to or in breach of the provisions of such statutes. If a public authority purports to dismiss an employee otherwise than in accordance with mandatory procedural requirements or on grounds other than those sanctioned by the statute the Courts would have jurisdiction to declare its act a nullity. Thus, where a Hospital Services' Board dismissed a clerk for reasons not authorised by the relevant conditions of service a declaration was granted to the applicant by the House of Lords. [*Mc. Ghelland v. Northern Ireland General Health Services Boards*¹]. Even where the statutory power of dismissal is not made subject to express procedural requirements or limited to prescribe grounds Courts have granted a declaration that it was invalidly exercised if the authority has failed to observe rules of natural justice or has acted capriciously or in bad faith or for impliedly unauthorised purposes. [See *Ridge v. Baldwin*² and *Short v. Poole Corporation*³]. Declarations of invalidity have often been founded on successful assertions that a public duty has not been complied with. [See *Attorney-General v. St. Ives R.D.C.*⁴]. It is, therefore, fairly clear that such a declaration can be issued against a person or an authority or a Corporation where the impugned act is in violation of or contrary to a statute under which it is set up or governed or a public duty or responsibility imposed on such person, authority or body by such a statute.

The High Court however, relied on two decisions of this Court as justifying it to issue the said declaration. The two decisions are *Bidi Bidi, Leaves and Tobacco Merchants' Association v. The State of Bombay*⁵, and *A.B. Abdul Kadir v. The State of Kerala*⁶. But neither of these two decisions is a parallel case which could be relied on. In the first case, the declaration was granted not against a company, as in the present case, but against the State Government and the declaration was as regards the invalidity of certain clauses of a notification issued by the Government in pursuance of power under section 5 of the Minimum Wages Act, 1948 on the ground that the said clauses were beyond the purview of that section. In the second case also, certain rules made under the Cochin Tobacco Act of 1981 (M.E.) and the Travancore Tobacco Regulation of 1987 (M.E.) were declared void *hab initio*. These cases were therefore not cases where writ petitions were held to be not maintainable as having been filed against a company and despite that fact a declaration of invalidity of an impugned agreement having been granted. In our view once the writ petition was held to be misconceived on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute, no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such declaration against a company registered under the Companies Act and not set up under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it and its workmen. The High Court, therefore, was in error in granting the said declaration.

The result is that the appeal must be allowed and the said declaration set aside. In the circumstances of the case we make no order as to costs.

S.V.J.

Appeal allowed.

1. (1957) 1 W.L.R. 594.

2. (1961) A.C. 40.

3. (1962) Ch. 66 at pp. 90 to 91.

4. (1961) 1 Q.B. 366.

5. (1962) 1 S.C.R. (Supp.) 381.

6. (1962) 2 S.C.R. (Supp.) 741 : (1963) 1 S.C.J. 75.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—MR. M. HIDAYATULLAH, *Chief Justice*, J. C. SHAH, V. RAMASWAMI, G. K. MITTER AND A.N. GROVER, JJ.

Mohd. Ismail

.. Appellant*

v.

Nanney Lal

.. Respondent.

Uttar Pradesh (Temporary) Control of Rent and Eviction Act (III of 1947), sections 3 (3) and 7-F—Scope—Suit for eviction—Permission to institute—State Government cancelling the permission given by the Commissioner—Suit, if becomes incompetent—Judicial process.

The question for determination is whether a suit for eviction of a tenant by a landlord, after obtaining the permission of the Commissioner under sub-section (3) of section 3 of the Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 becomes incompetent on the making of an order by the State Government under section 7-F cancelling the permission to sue given by the Commissioner. *Held*, that once a suit is validly instituted it must take its course and the decree passed therein must be given effect to unless the words of the statute render the decree inexecutable or liable to re-opening in a proper case on grounds mentioned in the statute. It was pointed out by this Supreme Court in *Bhagwan Das's case*, C.A. No. 1617 of 1958 dated 27th September, 1968, that the Legislature had provided for a decree for eviction of a tenant passed before the commencement of the Act liable to be rendered in executable unless it was based on any of the grounds mentioned in sub-section (3). The Legislature might, if so advised, have provided for a similar result in a case where the State Government had revoked the permission to sue granted by the Commissioner. It would make a mockery of the judicial process if it were to be held on the language of the sections as they stand at present, that irrespective of a decree being passed by the trial Court being upheld in appeal by the High Court or by this Court, the order of the State Government would nullify all proceedings.

Appeal by Special Leave from the Judgment and Order dated the 13th December, 1968 of the Allahabad High Court in Second Appeal No. 3474 of 1963.

J.P. Goyal, G.N. Wantoo and V.G. Parashar, Advocates, for Appellant.

K.P. Gupta, Advocate, for Respondent.

The Judgment of the Court was delivered by

Mitter, J.—The question in this appeal by Special Leave is, whether a suit for eviction of a tenant by a landlord, after obtaining the permission of the Commissioner under sub-section (3) of section 3 of the Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 becomes incompetent, on the making of an order by the State Government under section 7-F cancelling the permission to sue given by the Commissioner.

The relevant facts for disposal of this appeal are as follows. The respondent-landlord obtained permission of the District Magistrate to file a suit for eviction against the appellant under section 3 (1) of the Act on 29th May, 1961. The tenant went up to the Commissioner of Agra Division under section 3 (2) of the Act. On 26th July, 1961, the Commissioner dismissed the revision application. The tenant then filed a further revision application to the State Government under section 7-F of

* C.A. No. 263 of 1969.

the Act. Before the disposal of the last revision application, the landlord filed a suit for ejectment on 18th January, 1962, in the Court of the Munsif, Etah in pursuance of the permission given by the Commissioner. On 16th June, 1962, the State Government set aside the order of the Commissioner and revoked the permission granted to the landlord. The suit was dismissed by the Munsif of Etah on 17th November, 1962. The Civil Judge of Etah allowed the appeal of the landlord on 28th September, 1963. The tenant went up in Second Appeal to the High Court. On 13th December, 1968, a learned single Judge of the Allahabad High Court dismissed the tenant's appeal following a judgment of this Court in *Bhagwan Das v. Paras Nath*¹. Learned Counsel for the appellants contended that some aspects of the question had not been raised before and/or considered by this Court on the prior occasion which might have induced the Court to come to a different conclusion. Having heard Counsel at some length, we are convinced that there is no merit in his submissions. We respectfully agree with the decision in *Bhagwan Das's case*¹, and are satisfied that Counsel has not been able to show that any relevant aspect of the question was not considered on the former occasion.

There was no unanimity of opinion in the Allahabad High Court as regards the effect of an order passed by the State Government contrary to the Commissioner's order on the basis of which a suit for eviction was filed in the subordinate Courts. So far as the High Court was concerned, the matter was laid at rest by a Full Bench decision in the case of *Bansi Ram v. Mantri Lal*². This Court while not concurring with all that was said in *Bansi Ram's case*², agreed with the Full Bench that a suit validly instituted after obtaining permission as required by section 3 did not cease to be maintainable even if the State Government thereafter revoked the permission granted.

Section 3 (1) of the Act restricts the rights of landlords to institute suits for eviction of tenants to cases covered by clauses (a) to (g) of that sub-section except with the permission of the District Magistrate. The words of this sub-section are imperative and show that no such suit can be filed without the permission of the said authority. Under the Transfer of Property Act the only pre-requisite to the institution of a valid suit for eviction of a monthly tenant is the service of a proper notice to quit. The landlord is not obliged to make out any ground for such eviction. Where he seeks to eject a tenant and can make out a case which falls within any of the sub-clauses (a) to (g), he need not approach the District Magistrate for permission to sue. It follows that the District Magistrate must consider the justification for the institution of a suit in all other cases. His order is expressly made subject to any order under sub-section (3) of the section. In order that power under the latter sub-section can be exercised, it is necessary for the aggrieved party to apply to the Commissioner to revise the order of the Magistrate by making an application under sub-section (2) of the section within 30 days from the date on which the order is communicated to him. Sub-section (3) enjoins upon the Commissioner to hear the application, as far as may be, within six weeks from the date of making it and his powers in this regard are not subject to any limitation. A landlord may file a suit for eviction on getting the permission of the District Magistrate to do so but he runs the risk of such permission being revoked by the Commissioner in which case his suit will become infructuous as by the express words of sub-section (1) the permission of the District Magistrate is made subject to revision by the Commissioner. The question arises whether the same result will follow if the order of the Commissioner is in its turn upset by the State Government acting under section 7-F and whether sub-section (4) of section 3 should be so construed. In our opinion, an order under section 7-F cannot affect a suit filed prior thereto if the landlord has

1. C. A. No. 1617 of 1968 decided on 27th September, 1968.

2. I.L.R. (1965) 1 All. 545.

obtained the necessary sanction from the Commissioner. The relevant portion of the sections are quoted below* for facility of reference.

Under sub-section (1) the maintainability of a suit on grounds other than those mentioned in clauses (a) to (g) is made expressly subject to an order under sub-section (3). It will be noted that the Legislature has conferred various powers on the State Government besides the power to reverse orders under section 3. For reasons of its own the Legislature did not provide that the right to file a suit would be subject to or dependent upon an order under section 7-F in the same way as an order under section 3 (3).

Various reasons were given by this Court in *Bhagwan Das's case*¹ for coming to the conclusion that section 7-F was not to be construed in the same way as section 3 (3) and we are in entire agreement therewith. When a landlord files a suit for eviction only with the permission of the District Magistrate he knows that it would be open to the tenant to ask for revocation of the permission by an application to the Commissioner within 30 days from the communication of the order of the District Magistrate to him. He is also aware that the Commissioner must, except for unavoidable reasons, hear the application and dispose of it within six weeks thereafter. At the most, therefore he has to wait for about ten weeks from the order of the District Magistrate granting permission to find out whether he can safely institute a suit. But so far as the revisional powers of the State Government are concerned there is no time-limit fixed either for application by an aggrieved party or for the disposal thereof. It may be made at any time and the State Government is further authorised by this section (section 7-F) to act *suo motu*. In such a state of affairs, it would not be right to hold that the landlord must wait indefinitely and find out whether the permission granted to him will be upheld by the State Government should the tenant make an application for revision of the order of the Commissioner.

Apart from the above consideration, the words of section 7-F in our opinion, indicate that the State Government can only exercise its jurisdiction to revise the order of the Commissioner before the actual institution of the suit. The language of section 7-F shows that on the facts of the case before it the State Government must consider whether the grant of or refusal to grant permission for the filing of a suit should be upheld or not. The section does not seem to be aimed at invalidating a suit already instituted and can only operate at a stage before the landlord launches his proceeding. There is nothing in sub-section (4) of section 3 read with section 7-F to show that a landlord should wait till the powers of the revising authorities have been exhausted. If the Legislature had so intended, it could have used words in sub-section (1) of section 3 to indicate that the grant of permission by the District Magistrate would also be subject to an order under section 7-F. The same result might have been achieved by providing for the stay of a suit in case the State Government made an order under section 7-F contrary to that of the Commissioner.

*3. *Restrictions on eviction.*—(1) Subject to any order passed under sub-section (3) no suit shall, without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of the following grounds:—

(a) to (g)

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(2) Where any application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses to grant the permission, the party aggrieved by his order may, within 30 days from the date on which the order is communicated to him, apply to the Commissioner to revise the order.

(3) The Commissioner shall hear the application made under sub-section (2), as far as may be, within six weeks from the date of making it, and he may, if he is not satisfied as to the correctness legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him alter or reverse his order, or make such other order as may be just and proper.

(4) The order of the Commissioner under sub-section (3) shall, subject to any order passed by the State Government under section 7-F be final.

7-F.—*Revision to State Government.*—The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in section 3 or requiring any accommodation to be let or not to be let any person under section 7 or directing a person to vacate any accommodation under section 7-A and may make such order as appears to it necessary for the ends of justice.

Once a suit is validly instituted it must take its course and the decree passed therein must be given effect to unless the words of the statute render the decree inexecutable or liable to re-opening in a proper case on grounds mentioned in the statute. It was pointed out by this Court in *Bhagwan Das's case*¹ that the Legislature had provided for a decree for eviction of a tenant passed before the commencement of the Act liable to be rendered inexecutable unless it was based on any of the grounds mentioned in sub-section (3). The Legislature might, if so advised, have provided for a similar result in a case where the State Government had revoked the permission to sue granted by the Commissioner.

It was also pointed out in *Bhagwan Das's case*¹, that it would make a mockery of the judicial process if we were to hold on the language of the sections as they stand at present, that irrespective of a decree being passed by the trial Court being upheld in appeal by the High Court or by this Court, the order of the State Government would nullify all proceedings.

There is nothing in the judgment of this Court in *Shri Bhagwan v. Ram Chand*² read with section 16 of the Act which would incline us to come to any different conclusion. On the strength of the decision in that case read in the light of section 16, it was argued that the order of the State Government being quasi-judicial in nature section 16 (inset) placed the order of the State Government beyond the pale of scrutiny by a Court of law. We cannot see any force in this argument. The permission to sue given by the Commissioner has no effect on the course of the trial of the issues involved in that suit. That permission is only a pre-requisite to a suit as a notice under section 80 of the Code of Civil Procedure. The Court trying the suit for eviction has to find out whether a proper notice to quit was given and whether the tenancy was properly determined. It must also examine the grounds on the basis of which the landlord seeks to evict the tenant and decide for itself whether such grounds exist. Neither the District Magistrate nor the Commissioner nor the State Government is obliged to disclose any reasons which may influence the said authorities in coming to their decision and the Court is not called upon to examine whether the conclusion of any of the said authorities was properly arrived at.

Learned Counsel for the appellant would have us hold that section 16 ousted the jurisdiction of the Court to consider the propriety of any order of the State Government. In our view, that is not the effect of that section. The decision in *Shri Bhagwan v. Ram Chand*², shows that the State Government must offer a reasonable opportunity to both the parties while it exercises its jurisdiction under section 7-F and an order which is made in violation of the principles of natural justice may be quashed. Once the jurisdiction under section 16 is properly exercised the Court cannot examine the propriety of the order made thereunder.

In our view, as already pointed out, jurisdiction under section 7-F is only exercisable at a point of time anterior to the filing of a suit and Courts of law can therefore disregard any order under that section which is made after the filing of a suit.

In the result, the appeal fails and is dismissed with costs. Two months time granted from today for vacating subject to payment of rent and an undertaking given that the property would be handed over peacefully within that time.

V.M.K.

Appeal dismissed.

1. C.A. No. 1617 of 1968, decided on 27th September, 1968.

2. (1966) 2 S.C.J. 295 : (1965) 3 S.C.R. 218. Section 16.—Orders under the Act not

to be questioned in any Court—No order made under this Act by the State Government or the District Magistrate shall be called in question in any Court.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND K.S. HEGDE, JJ.

Shivashankar Prasad Sah and another

.. Appellants*

v.

Baikunth Nath Singh and others

.. Respondents.

*Civil Procedure Code (V of 1908), section 11—Res judicata—Plea, when can be said to be barred—Order 9, rule 9, Civil Procedure Code.**Bihar Land Reforms Act (XXX of 1950), sections 2, 3, 4, 6 and 14—Scope—Estate subject to mortgage vesting in the State—No suit to lie in any civil Court for the recovery of any money due from the proprietor (of the Estate) or tenure holder—Mortgage decree, if has become unexecutable.*

The real question for decision in this case is whether the dismissal of Misc. Cases Nos. 94 and 110 of 1959 for default of the judgment-debtors can be said to be a final decision of the Court after hearing the parties. Before a plea can be held to be barred by the principles of *res judicata*, it must be shown that the plea in question had not only been pleaded but it had been heard and finally decided by the Court. A dismissal of a suit for default of the plaintiff, would not operate as *res judicata* against a plaintiff in a subsequent suit on the same cause of action. If it was otherwise there was no need for the Legislature to enact rule 9 of Order 9, Civil Procedure Code, which in specific terms says that where a suit is wholly or partly dismissed under rule 8, the plaintiff should be precluded from bringing a fresh suit in respect of the same cause of action. Only a decision by a Court could be *res judicata*, whether it be statutory under section 11, Civil Procedure or constructive as a matter of public policy on which the entire doctrine rests. Before an earlier decision can be considered as *res judicata* the same must have been heard and finally decided.

There is no dispute that the property mortgaged was an Estate within the meaning of section 2 (i) and the notification issued under section 3 covered the entirety of the estate. Reading sections 3, 4 and 6 together, it follows that all Estates notified under section 3 vest in the State free of all encumbrances. The quondam proprietors and tenure-holders of those Estates lose all interests in those Estates. As proprietors they retain no interest in respect of them whatsoever. But in respect of the lands enumerated in section 6 the State settled on them the rights of raiyats. Though in fact the vesting of the Estates and the deemed settlement of raiyats rights in respect of certain classes of lands included in the Estate took place simultaneously, in law the two must be treated as different transactions; first there was a vesting of the Estates in the State absolutely, and free of all encumbrances. Then followed the deemed settlement by the State of raiyat's rights on the quondam proprietors. Therefore in law it would not be correct to say that what vested in the State are only those interests not coming within section 6. Section 4 (d) provides that 'no suit shall lie in any civil Court for the recovery of any money due from such proprietor (proprietor whose estate has vested in the State) or tenure holder the payment of which is secured by a mortgage or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped'. Proceedings in this section undoubtedly include execution proceedings. This is not a case where only a part of the mortgaged property has vested in the State. Under the circumstances the only remedy open to the decree holders is that provided in Chapter IV of the Act i.e., a claim under section 14 before the Claims Officer for "determining the amount of debt legally and justly payable to each creditor in respect of his claim".

Appeal by Special Leave from the Judgment and Order dated the 3rd February, 1964 of the Patna High Court in Appeal from Appellate Order No. 99 of 1963.

Sarjoo Prasad, Senior Advocate (*R.C. Prasad*, Advocate, with him), for Appellants.

K. K. Sinha and *S. K. Bisaria*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Hegde, J.—This appeal against the judgment of the Patna High Court dated the 3rd February, 1964, in its Appellate Order No. 99 of 1963 was filed after obtaining Special Leave from this Court. It arises from a proceeding under section 47, Civil Procedure Code. In execution of a mortgage decree, the decree-holders sought to proceed against Bakasht lands of the judgment-debtors. The judgment-debtors objected to the same on the ground that the execution was barred under section 4 (d) of the Bihar Land Reforms Act, 1950 (to be hereinafter referred to as the Act). But that objection was overruled by the executing Court on two different grounds namely (1) that the objection in question is barred by the principles of *res judicata* and (2) the bar of section 4 (d) pleaded is not tenable. The decision of the execution Court was affirmed in appeal but reversed in second appeal by the High Court.

The two questions that arise for decision in this appeal are (1) whether the objection as regards the executability of the decree pleaded by the judgment-debtors is barred by the principles of *res judicata* and (2) whether the mortgage decree has become unexecutable in view of the provisions of the Act.

We shall now briefly set out the material facts of the case. The mortgagees, the appellants in this appeal obtained a preliminary decree on 26th June, 1947 on the basis of a mortgage. The property mortgaged was an Estate within the meaning of the Act. That property included both Bakasht lands as well as other lands. The Act came into force after the passing of the aforementioned preliminary decree. The decree-holders filed petition for passing a final decree on 19th September, 1955. The Estate mortgaged vested in the State of Bihar on 1st January, 1956 as a result a notification issued under section 3 (1) of the Act. A final decree was passed in the mortgage suit on 1st October, 1956. Thereafter the mortgagees applied under section 14 of the Act and got determined the compensation to which they were entitled under the Act. It is said that they did not proceed any further in that proceeding but on the other hand filed on 18th June, 1958, an execution petition to execute the mortgage decree against the Bakasht lands. The judgment-debtors resisted that execution by filing an application under section 47, Civil Procedure Code, (Misc. Case No. 94 of 1959) on the ground that the decree cannot be executed in view of the provisions of the Act. That application was dismissed for the default of the judgment-debtors on 12th September, 1959. A second application raising the same ground (Misc. Case No. 110 of 1959) was filed by the judgment-debtors on 24th September, 1959. That against was dismissed on 23rd July, 1960, for default of the judgment-debtors. A third application raising the same ground of objection (Misc. Case No. 91 of 1960) was filed by the judgment-debtors on 12th September, 1960. That application was dismissed on 4th January, 1962, after examining the contentions of the parties. Therein the execution Court came to the conclusion that the objection raised by the judgment-debtors is barred on the principles of *res judicata* and further that the same has no merits. This decision as mentioned earlier was affirmed by the appellate Court but reversed by the High Court.

We shall first take up the contention that the objection taken by the judgment-debtors is barred by principles of *res judicata*. Though at one stage, learned Counsel for the appellants-decree-holders attempted to bring the case within Explanation 5, section 11, Civil Procedure Code, he did not pursue that line of argument but tried to support his contention on the broader principles of *res judicata*. The real question for decision in this case is whether the dismissal of Misc. Cases Nos. 94 and 110 of 1959 for default of the judgment-debtors can be said to be a final decision of the Court after hearing the parties. Before a plea can be held to be barred by the

principles of *res judicata*, it must be shown that the plea in question had not only been pleaded but it had been heard and finally decided by the Court. A dismissal of a suit for default of the plaintiff, we think, would not operate as *res judicata* against a plaintiff in a subsequent suit on the same cause of action. If it was otherwise there was no need for the Legislature to enact rule 9, Order 9, Civil Procedure Code, which in specific terms says that where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh-suit in respect of the same cause of action. The contention that the dismissal of a previous suit for default of the plaintiffs operates as *res judicata* in a subsequent suit in respect of the same claim was repelled by the Judicial Committee of the Privy Council in *Maharaja Radha Parshad Singh v. Lal Sahah Rai and others*¹. Therein the Judicial Committee observed thus:

"None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Judge of the Shahabad Court in 1881; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of Chapter VII of the Code; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief."

From this decision it is clear that the Judicial Committee opined that before a plea can be held to be barred by *res judicata* that plea must have been heard and determined by the Court. Only a decision by a Court could be *res judicata*, whether it be statutory under section 11, Civil Procedure Code or constructive as a matter of public policy on which the entire doctrine rests. Before an earlier decision can be considered as *res judicata* the same must have been heard and finally decided—see *Palvearthi Venkata Subba Rao v. Valluri Jagannadha Rao and others*².

The Courts in India have generally taken the view that an execution petition which has been dismissed for the default of the decree-holder though by the time that petition came to be dismissed, the judgment-debtor had resisted the execution on one or more grounds, does not bar the further execution of the decree in pursuance of fresh execution petitions filed in accordance with law—see *Lakshmibai Anant Kondkar v. Ravji Bhikaji Kondkar*³. Even the dismissal for default of objections raised under section 47, Civil Procedure Code, does not operate as *res judicata* when the same objections are raised again in the course of the execution—see *Bahir Das Pal and another v. Girish Chandrh Pal*⁴; *Bhagwati Prasad Sah v. Radha Kishun Sah and others*⁵; *Jethmal and others v. Mst. Sakina*⁶; *Bishwanath Kundu v. Smt. Subala Dassi*⁷. We do not think that the decision in *Ramnaraian v. Basudeo*⁸, on which the learned Counsel for the appellant placed great deal of reliance is correctly decided. Hence we agree with the High Court that the plea of *res judicata* advanced by the appellant is unsustainable.

The next question is whether the execution is barred under the provisions of the Act. The contention of the judgment-debtors is that is so barred where as according to the appellants as the Bakasht lands which form part of the mortgaged property had not vested in the State, the execution can proceed against those lands. Therefore we have to see whether the entire mortgaged property had vested in the State in pursuance of the notification under section 3 or only the mortgaged property minus the Bakasht lands.

There is no dispute that the property mortgaged was an Estate within the meaning of section 2 (i) and notification issued under section 3 covered the entirety of the Estate. But what was urged on behalf of the appellants is that what had vested in the State was the non-bakasht lands as well as the proprietary interest in the Bakasht lands and hence the Bakasht lands do not have the protection of

1. L.R. (1890) 17 I.A. 150.

2. (1964) 2 S.C.R. 310.11

3. (1929) 31 Bom. L.R. 400.

4. A.I.R. 1923 Cal. 287.

5. A.I.R. 1950 Pat. 354.

6. A.I.R. 1961 Raj. 59.

7. A.I.R. 1962 Cal. 272.

8. (1946) I.L.R. 25 Pat. 595.1

section 4 (d); Consequently it is not necessary for them to exclusively proceed under section 14.

The consequences of the vesting of an Estate is set out in section 4. Section 4 (a) provides that once an Estate vests in the State the various rights in respect of that Estate enumerated therein shall also vest in the State, absolutely free from all encumbrances. Among the rights enumerated therein undoubtedly includes the right of possession. In view of section 4 (a) there is hardly any doubt that the proprietor loses all his rights in the estate in question. After setting out the various interests lost by the proprietor that section proceeds to say "such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act." In order to find out the implication of the clause extracted above we have to go to section 6 which provides that on and from the date of vesting all lands used for agriculture or horticultural purposes which were in khas possession of an intermediary on the date of vesting (including certain classes of land specified in that section) shall subject to the provisions of sections 7-A and B be deemed to be settled by the State with such intermediary and he shall, be entitled to retain possession thereof and hold the as a raiyat under the State having occupancy rights in respect of such lands, subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner.

Reading sections 3, 4 and 6 together, it follows that all Estates notified under section 3 vest in the State free of all encumbrances. The quondam proprietors and tenure-holders of those Estates lose all interests in those Estates. As proprietors they retain no interest in respect of them whatsoever. But in respect of the lands enumerated in section 6 the State settled on them the rights of raiyats. Though in fact the vesting of the Estates and the deemed settlement of raiyats rights in respect of certain classes of lands included in the Estates took place simultaneously, in law the two must be treated as different transactions; first there was a vesting of the Estates in the State absolutely, and free of all encumbrances. Then followed the deemed settlement by the State of raiyat's rights on the quondam proprietors. Therefore in law it would not be correct to say that what vested in the State are only those interests not coming within section 6.

Section 4 (d) provides that "no suit shall lie in any civil Court for the recovery of any money due from such proprietor (proprietor whose estate has vested in the State) or tenure-holder the payment of which is secured by a mortgage of, or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped." Proceedings in this section undoubtedly include execution proceedings. This is not a case where only a part of the mortgaged property has vested in the State and as such the rule laid down by this Court in *Raj Kishore v. Ram Pratap*¹, is not attracted. As mentioned earlier the entire Estate mortgaged had vested though some interest in respect of a portion of the mortgaged property had been settled by the State on the mortgagors.

Under the circumstances the only remedy open to the decree-holders is that provided in Chapter IV of the Act i.e., a claim under section 14 before the Claims Officer for "determining the amount of debt legally and justly payable to each creditor in respect of his claim." The procedure to be followed in such a proceeding is prescribed in sections 15 to 18. Provisions relating to the assessment and payment of compensation payable to the quondam proprietor and tenure-holders are found in Chapter V of the Act (sections 19 to 31). Section 24 (5) provides that "in the case where the interest of a proprietor or tenure-holder is subject to a mortgage or charge, the compensation shall be first payable to the creditor holding such mortgage or charge and the balance, if any, shall be payable to the proprietor or tenure-holder concerned...." That sub-section further prescribes the maximum amount that can be paid to such a creditor.

1. (1967) 2 S.C.R. 56 : (1968) 1 S.C.J. 75 : A.I.R. 1967 S.C. 801.

In view of what has been stated above it follows that under the circumstances of this case it is not open to the appellants to proceed with the execution. Their only remedy is to get compensation under the Act.

Our conclusion receives strong support from some of the decisions of this Court. In *Rana Sheo Ambar Singh v. Allahabad Bank Ltd., Allahabad*¹, a question identical to the one before us, but arising under the U. P. Zamindari Abolition and Land Reforms Act, came up for consideration by this Court. One of the questions that arose for decision in that case was whether the Bhumidari right settled by the State on a previous proprietor whose estate had vested in the State was liable to be proceeded against in execution of a mortgage decree against the Estate that had vested in the State. This Court held that it was not liable to be proceeded against. Therein it was ruled that the intention of the U.P. Zamindari Abolition and Land Reforms Act was to vest the proprietary rights in the Sir and Khudkasht land and grove land in the State and resettle on intermediary not as compensation but by virtue of his cultivatory possession of lands comprised therein and on a new tenure and confer upon the intermediary a new and special right of Bhumidari, which he never had before by section 18 of the Act. The provisions in that Act relating to vesting and settlement of Bhumidari rights are in all essential particulars similar to those in the Act relating to vesting and settlement of Bakasht lands. This Court further ruled in that case that the mortgagee could only enforce his rights against the mortgagor in the manner as provided in section 6 (h) of the U. P. Act read with section 73 of the Transfer of Property Act and follow the compensation money under the Act.

In *Krishna Prasad and others v. Gauri Kamari Devi*², the question that arose for decision by the Court was whether a mortgage-decree-holder could proceed against the properties of the mortgagor other than those mortgaged in enforcement of the personal covenant when the property mortgaged had vested in the State under the provisions of the Act. That question was answered in the negative. In the course of the judgment Gajendragadkar, J., (as the then was) who spoke for the Court observed that there is no doubt "that the scheme of the Act postulates that where the provisions of the Act apply, claims of the creditors have to be submitted before the Claims Officer, the claimants have to follow the procedure prescribed by the Act and cannot avail of any remedy outside the Act by instituting suit or any other proceeding in the Court of ordinary civil jurisdiction." Proceeding further he observed:

"It is in the light of this scheme of the Act that we must refer to section 4 (a) and determine what is true scope and effect are. Mr. Jha contends that in construing the words of section 4 (d) it would be necessary to bear in mind the object of the Act which was merely to provide for the transference to the State of the interests of the proprietors and tenure-holders in land and of the mortgagees and lessees of such interests. It was not the object of the Act, says Mr. Jha, to extinguish debts due by the proprietors or tenure-holders and so, it would be reasonable to confine the operation of section 4 (d) only to the claims made against the estates which have vested in the State and no others. In our opinion, this argument proceeds on an imperfect view of the aim and object of the Act. It is true that one of the objects of the Act was to provide for the transference to the State of the estates as specified. But as we have already seen, the provisions contained in section 16 in regard to the scaling down of the debts due by the proprietors and tenure-holders clearly indicate that another object which the Act wanted to achieve was to give some redress to the debtors whose estates have been taken away from them by the notifications issued under section 3. Therefore, in construing section 4 (d), it would not be right to assume that the interests of the debtors affected by the provisions of the Act do not fall within the protection of the Act"

and again at page 578.

1. (1962) 2 S.C.R. 441 : (1962) 1 S.C.J. 679. S.C. 1464.
2. (1962) 3 S.C.R. (Supp.) 564: A.I.R. 1962

"Having regard to the said scheme, it is difficult to confine the application of section 4 (d) only to execution proceedings in which the decree-holder seeks to proceed against the estate of the debtor. In fact, an execution proceeding to recover the decretal amount from the estate which has already vested in the State, would be incompetent because the said estate no longer belong to the judgment-debtor."

Summarising the effect of the aforementioned decisions this is what this Court observed in *Raj Kishore's case*¹, a case arising under the Act :

"From the principles laid down by this Court in the above two decisions, it follows that where the whole of the property mortgaged is an estate, there can be no doubt that the procedure prescribed by Chapter IV has to be followed, in order that the amount due to the creditor should be determined by the claims officer and the decision of the Claims Officer or the Board has been made final by the Act."

For the reasons mentioned earlier we are of the opinion that the decision of the majority of the judges in the Full Bench decision in *Sidheswar Prasad Singh v. Ram Saroop Singh*² is not correct. The true effect of the decisions of this Courts in *Rana Sheo Ambar Singh's case*³, and *Krishna Prasad's case*⁴, is as explained by Kamla Sahai, J., in that case.

In the result this appeal fails and it is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. M. SHELAT AND V. BHARGAVA, JJ.

Arati Paul

.. *Appellant**

v.

The Registrar, Original Side, High Court, Calcutta and others .. *Respondents.*

Calcutta High Court Rules—Two suits, one of which is a Partition suit, referred to the sole arbitration after Presiding Judge, extra. cursum curiae—Presiding Judge Passing a Preliminary decree—Whether such an order is an order of an arbitrator or decree by a Court—Registrar on the original side whether can be restrained from keeping the judgment on the record of the suit.

The following agreement was put forward before the Court referring the dispute in both the suits to the sole arbitration of the Presiding Judge, 'extra cursum curiae.'

"It is recorded that all the parties consent to this Tasta. Suit as well as Partition suit being Suit No. 1045 of 1957 and all the disputes involved in these two matters be settled and referred to the sole arbitration of the Honble Mr. Justice P.C. Mallick and the parties agree to abide by any decision that will be given and no evidence need be taken except or to what his Lordship might desire and the evidence need not be recorded in any formal manner. Parties agree that his Lordships would have all the summary Powers including the power to divide and Partition the Properties and to make such decrees as his Lordship thinks fit and Proper and for the purpose of partition if necessary to engage or appoint surveyors and Commissioner as his Lordship thinks best.

It is recorded that all parties have referred this matter to the learned Judge in what is known as *extra cursum curiae* Jurisdiction of this Court.

It is further recorded that all parties agree that they will not prefer any appeal from or against the decree or order that may be passed by his Lordship" the Hon'ble Mr. Justice Mallick, Construing this agreement held that in a case like the Present, where the arbitration agreement envisages that the Presiding Officer

¹ (1968) 1 S.C.J. 75

² (1963) B.L.J.R. 802 : A.I.R. 1963 Pat.

³ (1962) 1 S.C.J. 679.

⁴ A.I.R. 1962 S.C. 1464.

⁴¹² *C.A. No. 745 of 1966.

after Court should himself act as an arbitrator, he, in such circumstances, will obviously occupy a dual capacity. He will be both an arbitrator to decide the matters referred to him by the agreement of the Parties, and a Court before which the suit continues to remain pending having Jurisdiction to deal with the suit in accordance with the provisions of the arbitration Act. The actual order passed by Justice Mallick also makes it clear that, in passing that order, he purported to act as the Court deciding the suit and not as the arbitrator to whom some matters in dispute were referred by the parties. At the beginning of the order, Mallick, J. described himself as the "Court." When making the operative order, he used the following language "in the result, for the present, I will pass a preliminary decree as under," on the face of it, when he passed this order, he acted as a judge seized of the suit who alone was competent to pass a preliminary decree in the suit. Consequently, the submission that the order made by Mallick, J., should be held to be an award of an arbitrator pure and simple and not a decree by a Court was not accepted.

The sole relief claimed before the High Court was the issue of a writ of *mandamus* directing the Registrar on the original side to recall, cancel and withdraw this order and to take it off the record, on the ground that it was an award and not a judgment after Court. Since it has been held that it was a judgment of the Court, the Registrar on the original side, under the Rules of the Calcutta High Court, was bound to file it on record and retain it there. The appellant could have sought appropriate remedy to having that judgment vacated and, if such a remedy had been sought against that judgment, directly, the question whether it was a good judgment and should be retained on the record or not could have been appropriately decided. The remedy sought by the appellant of seeking a writ to restrain the Registrar on the original side from keeping the judgment on the record of the suit could not possibly be allowed, while the judgment stood and was not vacated.

Appeal by Special Leave from the Judgment and Order, dated the 18th February, 1965 of the Calcutta High Court in Appeal from Original Order No. 226 of 1964.

M. C. Chagla, Senior Advocate (*D. N. Mukerjee* and *P. K. Sen*, Advocate, with him), for Appellant.

B. Sen, Senior Advocate, (*S. C. Mazumdar*, Advocate, and *G. S. Chatterjee*, Advocate for *Sukumar Basu*, Advocate with him), for Respondent Nos. 1 and 2.

N. N. Goswami and *S. N. Mukerjee*, Advocates, for Respondent Nos. 3 and 4.

The Judgment of the Court was delivered by

Bhargava, J.—This appeal, by Special Leave, is directed against a judgment of the Appellate Bench of the High Court of Calcutta, dated 18th February, 1965, dismissing an appeal against an order of a single Judge by which he dismissed a petition under Article 226 of the Constitution on 26th August, 1964. The facts leading up to this litigation are that one Shrish Chandra Paul died in the year 1930, leaving behind his widow Pramila Sundari, his daughter Arati, and 4 sons Balai, Kanai, Netai and Gour. In the year 1945, Netai died leaving his mother Pramila Sundari as his sole heiress. On 27th September, 1946, a deed of gift in respect of two premises Nos. 60/11 and 60/12 in Gour Beria Lane was executed by Pramila Sundari in favour of her three sons Balai, Kanai and Gour. On 18th March, 1952, there was an agreement for partition between Pramila Sundari and her three sons Balai, Kanai and Gour, by which the joint estate left by Shrish Chandra Paul was partitioned into four lots and a small portion of the property was left joint. On 13th June, 1957, Pramila Sundari instituted Suit No. 1045 of 1957 against Balai, Kanai and Gour for a declaration that the deed of gift and the agreement of partition were void and inoperative, and for a fresh declaration of the shares of the parties and partition of the joint properties. In this suit, Arati was also impleaded as a defendant. On 26th August, 1957, Pramila Sundari executed a will bequeathing her entire estate absolutely to Arati Paul and Gour in equal shares. On 13th January, 1958, Pramila Sundari died, and consequently, on 12th December, 1958,

and order was made in Suit No. 1045 of 1957 transposing Arati Paul as the plaintiff. On 3rd February, 1960, Arati Paul applied in the Calcutta High Court for grant of Letters of Administration, with a copy of the will of Pramila Sundari annexed. This testamentary proceeding was contested and was marked in the year 1962 as Testamentary Suit No. 12 of 1962. On 17th December, 1962, the Testamentary Suit No. 12 of 1962 and the Partition Suit No. 1045 of 1957 appeared in the peremptory list of Mallick, J., and the Testamentary Suit was partly heard. On 2nd and 3rd January, 1963, there was further hearing in the testamentary suit. On 4th January, 1963, an agreement was put forward before Mallick, J., referring the dispute in both the suits to the sole arbitration of Mallick, J., *extra cursum curiae*. Since this reference is of importance, we may quote it in full :—

“It is recorded that all the parties consent to this Tasta. Suit as well as the partition Suit being Suit No. 1045 of 1957 and all the disputes involved in these two matters be settled and referred to the sole arbitration of the Hon'ble Mr. Justice P. C. Mallick and the parties agreed to abide by any decision that will be given and no evidence need be taken except or to what his Lordship might desire and the evidence need not be recorded in any formal manner. Parties agree that his Lordship would have all the summary powers including the power to divide and partition the properties and to make such decrees as his Lordship thinks fit and proper and for the purpose of partition if necessary to engage or appoint Surveyors and Commissioners as his Lordship thinks best.

It is recorded that all the parties have referred this matter to the Learned Judge in what is known as *extra cursum curiae* jurisdiction of this Court.

It is further recorded that all parties agree that they will not prefer any appeal from or against the decree or order that may be passed by his Lordship the Hon'ble Mr. Justice Mallick.”

When this note was recorded, all the parties to the two proceedings were represented through their Counsel. In pursuance of this agreement, Mallick, J., passed an order in Suit No. 1045 of 1957 on 1st April, 1963. It may be mentioned that the main dispute in the present case is whether this order of Mallick, J., in this partition suit amounts to an award or a judgment in a suit. On the same day, by a separate order, he also granted Letters of Administration in the testamentary Suit. On 5th April, 1963, Arati Paul filed an objection to the recording of this order as a judgment. On 4th May, 1963, drafts of decrees drawn up in terms of that order were issued. On 13th May, 1963, Arati Paul applied for change of her Attorney, in the partition Suit No. 1045 of 1957. On 17th May, 1963, the order of Mallick, J., dated 1st April, 1963 was filed on the record of Suit No. 1045 of 1957 as a judgment. On 24th July, 1963, the application of Arati Paul for change of Attorney was allowed. Thereafter, on 20th August, 1963, Arati Paul presented a Letter of Demand to the Registrar of the Original Side of the High Court to recall, cancel and withdraw the filing of the order of Mallick, J., dated 1st April, 1963 from the record of the suit and to take it off the file of that suit.

Failing to get any response, Arati Paul, on 4th September, 1963, presented a petition under Article 226 of the Constitution praying for issue of a writ in the nature of *mandamus* directing the Registrar of the High Court on the Original Side to forthwith recall, cancel and withdraw the filing of the said pretended Award (that is how the order of Mallick, J., was described in this petition), dated 1st April, 1963 as a judgment in the said Suit No. 1045 of 1957 as part of the records of the said suit, and another writ of *mandamus* directing the Registrar of the High Court to forthwith take off the said pretended Award, dated 1st April, 1963 from the file and/or records of the said Suit No. 1045 of 1957. In this petition, apart from the Registrar of the High Court on the Original Side, Balai, Kanai and Gour were also impleaded as opposite parties. This petition under Article 226 of the Constitution was numbered as Matter No. 366 of 1963 and was summarily rejected by Banerjee, J., on 5th September, 1963. On 16th September, 1963, Appeal No. 228 of 1963 was entertained against this judgment under the Letters Patent, but an application presented for an interim injunction restraining the Registrar from taking any steps pursuant

to the judgment of Mallick, J., dated 1st April, 1963 pending disposal of the appeal was rejected. On 27th November, 1963, Arati Paul obtained Special Leave to appeal from this Court against the refusal of the interim injunction by the interlocutory order, dated 16th September, 1963. While this appeal was still pending in this Court, the Appellate Bench of the High Court, on 28th April, 1964, allowed Appeal No. 228 of 1963, directed issued of a Rule in Matter No. 366 of 1963, and ordered stay of all proceedings pursuant to the order of Mallick, J., dated 1st April, 1963, till the final disposal of the Rule. Since the appeal in this Court had become infructuous, it was not prosecuted and was dismissed for non-prosecution on 29th April, 1964. On 10th June, 1964, two of the parties Kanai and Balai took out a notice of motion for revocation of Letters of Administration which had been granted to Arati Paul by the order of Mallick, J., dated 1st April, 1963 in the Testamentary Suit. This notice was returnable on 15th June, 1964. Matter No. 366 of 1963, having been remanded by the Appellate Bench, appeared for final hearing before Sinha, J., on 15th July, 1964, but it was directed to go out of the list as an objection was taken on behalf of Kanai and Balai to the matter being taken up by him on the ground that he was a member of the Appellate Bench which had directed issue of the Rule in that Matter. On 16th July, 1964, this Matter No. 366 of 1963 was mentioned before the Chief Justice for being assigned to some other Judge, when a direction was made by the Chief Justice that a letter should be written by the party concerned to his Secretary. On 27th July, 1964, the Notice of Motion taken out by Kanai and Balai for revocation of Letters of Administration was partly heard by Mallick, J., who recorded the following minutes:—

“Part Head. The Rule issued by the Appeal Court in Matter No. 366 of 1963 in the matter of *Arati Paul v. Registrar, O.F.*, appears to be intimately connected with the application that is now pending before me. I direct that this matter with the said Matter No. 366 be placed before the Hon’ble C.J., for proper determination. Let this matter along with the matters appear day after tomorrow when I shall give directions. Interim Order to continue except that Arati Paul will collect rent.”

It appears that, simultaneously with these proceedings, an application for taking proceedings for Contempt of Court were also pending before him in this connection. Hearing in Matter No. 366 of 1963 was concluded on 12th August, 1964, and then an order was made that this Matter as well as the proceedings relating to Notice of Motion for revocation of the Letters of Administration and the application for taking proceedings for contempt should appear in the list for judgment one after the other. On 26th August, 1964, Mallick, J., passed an order discharging the Rule in Matter No. 366 of 1963 as well as dismissing the other two applications. Subsequently, on 1st September, 1964, the preliminary decree drawn up on the basis of the order of Mallick, J., dated 1st April, 1963 in Partition Suit No. 1045 of 1957 was signed by him, and on 3rd September, 1964, the decree was filed. On 21st September, 1964, Arati Paul filed Appeal No. 226 of 1964 challenging the order, dated 26th August, 1964, passed by Mallick, J., dismissing Matter No. 366 of 1963. The appeal was dismissed by the Appellate Bench of the High Court on 18th February, 1965 and the order of the High Court in the appeal was filed on 16th March, 1965. Arati Paul then applied for a certificate under Article 133 (1) of the Constitution for Leave to appeal to this Court. That having been refused, she obtained Special Leave from this Court and has now come up in this appeal challenging the confirmation by the Appellate Bench of the order of dismissal of Matter No. 366 of 1963.

The prayer in the writ petition (Matter No. 366 of 1963) has been pressed before us by Mr. Chagla on behalf of the appellant on the sole ground that the order of Mallick, J., dated 1st April, 1963 was in the nature of an award made by an arbitrator and not a judgment in the partition suit, so that the appellant was entitled to obtain a writ for its recall, cancellation and withdrawal and for taking it off the record of the suit. Being a mere award of an arbitrator, it could not be treated as a judgment in the suit, nor could a decree be drawn up on its basis. On behalf of the respondents, other than the Registrar of the High Court on the Original Side,

Mr. Goswami has argued that, even though, under the agreement, dated 4th January, 1963 Mallick, J., was requested to act *extra cursum curiae* and the suit was left to his arbitration, he, in fact, when passing the order, dated 1st April, 1963, acted as a Court and passed a preliminary decree. According to him, a preliminary decree in a suit for partition can only be passed by a Court and not be an arbitrator when giving an award in the dispute referred to him. He has, therefore urged that the Registrar, was right in filing that order on the record of Suit No. 1045 of 1957 as a judgment, and no writ of *mandamus* can be issued to him to recall, cancel or withdraw it or take it off the record. Learned Counsel for the Registrar also urged that all that the Registrar did was to file the order of Mallick, J., in accordance with the Rules of Court, because it was a judgment passing a preliminary decree in the suit, so that the appellant was not entitled to the writ of *mandamus* sought in Matter No. 366 of 1963.

Mr. Chagla, in support of his argument, relied primarily on two decisions of Courts in England and on the principle enunciated by Russell in his book on "The Law of Arbitration", 17th Edition. In this book at page 117, Russell has enunciated the principle as follows :—

"The subject-matter of an action may be referred to a judge as arbitrator. The judge in such a case will, if such is the intention of the parties, be merely an arbitrator and have no special powers by virtue of the fact that he is a judge and his award will not be subject to appeal."

After laying down this principle, Russell goes on to elaborate it in the subsequent notes with reference to some decision, and one of these principles enunciated is :

"When, with the consent of both parties, a judge deviates from the regular course of procedure of the Court, he ceases to act judicially and becomes an arbitrator, whose decision is subject to no appeal."

In support of this last proposition, Russell has quoted the decisions in *Bickett v. Morris*¹, and *Waite v. Buccleuch (Duke)*². We examined the decisions in these two cases, but could not find any specific statement in them that the decision given by a Judge on deviation from the regular course of procedure of the Court has to be held to be an award, though it was held in both cases that it would not be subject to an appeal.

The principal case on which reliance is placed on behalf of the appellant is the decision of the House of Lords in *Robert Murray Burgess v. Andrew Morton*³. In that case, a suit was first brought for recovery of a certain amount and the cause was set down for trial before the Lord Chief Justice, when there being no likelihood of its being reached, the parties, with the consent of the learned judge, agreed to withdraw it from trial, and to state a special case for the decision of the Court. It was held by the House of Lords that the special case so stated did not raise directly any question of law and its decision only depended on questions of fact, so that the statement of the special case did not confer jurisdiction on the Court to deal with it as such. The learned Judges of the Divisional Court seized of the special case pointed out the incompetency and inexpediency of trying such a question by means of a special case, but expressed their willingness to do the best they could to decide it, if the parties desired them to do so, and on that footing, they heard the case and gave judgment. On appeal, the Court of Appeal reversed that judgment. This judgment of the Court of Appeal was brought up before the House of Lords which had to consider the nature of the judgment given by the Divisional Court. Lord Watson in his speech held :—

"There are several decisions of this House, in cases coming from Scotland, which appear to me to affirm that the judgment of a Court below, pronounced *extra cursum curiae*, is in the nature of an arbiter's award, and that, as a general rule at least, no appeal from it will lie. An appeal was held, on that ground, to be

1. (1866) L.R. 1 H.L. Sc. 47.
2. (1866) L.R. 1 H.L. Sc. 70.

3. (1896) A.C. (H.L.) 136.

incompetent in *Graig v. Duffus*¹; *Dudgeon v. Thomson*², and *Magistrates of Renfrew v. Hoby*.³

Lord Shand also expressed a similar view, taking note of the fact that, as soon as it became apparent to the learned Judges of the Divisional Court that the special case raised only a question of fact for their determination, they would have been warranted in declining to give judgment on it. It was apparent that the learned Judge yielded to the entreaties of both parties in entertaining and disposing of the case; and, on this basis, expressed his opinion as follows :—

“ I agree in thinking that the proceeding was *extra cursum curiae*, and that the decision of the dispute between the parties was of the nature of an award by arbitrator, as, indeed, the learned judges of the Divisional Court seem themselves to have thought, as appears not only from the terms of Wills, J.’s judgment, but from the observations of both judges when the defendant proposed to appeal.”

Reliance was also placed on the decision of Goddard, J., in *Wyndham v. Jackson*⁴. The facts of that case were that the plaintiff issued a writ in the Chancery Division claiming an account and payment of all sums due to her under a contract entered into by the plaintiff with the defendants. An order was made in the action by consent directing an account and the master, who dealt with that order, extended the ambit of his enquiry beyond the terms of the order at the invitation of both parties, gave a decision on a matter which was not covered by the Judge’s order for an account, and issued a certificate to the effect that a certain sum was due from the defendant to the plaintiff. The question that was raised before Goddard, J., by the plaintiff was that she was entitled to recover the amount certified by the master, on the ground that the certificate was equivalent to an award having been made pursuant to an oral submission by Counsel, who asked him to deal with all matters in dispute, though not technically covered by the order directing an account. It was also submitted on her behalf that the minute in the master’s book, indicating an order that he was prepared to make on the plaintiff’s application for an order for payment, was also an award entitling her, not only to the amount mentioned, but also to the costs of the Chancery proceedings. After considering the views expressed in a number of cases, Goddard, J., held :—

“ I must take it that it has been finally decided, in a matter between the parties, that the certificate was given *extra cursum curiae*. Then, as I find it was the result of a hearing which both parties requested, and to which they assented, I think it falls within the line of cases on which the plaintiff relies, and can be enforced as an award.”

This case went up in appeal before the Court of Appeal whose decision is reported in *Wyndham v. Jackson*⁵. That Court differed from Goddard, J., on the nature of the order made by the master and held that the determination by the master was not a final determination and was never intended to be treated as a final arrangement between the parties. That matter was still to go before the Judge who had made the order for account and the master’s certificate could not be binding until it had been confirmed by the Judge. The position of the master was held to be exactly analogous to the position of an arbitrator to whom the Court may have referred a matter to make a report to the Court in order that the Court may give a final decision between the parties. On this view, the Appeal Court did not go into the question whether the decision given by the master amounted to a decision given *extra cursum curiae* and whether it was enforceable as an award. The award of the master, being treated as provisional and subject to confirmation by the Judge, could obviously not be enforced as such. Thus, the view expressed by Goddard, J., that the decision of the master could be enforced as an award, if it had been final, was neither affirmed nor set aside.

1. 6 Bolls Ap. 308.
2. 1 Macq. 714.
3. 2 Macq. 478.

4. (1937) 3 All E.R. 677.
5. (1938) 2 All E.R. 109.

The cases in India relied upon are two decisions of the Bombay and Calcutta High Courts. In *Sayad Zain v. Kalabhai Lalubhai*¹, before the case came to a regular hearing before the Court of the First Class Subordinate Judge, Surat, the parties as well as their pleaders signed an application which ran as follows :—

“We have decided that the Court should make a settlement of the dispute between us according to Chapter XXXVIII of the Civil Procedure Code, and we will abide by whatever decision the Court may give.”

We have specially decided that the Court should have full authority to obtain information from the parties in whatever way the Court may think proper, but the parties are not to produce any evidence except documentary records.”

The Subordinate Judge, in pursuance of this agreement, proceeded, to deal with the case and ordered defendant to pay plaintiff a certain sum, having dispensed with the requirement of going through the formal procedure of rejecting the suit and registering their application as a fresh suit, because the parties referred him to the decision in *Raoji Trimbak Nagarkar v. Govind Vinaya, Nagarkar*². An appeal against this decision was taken to the High Court of Bombay which noted the fact that the Subordinate Judge had referred to the case mentioned above and held :—

“The very mention of that case shows that the parties must have intended that the decision of the Subordinate Judge as arbitrator should be final. In that case, as in this, the parties solemnly agreed by themselves and by their pleaders to abide by the decision of the Court to be made in a particular way. They cannot, therefore, appeal from it.”

The Court further expressed the opinion that :

“The fact that the express provisions of Chapter XXXVIII of the Civil Procedure Code, were knowingly disregarded, shows that the proceedings were *extra cursum curiae*, and thus the judgment of the Subordinate Judge was in the nature of an arbitrator's award, against which an appeal cannot be entertained if the competency of the appellate Court is objected to by the party holding the judgment. The fact that the Subordinate Judge gave his award in the form of a decree will not make it a decree from which a regular appeal can lie.”

In *Baikanta Nath Goswami v. Sita Nath Goswami*³, after the hearing of a suit in a Munsif Court had commenced and some evidence had been recorded, the parties agreed to leave the questions in dispute between them to the determination of the Munsif after he had inspected the locality, and also agreed not to raise any objection to the decision so arrived at by the Munsif and to hold themselves bound by the decision of the Munsif. It was specifically stated in the agreement that neither of the parties shall be competent to raise any objection to the decision or to prefer an appeal. Acting on this submission, the Munsif made a local inspection and passed an order with which the plaintiffs were not content, so that they applied to the Munsif under section 623 of the Civil Procedure Code, 1882, for a review. The Munsif granted the review and passed a second order in modification of his first order, and again embodied the order in what purported to be a decree in the suit. Against this decree, an appeal was filed by the defendants before the District Judge who entertained the appeal and made an order of remand. On second appeal the High Court of Calcutta held that the first judgment of the Munsif was in the nature of an award and that it did not lose that character because he embodied the operative part of that judgment in what purported to be a decree in the suit. He was in fact an arbitrator by the submission of the parties and his decision was an award. It was not open to him to alter that award when made or to review his decision. It was further held that no appeal, consequently, lay to the District Judge against that decision. It is on the basis of these cases that it was argued that, in the present case also, the order made by Mallick, J. should be held by us to be in

1. (1899) I.L.R. 23 Bom. 752.

2. (1897) P.J. 413.

3. (1911) I.L.R. 38 Cal. 421.

the nature of an award made by an arbitrator, so that it cannot be treated as a decree and filed as such in the partition suit which was pending before him.

As against these cases cited on behalf of the appellant, our attention has been drawn on behalf of the respondents to the views in Halsbury's Laws of England, and to certain decisions of Courts in India. In Halsbury's Laws of England, 3rd Edn., Vol. 2, at page 8 in para. 15, it is stated :—

“An arbitration agreement must be an agreement to refer disputes to some person or persons other than a Court of competent jurisdiction. In principle a judge sitting *extra cursum curiae* may sit as arbitrator under an arbitration agreement and a reference to a Foreign Court has been treated as an arbitration agreement for the purpose of exercising the jurisdiction to grant a stay of proceedings arising out of the same subject-matter. An agreement that the decision of a Judge sitting in Court should be unappealable is however, despite the language of some of the decisions cited, not an arbitration agreement; the decision, when given, is a judgment, not an award, and the Judge is not placed in the position of an arbitrator.”

Reliance is placed particularly on the last sentence of the above extract from Halsbury's Laws of England.

In *Nidamarthi Mukkanti v. Thammana Ramayya*¹, parties in a suit pending before the District Munsif presented a petition undertaking that both parties would abide by the decision of the Court that may be passed, as it thinks just, after perusing the documents filed by both parties and all the records in the said suit, and after measuring the sites and inspecting the marks, etc., which are thereon. The District Munsif ordered accordingly, inspected the site, and found in favour of the plaintiff and pronounced judgment giving him the order claimed, and granted the injunction. It was held by the Madras High Court on appeal that the District Munsif acted as arbitrator by consent of parties and that, consequently, no appeal lay from his decision which must be looked upon as an award. It was, however, added that, as no attempt had been made to attack that award on any of the grounds specified in section 521 of the Civil Procedure Code, the Court must look on the decree of the District Munsif as one passed in accordance with the award and uphold it as such.

In *Chinna Venkatasami Naicken v. Venkatasami Naicken and another*², in a suit for money due upon a mortgage bond, after the examination of some witnesses, parties agreed to refer the questions of law and fact arising in the case to the decision of three persons, *viz.*, the Subordinate Judge and two friends of the parties. An award was made by the majority. Thereupon, an application was presented by the defendants to set aside the award on various grounds. The Subordinate Judge over-ruled the objections and passed a decree in accordance with the award. In the Revision before the Madras High Court, the main ground taken was that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. Seshagiri Ayyar, J., in confirming the decree of the Subordinate Judge, held :—

“In my opinion, therefore, although the procedure adopted by the Subordinate Judge in dealing with the matter as if it was a reference under the Second Schedule and as if the provisions of the Code applied was wrong, inasmuch as a decree passed in terms of the award, the defendant as a party to the reference is entitled to contest its finality and to request that the case should be heard again.”

Wallis, C.J. said :—

“I think a reference of the suit to the presiding Judge must be held to be altogether *extra cursum curiae* and not the less so when two others are joined with him, and that the decree passed in accordance with their decision must be

1. (1903) I.L.R. 26 Mad. 76.

2. (1919) I.L.R. 42 Mad. 625 : 36 M.L.J. 291.

regarded as a consent decree, and as not subject to the provisions of the Second Schedule."

In *Neti Venkata Somayajulu Garu v. Adusumilli Venkanna*¹, in a suit claiming an easement of necessity in respect of certain lands, the District Munsif, at the request of the defendant, made a local inspection of the site, whereafter the plaintiff was examined-in-chief and some documents were filed. Thereafter, the parties requested the Court to give a decision on the evidence already on the record and intimated that they proposed to adduce no further evidence. The Munsif gave his decision partly in favour of the plaintiff and partly against him. The plaintiff appealed to the Subordinate Judge who dismissed the appeal, holding it to be barred by reason of the joint statement given by the parties before the Munsif. On further appeal the High Court of Madras held that, although the proceeding was not *extra cursum curiae*, the right of appeal was nevertheless barred by reason of the special agreement.

In *K. P. Dalal v. R. S. Janadar*², in an application registered as a suit for ejectment from a premises, the Judge trying the suit, at the first hearing of the suit, after pleadings of parties had been put in, enquired of the Advocates of the parties as to whether they wanted a formal trial or whether they were prepared to leave the matter to him to be summarily decided as an arbitrator after hearing the respective Advocates and inspecting the premises. Both the Advocates agreed to the learned Judge hearing the facts from them and after inspection of the premises by the Court to submit to his decision as suggested. Thereafter, the Judge inspected the premises and ultimately, on a further agreement by both parties that the matters in dispute should be decided by the Judge as an arbitrator, he gave his decision. When the case came up in revision before the Bombay High Court, the learned Judge of that Court referred to the quotations from Halsbury's Laws of England and Russell on Arbitration which we have noticed earlier, and expressed his opinion that he did not think that those observations necessarily meant that the Judge ceased to be a Judge and became a pure arbitrator in the sense that he could refer the dispute to himself and also remit the award to himself. The order of the trial Judge dismissing the application and making no order as to costs was upheld on the view that the trial Judge had not lost his capacity as a Judge and had not become a pure arbitrator governed by the Arbitration Act and, therefore, the provisions of that Act would not apply to him. So that the order passed by the trial Judge was correct.

In *Bajinath v. Dhani Ram*³, a suit for declaration removal of certain encroachments, and a perpetual injunction came for trial before the Munsif where the parties agreed that the Munsif should decide the case on inspection of the documents filed by the parties and on inspection of the locality. They further agreed to accept the decision of the Munsif. The Munsif wrote a judgment and decreed the suit in part. There was an appeal to the District Judge which was dismissed and the second appeal came before the High Court of Allahabad which was also dismissed. While the appeal before the District Judge was pending, an application for review of judgment was also presented before the Munsif. In disposing of this application, the Munsif held that he was an arbitrator and that his decision was binding on the parties, so that an application for review did not lie as there was no sufficient cause for review. This order was again taken up in Revision before the High Court, and the question arose whether the Munsif could not entertain the application for review because he was an arbitrator. The Court held :—

"The Munsif, in accepting the position of an arbitrator, had a twofold capacity. He was an arbitrator, but he was also the Court. If the arbitrator left anything undecided, the parties would be entitled to go to the Court and to ask the Court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right."

1. (1935) I.L.R. 58 Mad. 31 & 66 M.L.J. 622.

2. A.I.R. 1945 Bom. 478.

3. (1929) I.L.R. 51 All. 103.

On this view, the Court was of the opinion that an application for review lay against the judgment of the Munsif, allowed the revision and directed the Munsif to take up the application for review afresh and consider it on the merits.

In *Edapalli Kotamma v. Nullabani Mangamma and others*¹, in a suit for mandatory injunction directing the defendants to remove certain constructions and for a permanent injunction restraining them from obstructing the flow of surplus water from plaintiff's land, the parties, after a Commissioner appointed to inspect the locality had prepared certain plans and submitted his reports, signed and filed a memorandum before the District Munsif in the following terms:—

“Both parties agreed to abide by the decision of the Hon'ble Court after personal inspection. The parties are not adducing oral evidence. Documentary evidence can be received.”

The District Munsif inspected the locality, placed on record a detailed note of the physical features of the locality, etc., and, on the basis of Commissioner's plans and reports and his own personal inspection, gave a judgment for the plaintiff's. A decree was also drawn up in the usual course. The first defendant preferred an appeal which was rejected by the first appellate Court on the ground that it was incompetent. In second appeal before the Andhra Pradesh High Court, the question arose whether the first appellate Court was right in holding that no appeal lay to it from the decree of the trial Court. A learned single Judge of the Andhra Pradesh High Court differed from the view expressed in *Nidamartai Mukkanti's case*², and held that there could not be a reference to arbitration by the Judge to himself. He expressed the view by saying:

“It would be fantastic to say that in a case like the present, the Court made a reference to itself, fixed the time for the making of the award, stayed its hand till the expiry of the time fixed for the submission of the award, received the award, gave time for objections to the award, heard the objection and, finding no grounds for setting aside the award, pronounced judgment in accordance therewith.” He went on to hold:—

“The Arbitration Act of 1940 makes it clear that a reference to arbitration could be made only in accordance with the Act and the procedure prescribed by the Act should have been followed before sections 17 and 39 of the Act barring appeals from decrees on awards, could be invoked. Consequently, the decision of the trial Court could not be treated as the award of an arbitrator and the decree that followed, could not be held to be a decree on an award and therefore not open to appeal.”

He then proceeded to examine the question whether, there being no statutory provisions barring a right of appeal in that case, there was any principle of law which deprived the parties of the right of appeal. He noted the fact that, in that case, there was no express agreement not to appeal; but the controversy turned on the question whether, by their conduct, the parties should be deemed to have given up their right of appeal and whether the waiver of the right of appeal should be implied from the terms of the agreement between the parties. The learned Judge held that there had been no waiver of the right of appeal, so that the appeal before the first appellate Court was competent. The order dismissing that appeal was set aside and the case was remanded for a decision of the appeal on merits.

Reference may also be made to a decision of the Privy Council in *Pisani v. Attorney-General of Gibraltar*³. In that case, the Crown claimed certain lands as escheated for want of heirs of the deceased owner. The defendants to the action were a purchaser from that owner, a person who claimed that the purchaser was only a trustee for him, and certain legatees and beneficiaries under a will of the deceased. During the course of trial, it became evident that the title of the Crown by escheat was unsustainable, but, instead of dismissing the suit, the Court, with the consent

1. (1955) An.W.R. 517: A.I.R.-1957 A.P. 700. 2. (1903) I.L.R. 26 Mad. 76.
3. (1874) 5 pc. 516 (E.)

of the parties, allowed an amendment of the pleadings by the addition of a prayer that the rights of the several defendants might be ascertained and declared by the decree of the Court. The Court then enquired into the rival claims of the defendants, and declared their respective rights. One of the defendants preferred an appeal from the judgment to the Privy Council and a preliminary objection was taken to the competency of the appeal. The Judicial Committee of the Privy Council held that, though the amendment of the pleadings in the Court below could not have been made except by a consent of parties and though the Court below had been invited by the rival claimants to adjudicate upon their rights *inter se*, there was no stipulation that the right of appeal should be given up. The parties did not contemplate that the Judge was to hear the cause otherwise than as a Judge or that the litigation was not to go on subject to all the incidents of a cause regularly heard in Court, including an appeal to the Judicial Committee. There was nothing in the proceedings suggesting that the parties waived their right of appeal. It was in this context that the Judicial Committee made the following observations:—

“It is true that there was a deviation from the *cursum curiae*, but the Court had jurisdiction over the subject and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal”

The Privy Council added that it was wrong to regard the decision of the Court as an award of an arbitrator or to attribute an intention to the parties that the decision should not be open to appeal.

A review of all these decisions shows that the question as to the nature of an order made in circumstances similar to those with which we are concerned has been considered both in England and in India primarily for the purpose of deciding whether such an order is subject to an appeal like an ordinary judgment of a Court from which an appeal lies. In some cases, the right of appeal was negatived on the ground that such a decision was in the nature of an arbitrator's award. In other cases, it has been treated as a judgment amounting to a decision by consent of parties. In the case before us, the position is different. No appeal was ever sought to be filed against the order of Mallick, J., dated 1st April, 1963. Further the language of the agreement of the parties, on the basis of which Mallick, J., proceeded to make that order, was different from that considered in these various decisions. At the first stage, the parties got it recorded that the matters were to be settled and referred to the sole arbitration of Mallick, J. The parties agreed to abide by any decision that might be given by him and that no evidence need be taken except or to whatever extent Mallick, J. might desire. The evidence need not be recorded in any formal manner. Mallick, J., was to have all the summary powers, including the power to divide and partition the properties. The conferment of these powers on Mallick, J., who was already seized of the partition suit, was clearly intended to enable him to function as an arbitrator so as not be bound by the rules of procedure applicable to him as a Court. At the same time, the parties added that Mallick, J., was to make such decrees as he thought fit and proper and, for the purpose of partition, if necessary, he could engage or appoint Surveyors and Commissioners as he thought best. On the face of it, an arbitrator could not pass any decree. The decree could only be passed by Mallick, J., in his capacity of Court seized of the suit. Even if it be held that the first part of the agreement had the effect of bringing about a reference to him in his capacity as arbitrator, he did not cease to be seized of the partition suit as a Court. Even under the Arbitration Act if a reference is made to an arbitrator in a suit pending in a Court, the Court does not cease to have jurisdiction over the suit. All that is required by the provisions of the Arbitration Act is that no further proceedings are to be taken by the Court, except in accordance

with the other provisions of that Act. The suit continues to remain pending before the Court. In a case like the present, where the arbitration agreement envisages that the Presiding Officer of the Court should himself act as an arbitrator, he, in such circumstances, will obviously occupy a dual capacity. He will be both an arbitrator to decide the matters referred to him by the agreement of the parties, and a Court before which the suit continues to remain pending having jurisdiction to deal with the suit in accordance with the provisions of the Arbitration Act. It is a question whether a reference to arbitration by a Presiding Judge, before whom a suit is pending, can be competently made under the Arbitration Act, but that is a point on which we need express no opinion, because if it be held that there was no reference to arbitration in the present case, the order passed by Mallick, J., must be held to be a preliminary decree passed by him as a Court seized of the partition suit. On the other hand, even if it be held that there was a competent reference, it is clear that, after deciding the matters left to his decision as an arbitrator by the parties Mallick, J., proceeded further to deal with the suit himself as a Court and to pass a preliminary decree in it which course being adopted by him was envisaged by the parties themselves when they stated that he could make such decrees in the suit as he thought fit. The actual order passed by Mallick, J. also makes it clear that, in passing that order, he purported to act as the Court deciding the suit and not as the arbitrator to whom some matters in dispute were referred by the parties. At the beginning of the order, Mallick, J., described himself as "the Court". When making the operative order, he used the following language:—

"In the result, for the present, I will pass a preliminary decree as under :—"

On the face of it, when he passed this order, he acted as a Judge seized of the suit who alone was competent to pass the preliminary decree in the suit. Consequently, we cannot accept the submission made by Mr. Chagla that the order made by Mallick, J., should be held to be an award of an arbitrator pure and simple and not a decree by a Court.

We are not concerned in this appeal with the question whether it was appropriate for Mallick, J., to have dealt with the suit in this manner, nor whether the actual order made by him passing the preliminary decree was correct or was liable to be set aside on the ground of the incorrect procedure adopted by him. As we have mentioned earlier, the sole relief claimed before the High Court was the issue of a writ of *mandamus* directing the Registrar on the Original Side to recall, cancel and withdraw this order and to take it off the record, on the ground that it was an award and not a judgment of the Court. Since we have held that it was a judgment of the Court, the Registrar on the Original Side, under the Rules of the Calcutta High Court, was bound to file it on the record and retain it there. The appellant could have sought appropriate remedy for having that judgment vacated and, if such a remedy had been sought against that judgment directly, the question whether it was a good judgment and should be retained on the record or not, could have been appropriately decided. The remedy sought by the appellant of seeking a writ to restrain the Registrar on the Original Side from keeping the judgment on the record of the suit could not possibly be allowed, while the judgment stood and was not vacated.

In the result, we have to hold that the order of the High Court dismissing the petition filed by the appellant was correct and justified. The appeal is dismissed, but, in view of the special circumstances of this case, we direct parties to bear their own costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, V. RAMASWAMI AND G. K. MITTER, JJ.

(1) Beohar Rajendra Sinha and others .. *Appellants*
(In C. A. No. 386 of 1966)

(2) The State of Madhya Pradesh
(In C. A. No. 387 of 1966)

v.

(1) The State of Madhya Pradesh and another .. *Respondents*.
(In C. A. No. 386 of 1966).

(2) Mst. Maharaniahu and others
(In C. A. No. 387 of 1966).

Civil Procedure Code (V of 1908), section 80—Object of—Notice issued by Karta of undivided joint family—Disruption, of the family subsequent to notice—Suit by all divided members—Cause of action mentioned and relief claimed in the notice same as in the plaint—Notice given by karta sufficient to sustain suit brought by divided coparceners.

The object of the notice under section 80, Civil Procedure Code is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle in claim out of Court. The section is no-doubt imperative; failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim. In considering whether the provisions of the statute are complied with, the Court must take into consideration the following matters in each case (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice, (2) whether the cause of action and the relief which the plaintiff claim are set out with sufficient particularity; (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section; and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been delivered or left. In construing the notice the Court cannot ignore the object of the Legislature *viz.*, to give to the Government or public servant concerned an opportunity to reconsider its or his legal position. If on reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or irregularities should be ignored. It is true that the terms of section 80 of the Civil Procedure Code must be strictly complied but that does not mean that the terms of the notice should be scrutinized in an artificial or pedantic manner.

On facts held, it is true that Beohar Raghubir Singh did not expressly describe himself as the karta. But reading of the contents of the notice Exhibit P-8 in a reasonable manner it appears that the claim of Beohar Raghubir Singh was made on behalf of the joint family. There was identity between the person giving the notice and the persons filing the suit because it must be deemed in law that each of the plaintiffs had given the notice under section 80, Civil Procedure Code through the Karta Beohar Raghubir Singh. The notice given by the karta was sufficient to sustain the suit brought by the divided coparceners.

On facts held, that the plaintiffs had not established their title.

Appeals by Special Leave from the Judgment and Decree dated the 16th April, 1963 of the Madhya Pradesh High Court in First Appeal No. 217 of 1959.

S. V. Gupte, Senior Advocate (*P.C. Bhartari*, Advocate, and *J.B. Dadachanji*, Advocate of *Messrs. J. B. Dadachanji & Co.*, with him), for Appellants (In C.A. No. 386 of 1966) and Respondents (In C.A.No. 387 of 1966).

I. N. Shroff, Advocate and *Miss Rama Gupta*, Government Advocate of Madhya Pradesh for State of Madhya Pradesh.

The Judgment of the Court was delivered by

Ramaswami, J.—These appeals are brought by Special Leave from the judgment of the High Court of Madhya Pradesh dated 16th April, 1963, in First Appeal No. 217 of 1959, whereby the High Court modified partly the judgment of the First Additional District Judge, Jabalpur dismissing Civil Suit No. 10-A of 1954.

The suit was instituted against the State of Madhya Pradesh by Beohar Raghubir Singh and his three grand-sons. Beohar Raghubir Singh's son Beohar Rajendra Sinha, was a *pro forma* defendant. A notice under section 80 of the Civil Procedure Code had been given by Raghubir Singh on 11th January, 1954. Plaintiffs 2, 3 and 4, his grand-sons were joined as plaintiffs because in a partition made subsequent to the giving of the notice, they were each entitled to 1/5th share along with the first plaintiff. Beohar Rajendra Sinha was joined as a defendant because he did not choose to join as the plaintiff. The plaintiffs sought a declaration (1) that the three nazul plots in suit had been in possession of the plaintiffs and their predecessors in their own right from time immemorial and their status was that of Rajya Sarkar; and (2) that the order of the State Government in the Survey and Settlement Department refusing to recognise their possession over the plots was wrong and *ultra vires*. The dispute relates to Phoota Tal, a tank situated within the town of Jabalpur. It was plot No. 282 in the settlement of 1863 A.D. Its area then was 5.24 acres. It was recorded as Malkiat Sarkar and in the last column there was an entry showing possession of Aman Singh Thakur Prasad. The next settlement took place in 1890-91. The survey number of Phoota Tal was changed to plot No. 325. Its area remained the same, it was recorded as "water (pani)" and in the last column, the entry showed the possession of Beohar Narpatsingh Raghubir Singh. The third settlement took place in 1909-10. The plot number of Phoota Tal was then changed to 327. Its area remained the same, it was still recorded as "water" but there was no entry in favour of any one showing possession. The nazul settlement took place in 1922-23. In this settlement, the tank was given new numbers 33, 34, 35, 36, 37 and 171. Its area was recorded as 5.2 acres. In this settlement about 2 acres of land was found to be occupied by the Municipal Committee, Jabalpur. The land so found to be occupied was recorded as in the possession of the Municipal Committee, Jabalpur and the remaining land was again recorded as "malkiat sarkar". There was no entry regarding possession in the remarks column so far as the remaining land was concerned. The plaintiffs alleged that Thakur Prasad and Aman Singh were their ancestors, that they had been in continuous possession of the disputed land and the omission to record their possession in the last two settlements of 1909-10 and 1922-23 was due to some oversight. In 1948 the first plaintiff made an application for correction to the Deputy Commissioner, Jabalpur who made an order in his favour Exhibit P-5. The order of the Deputy Commissioner was however set aside by the State Government on 28th May, 1953 and it was held that the plaintiffs had no title to the disputed land. The plaintiff therefore prayed for a declaration of the title to the disputed plots and for the correction of the entry in the settlement record showing the status of the plaintiff as that of "Raiyat Sarkar". The suit was contested by the State of Madhya Pradesh. It was urged that the plaintiff had no possession over the disputed land and the order of the State Government dated 28th May, 1953, was correct. It was contended that plaintiffs 2, 3 and 4 had no right to institute the suit because no notice under section 80 of the Civil Procedure Code was given on their behalf. The suit was not contested by the second defendant Beohar Rajendra Sinha. By its judgment dated 24th January, 1959 the trial Court held that there was no documentary evidence from 1891 to 1932 to support the possession of the ancestors of the plaintiffs regarding Phoota Tal. The trial Court also held that in all the settlement

entries, the land was recorded as belonging to the Government "Milkiat Sarkar". In any event, between 1891 to 1932 there was no evidence regarding the user of the property by the plaintiffs and in the subsequent years a part of the property was found in possession of the Municipal Committee. The trial Court dismissed the suit. Against the judgment of the trial Court the plaintiffs preferred an appeal to the High Court. The High Court held in the first place that the notice Exhibit P-8 was not in conformity with section 80 of the Civil Procedure Code. The High Court held that Beohar Raghubir Singh had lost the right to represent the joint family as karta at the time of institution of the suit because there had been a severance of joint status and the notice served by Beohar Raghubir Singh could not ensure to the benefit of the other plaintiffs. On the merits of the case, the High Court found that the plaintiffs had established their possession for the statutory period of 60 years. The High Court held that the plaintiffs had acquired the right of Raiyat Sarkar and that the order of the State Government refusing to correct the revenue record was illegal. On these findings the High Court modified the judgment of the trial Court to the extent that there was a declaration in favour of the plaintiffs that they were entitled to 1/5th share of the property in dispute and the claim regarding the 4/5th share was dismissed. The order of the State Government dated 28th May, 1953 refusing to recognise the possession of the plaintiffs was held to be wrong and illegal.

The first question to be considered in these appeals is whether the High Court was right in holding that the notice given under section 80 of the Civil Procedure Code by the first plaintiff was effective only with regard to Raghubir Singh and the notice was ineffective with regard to the other plaintiffs and therefore Raghubir Singh alone was entitled to a declaration as regards the 1/5th share of the disputed plot. On behalf of defendant No. 1 it was contended by Mr. Shroff that at the time of giving notice the plaintiffs and the second defendant were joint and plaintiff No. 1 Raghubir Singh was karta of the joint family. The notice was given on 11th January, 1954 and the suit was instituted on 20th July, 1954. It was admitted that between these two dates there was a disruption of the joint family of which Raghubir Singh was karta. It was argued that the right of the first plaintiff to represent the family had come to an end before the institution of the suit, and hence plaintiffs 2, 3 and 4 had to comply individually with the provisions of section 80 of the Civil Procedure Code before appearing as plaintiffs in the suit. In our opinion, there is no justification for this argument. We consider that there is substantial identity between the person giving the notice and the persons filing the suit in the present case. At the time of giving notice the first plaintiff Beohar Raghubir Singh was admittedly the eldest member of the joint family and being a karta he was entitled to represent the joint family in all its affairs. The cause of action had accrued at the time of giving of the notice and it was not necessary to give a second notice merely because there was a severance of the joint family, before 20th July, 1954 when the suit was actually instituted. It is obvious that the notice was given by Beohar Raghubir Singh as a representative of the joint family and in view of the subsequent partition the suit had to be instituted by all the divided members of the joint family. We are of the opinion that the notice given by Beohar Raghubir Singh on 11th January, 1954, was sufficient in law to sustain a suit brought by all the divided coparceners who must be deemed to be as much the authors of the notice as the karta who was the actual signatory of the notice. There is substantial identity between the person giving the notice and the persons bringing the suit in the present case and the argument of defendant No. 1 on this point must be rejected.

The object of the notice under section 80, Civil Procedure Code is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of Court. The section is no doubt imperative; failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim. In considering whether the provisions of the statute are complied with, the Court must take into account the

following matters in each case (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice; (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularity, (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section; and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and of the plaint contains a statement that such a notice has been so delivered or left. In construing the notice the Court cannot ignore the object of the Legislature, *viz.*, to give to the Government or the public servants concerned an opportunity to reconsider its or his legal position. If on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give any incidental defects or irregularities should be ignored.

In the present case, the notice was served on 11th January, 1954 by Beohar Raghubir Singh. The notice stated the cause of action arising in favour of the joint family. The requirements as to cause of action, the name, description and residence of the plaintiff were complied with and the reliefs which the plaintiff claimed were duly set out in the notice. It is true that Beohar Raghubir Singh did not expressly describe himself as the karta. But reading the contents of the notice Exhibit P-8 in a reasonable manner it appears to us that the claim of Beohar Raghubir Singh was made on behalf of the joint family. It is true that the terms of section 80 of the Civil Procedure Code must be strictly complied but that does not mean that the terms of the notice should be scrutinised in an artificial or pedantic manner. In *Dihan Singh Sobah Singh and another v. The Union of India and another*¹, Bhagwati, J., observed in the course of his judgment—

“We are constrained to observe that the approach of the High Court to this question not well-founded. The Privy Council not doubt laid down in *Bhakchand Dagadusa v. Secretary of State*², that the terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock C. B. in *Jones v. Nicholls*³. “We must import a little common sense into notices of this kind.” Beaumont G.J., also observed in *Chandu Lal Vadilal v. Government of Bombay*⁴, ‘One must construe section 80 with some regard to common sense and to the object with which it appears to have been passed.....’”

As already pointed out, the suit was instituted in the present case by the divided members of the Hindu joint family on 20th July, 1954. The notice had been given on 11th January, 1954 by Beohar Raghubir Singh who was the karta of the undivided joint family. In our opinion, there was identity between the person giving a notice and the persons filing the suit because it must be deemed in law that each of the plaintiffs had given the notice under section 80 of the Civil Procedure Code through the karta Beohar Raghubir Singh. It is not disputed that the cause of action set out in the notice remained unchanged in the suit. It is also not said that the relief set out in the plaint is different from the relief set out in the notice. We are accordingly of the opinion that the notice given by the karta was sufficient to sustain the suit brought by the divided co-parceners and the decision of the High Court on this point must be over-ruled.

The view that we have expressed is borne out by the Judgment of this Court in *State of Andhra Pradesh v. Gundugola Venkata Suryanarayan Garu*⁵. In that case, the Government of Madras applied the provisions of the Madras Estates Rent Reduction Act, 1947 to the lands in the village Mallindhapuram on the ground that the grant was of the whole village and hence an estate within the meaning of section

1. (1958) S.C.J. 363 : (1958) 1 A.W.R. (S.C.) 93 : (1958) 1 M.L.J. (S.C.) 93 : (1958) S.C.R. 781.

2. (1927) L.R. 54 I.A. 338 : 53 M.L.J. 81.

3. (1844) 13 M. & W. 361, 363 : 153 E.R. 149, 150.

4. I.L.R. (1943) Bom. 128.

5. (1964) 4 S.C.R. 945.

3 (2) (d) of the Madras Estates Land Act, 1908. The respondent and another person served a notice under section 80 of the Code of Civil Procedure upon the Government of the State of Madras in which they challenged the above mentioned notification and asked the Government not to act upon it. Out of the two persons who gave the notice, the respondent alone filed the suit. The trial Court held that the original grant was not of the entire village and was not so confirmed or recognised by the Government of Madras and as it was not an "Estate" within the meaning of section 3 (2) (d) of the Madras Estates Land Act, the Madras Rent Reduction Act, 1947 did not apply to it. But the suit was dismissed on the ground that although two persons had given notice under section 80 of the Code of Civil Procedure, only one person had filed the suit. The High Court agreed with the trial Court that the grant was not of an entire village but it also held that the notice was not defective and the suit was maintainable as it was a representative suit and the permission of the Court under Order 1, rule 8 had been obtained in this case. The High Court granted the respondent the relief prayed for by him. Against the order of the High Court the appellant appealed to this Court which dismissed the appeal holding that in the circumstances of the case there was no illegality even though the notice was given by two persons and the suit was filed by only one. If the Court grants permission to one person to institute a representative suit and if the person had served the notice under section 80, the circumstance that another person had joined him in serving the notice but did not join him in the suit, was not a sufficient ground for regarding the suit as defective. At page 953 of Report Shah, J., observed as follows :—

"The notice in the present suit was served by the plaintiff and Yegneswara Sastri. They raised a grievance about the notification issued by the Government of Madras on 16th May, 1950; it was not an individual grievance of the two persons who served the notice but of all the Inamdars, or agramdars. The relief for which the suit was intended to be filed was also not restricted to their personal claim. The notice stated the cause of action arising in favour of all the Inamdars, and it is not disputed that the notice set out the relief which would be claimable by all the Inamdars or on their behalf in default of compliance with the requisition. The plaintiff it is true alone filed the suit, but he was permitted to sue for and on behalf of all the Inamdars by an order of the Court under Order 1, rule 8 of the Code of Civil Procedure. The requirements as to the cause of action, the name, description and place of residence of the plaintiff was therefore complied with and the relief which the plaintiff claimed was duly set out in the notice. The only departure from the notice was that two persons served a notice under section 80 informing the Government that proceedings would be started, in default of compliance with the requisition, for violation of the rights of the Inamdars, and one person only out of the two instituted the suit. That in our judgment is not a defect which brings the case within the terms of section 80."

On behalf of respondent No. 1 reference was made to the two decisions of the Judicial Committee in *Vellayan Chatti and others v. Government of the Province of Madras and another*¹, and *Government of the Province of Bombay v. Pestonji Ardesir Wadia and others*². But the principle of these decisions has no bearing on the question presented for determination in the present case. In *Vellayan Chatti's*¹ case a notice was given by one plaintiff stating the cause of action, his name, description and place of his residence and the relief which he claimed although the suit was instituted by him and another. It was observed by the Judicial Committee :

"The section according to its plain meaning requires that there should be in the language of the High Court of Madras "identity of the person who issues the notice with the person who brings the suit." : See *Venkata Rangiah Appa Rao v. Secretary of State*³, and on appeal *Venkata Rangiah Appa Rao v. Secretary of State*⁴.

1. I.L.R. (1948) Mad. 214 : (1947) 2 M.L.J. 208 : 74 I.A. 223 : A.I.R. 1947 P.C. 197.

2. (1949) 76 I.A. 85 : (1949) 2 M.L.J. 161.

3. (1931) I.L.R. 54 Mad. 416 : 59 M.L.J. 923.

4. A.I.R. 1935 Mad. 389.

To hold otherwise would be to admit an implication or exception for which there is no justification."

Two persons had sued for a declaration that certain lands belonged to them, and for an order setting aside the decision of the Appellate Survey Officer in regard to those lands. It was found that one alone out of the two persons had served the notice. The relief claimed by the two persons was personal to them and the right thereto arose out of their title to the land claimed by them. It was held by the Judicial Committee that without a proper notice under section 80 the suit could not be instituted for to hold otherwise would be to admit an implication or exception for which there was no justification. In the other case, in *Pestonji Ardeshir Wadia's*¹ case two trustees of a trust served a notice in October, 1933 upon the Government of Bombay under section 80 intimating that the trustees intended to institute a suit against the Government on the cause of action and for the relief set out therein. One of the trustees died before the plaint was lodged in Court, and two more trustees were appointed in the place of the deceased trustee. Thereafter the two new trustees and the surviving trustee filed the suit out of which the appeal arose which was decided by the Judicial Committee. No notice was served on the Government on behalf of the two new trustees. The Judicial Committee accepted the view of the High Court that where there were three plaintiffs, the names and addresses of all of them must be given in the notice. Their Lordships observed that:

"the provisions of section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. In the present case it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit."

It is clear that the principle of these two decisions of the Judicial Committee has no application in the present case because the material facts are different.

We proceed to consider the next question arising in these appeals, *viz.*, whether the High Court was right in holding that the plaintiffs had established their title as raiyat sarkar with regard to 1/5th share in nazul plots Nos. 34/31, 33 and 171/1 mentioned in the Deputy Commissioner's order, dated 7th May, 1948 in Revenue Case No. 9 /45-46. It was argued on behalf of defendant No. 1 that there was no evidence to show that the plaintiffs were in possession of the land from 1909 to 1932, and the plaintiffs had not established their title by prescription for the statutory period of 60 years. It was contended that the High Court had no justification for holding that the plaintiffs had established the title of "Raiyat Sarkar" and the finding of the High Court was not based upon any evidence. In our opinion, the argument put forward on behalf of defendant No. 1 is well-founded and must be accepted as correct. In the settlement of 1863-64 Exhibit P-1 the names of Amansingh and Thakurprasad were noted in the remarks column. But the column regarding tenancy right is definitely blank. The owner is shown in the Khasra as the State "Milkiat Sarkar." In the settlement of 1890-91 Amansingh Narpatsingh is again shown in the remarks column of the karta. But the column regarding any kind of tenancy right is again blank. It is clear that in the settlements of 1860 and 1890-91 the ownership of the land is recorded as that of the Government. The possession of the plaintiffs or of their ancestors could not be attributed to ownership or tenancy right of the property. In the settlement of 1909-10, Exhibit P-3 there is no entry in the remarks column showing the possession of the ancestors of the plaintiffs. It was said on behalf of the plaintiffs that no notice was given to them of the proceedings of the settlement of 1909-10. Even assuming that this allegation is correct, the entries of the khasra P-3 cannot be treated to be a nullity and of no effect. In any event, it was open to the plaintiffs to adduce other reliable evidence to prove their possession between the years 1909 to 1932. But the plaintiffs have failed to produce any such evidence. In the nazul settlement of 1922-23 the tank was given new plot numbers 33, 34, 35, 36, 37 and 171 and its area was recorded

as 5.24 acres. In this settlement about 2 acre of land was found to be occupied by the Municipal Committee, Jabalpur. The land so found to be occupied was recorded as in the possession of the Municipal Committee, Jabalpur and the remaining land was again recorded as "Malkiat Sarkar." There is no entry as regards the remaining land recording anybody's possession in the remarks column. Actually proclamations were made during this settlement and objections were invited as per Exhibit ID-14. A date was fixed upto 31st August, 1924 but no one came forward. The proclamation clearly recited that the vacant sites which were not in possession of anybody were not recognised as belonging to any person. It is impossible to believe that the plaintiffs or their ancestors were unaware of such a proclamation. Had they been in possession they would not have failed to make a claim. For the period after 1933-34 the plaintiffs produced account books to show that they exercised certain rights. Certain receipts were also proved but they also relate to a period after 1939. We have gone through the oral evidence produced by the plaintiffs and it appears to be unreliable. The result is that for the period 1891 till 1932 there is no reliable oral documentary evidence to prove that the plaintiffs or their ancestors had any possession over the disputed land. On the contrary the disputed land i.e., Phoota Tal was always recognised as Malkiat Sarkar and the State Government was justified in holding that the order of the Deputy Commissioner, dated 7th May, 1948 should be set aside.

In the course of the argument reference was made by Mr. Gupte to the following passage in the Central Provinces Settlement Instructions (Reprint of 1953) page 213 :

"In dealing with proposed method of the settlement of titles it will be convenient in order to remove all causes for misapprehension among residents, to lay emphasis on the policy of Government in making these settlements. That policy was defined in the Chief Commissioner's Resolution No. 502-BK dated the 19th October, 1917, in the Revenue and Scarcity Department, but its main principles will bear repetition.

As it is not the intention of Government in making the settlement to disturb long possession, but only to obtain an accurate record of the lands which are its property and to secure its right to any land revenue to which it may be entitled, long possession, even without clear proof of a definite grant from Government will be recognised as entitled the holder to possession. In deciding what constitutes long possession in any individual town, regard will be had to the special circumstances of the place, and while this point will be dealt with more particularly in the Deputy Commissioner's report, the following general principles will ordinarily be observed:

(1) all occupants who are able to prove possession to any land prior to 1891 or such later date as may be fixed for each town, either by themselves or by a valid title from a previous holder, and all occupants who can prove a definite grant or lease from Government will be recorded as entitled to hold such land as against Government (paragraph 6 of the Resolution)."

On the basis of this passage it was argued that it was the duty of the settlement officer to treat the plaintiffs as having established their title because they were shown to be in possession in the settlement of the year 1890-91. We are unable to accept this argument as correct. The passage quoted above only applies to a case where the ownership of the land was unknown, i.e., where possession is proved for a long time, but its original title could not be traced, and not to a case where the land is recorded as Government land.

For the reasons expressed, we hold that the suit brought by the plaintiffs being Civil Suit No. 10-A of 1954 should be dismissed. Civil Appeal 386 of 1966 is accordingly dismissed and Civil Appeal 387 of 1966 is allowed with costs in favour of defendant No. 1 i.e., State of Madhya Pradesh. There will be one hearing fee.

S.V.J.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND A. N. GROVER, JJ.

Smt. Swaran Lata Ghosh

.. Appellant*

v.

Harendra Kumar Banerjee and another

.. Respondents.

*Practice—Judicial trial—Essential attributes—Disputed claim—Judicial determination, to be supported by the most cogent reasons that suggest themselves to a Judge.**Civil Procedure Code (V of 1908), Order 20, rules 1 to 8 and Order 49, rule 3—Scope—Chartered High Court not obliged to record a judgment strictly according to Order 20, Rules 4 and 5—Order 49, rule 3 how far applies to the trial of suits by Chartered High Courts—Judicial determination to be supported by reasons duly recorded.*

It is true that rules 1 to 8 of Order 20 of the Code of Civil Procedure are, by the express provision contained in Order 49, rule 3, Clause (5) in applicable to a Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. A Judge of a Chartered High Court is not obliged to record a judgment strictly according to the provisions contained in rules 4 (2) and 5 of Order 20, Code of Civil Procedure. But the privilege of not recording a judgment is intended normally to apply where the action is under undefended, where the parties are not at issue on any substantial matter, in a summary trial of an action where leave to defend is not granted, in making interlocutory orders or in disposing of formal proceedings and the like. Order 49, rule 3 of the Code of Civil Procedure undoubtedly applies to the trial of suits; but the question is not one merely of power but of exercise of judicial discretion in the exercise of that power. The function of a judicial trial is to hear and decide a matter in contest between the parties in open Court in the presence of parties according to the procedure prescribed for investigation of the dispute and the rules of evidence. The conclusion of the Court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure.

The plaintiff's case was founded upon extracts of Bank account; the extracts however do not evidence the agreement under which the money passed from the plaintiff to Ghosh (husband of the appellant). The plaintiff had to prove not only that money passed from him to Ghosh, he had to prove that money passed under the agreement pleaded by him. Oral testimony of the plaintiff had to be examined in the context of several weighty circumstances, e.g., complete absence of documentary evidence in the handwriting of Ghosh; absence of correspondence relating to the transactions between Ghosh and the plaintiff; absence of books of account in support of the transactions; improbability of a transaction of the nature pleaded between an attorney and the plaintiff, absence of any previous business or professional relationship between Ghosh and the plaintiff; absence of vouchers supporting the alleged payment of interest and repayment of part of the principal and other important circumstances. In reaching a conclusion the Court had to consider the probabilities and the circumstances in which the plaintiff alleged that he had deposited the two sums of money with Ghosh. It was essentially a case in which there should have been a full record of the reasons which persuaded the learned Trial Judge to reach the conclusion he did. A mere order directing payment of the money, not supported by reasons, does not do duty or a judgment according to law.

Appeal by Special Leave from the Judgment and Order, dated the 4th August, 1964 of the Calcutta High Court in Appeal from Original Order No. 99 of 1963.

D. N. Mukherjee, Advocate, for Appellant.

S. C. Majumdar, Advocate, for Respondents.

The Judgment of the Court was delivered by

Shah, J.—Birendra Krishna Ghosh—hereinafter called “Ghosh”—was practising as an attorney-at-law in the High Court of Calcutta. He died in August, 1950. H. K. Banerjee—the first respondent herein—commenced in 1951 an action in the High Court of Calcutta on the original side against Swaran Lata and Arun Kumar—widow and minor son respectively of Ghosh—on a decree of Rs. 15,000 claiming that it was the balance of “capital deposits” due to him from Ghosh and Rs. 1,535 interest due thereon. The plaintiff claimed that he had deposited with Ghosh Rs. 6,000 on 10th December, 1946 for the “specific purpose of investing the amount” and the latter agreed to pay interest at the rate of 6 per cent. per annum and to repay the same or any portion thereof when demanded; that on or about 17th February, 1948, he had deposited Rs. 10,000 with Ghosh also for “the specific purpose of investing” that sum, and the latter had agreed to pay interest at the rate of 7 per cent. per annum and to repay the same or part thereof when demanded; that under the agreement Ghosh paid diverse sums of money as interest, and on 3rd July, 1947 Ghosh repaid Rs. 1,000 out of Rs. 6,000 deposited; and that the balance of Rs. 15,000 and Rs. 1,535 interest due thereon were repayable by the defendants to the plaintiff.

Swaran Lata filed a written statement denying the claim of the plaintiff. She denied that the sums of Rs. 6,000 and Rs. 10,000 were entrusted to or deposited with her husband as alleged by the plaintiff: she denied that her husband repaid any amounts towards interest or part payment of principal; and she submitted that the suit was in any event barred by the law of limitation.

The trial of the suit commenced before Law, J., on 12th July, 1962. In support of the plaintiff's case four witnesses were examined. The plaintiff tendered in evidence extracts from certain Bank accounts and correspondence. He produced no documentary evidence in support of his case that any amount was deposited with Ghosh, on terms set out in the plaint. Apparently he relied upon the entries in the extracts from the statements of account with the United Bank of India Ltd., the Imperial Bank of India, the Hooghly Bank Ltd. and correspondence between him and Swaran Lata. The learned Judge by order, dated 17th August, 1962 passed the following order:

“There will be a decree for Rs. 15,000 with interest on judgment on Rs. 15,000 at 6 per cent. per annum and costs. No interim interest allowed.”

Pursuant to that order a decree was drawn up.

Against the decree Swaran Lata appealed to the High Court under clause 15 of the Letters Patent, and raised several grounds in the memo. of appeal on the merits. The High Court disposed of the appeal by a short judgment observing:

“We think that the plaintiff sufficiently proved the case made in the plaint. On the 10th December, 1946, the plaintiff entrusted and deposited with Birendra Krishna Ghosh a sum of Rs. 6,000 for the express and specific purpose of investing the sum to yield interest at the rate of 6 per cent. per annum. He also entrusted and deposited with Birendra Krishna Ghosh on the 17th February, 1948 a sum of Rs. 10,000 for “the express and specific purpose of investing the sum to yield interest at the rate of 7 per cent. per annum.”

The Court observed that the amounts paid to Ghosh were deposits, within the meaning of Article 60 of the Indian Limitation Act, 1908, and since interest was paid in respect of both the deposits within three years of the institution of the suit, no question of limitation arose, and the Trial Court had “rightly decreed the suit.” The High Court, however, modified the decree passed by the Trial Court and declared that the liability of the defendants was not personal and was limited only to

“the assets and properties” of Ghosh received by them. With Special Leave, Swaran Lata Ghosh has appealed to this Court.

The defendants had filed a written statement denying the averments in the plaint and had contested the claim of the plaintiff. The learned Judge apparently raised no issues. We have found in the printed paper book no record of any issues raised. On behalf of the plaintiff, witnesses were examined to prove the two deposits and the terms of the deposit which it was claimed were orally agreed upon. There was no documentary evidence supporting the case of the plaintiff relating to the agreements between him and Ghosh. There was also no documentary evidence supporting the case of payment of interest on the amounts deposited, or of re-payment of a part of the principal. Indisputably the pleadings of the parties raised substantial issues of fact for trial, and a lengthy trial was held. But the learned Trial Judge delivered no judgment. He merely decreed the claim. The decree was on the face of it erroneous, because it directed Swaran Lata and her minor son Arun Kumar personally to pay the amount decreed.

Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the Court or by law, he must regard the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is unfortunate that the learned Trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint.

The defendants it is true led no oral evidence and produced no documentary evidence. But the defendants had apparently no personal knowledge about the transactions and there is no clear evidence on the record that the first defendant Swaran Lata had in her possession any books of account of the deceased which she could have produced and had withheld. The burden of proving the claim in all its details lay upon the plaintiff. Absence of a documentary evidence in support of the case made the burden more onerous.

We are unable to agree with Counsel for the plaintiff that “for all practical purposes” the action was undefended and that the Trial Judge recorded merely formal evidence in proof of the plaintiff’s case. The defendants had filed a written statement denying the plaintiff’s claim, had appeared by Counsel at the trial, and had challenged the plaintiff’s evidence by intensive cross-examination. The plaintiff who was the principal witness was asked as many as 317 questions and his examination appears to have taken the better part of a day. In the course of the examination in attempting to elicit the truth the learned Judge took no mean or insignificant part. Three more witnesses were also examined.

We are also unable to agree that the only plea raised at the trial and in the Court of appeal was about the personal liability of the defendants. The evidence led at the trial and the cross-examination amply establish that the defendants defended the claim on the merits. The High Court in appeal modified the decree and restricted it to the estate inherited by the defendants from Ghosh. But there is no reason to hold that the only point argued before the Trial Court related to the extent of liability of the defendants. The grounds in the memorandum of appeal belie that submission.

It is true that rules 1 to 8 of Order 20 of the Code of Civil Procedure are, by the express provision contained in Order 49, rule 3, clause (5) inapplicable to a Chartered High Court in the exercise of its ordinary or Extraordinary Original Civil Jurisdiction. A Judge of a Chartered High Court is not obliged to record a judgment strictly according to the provisions contained in rules 4 (2) and 5 of Order 20, Code of Civil Procedure. But the privilege of not recording a judgment is intended normally to apply where the action is undefended, where the parties are not at issue on any substantial matter, in a summary trial of an action where leave to defend is not granted, in making interlocutory orders or in disposing of formal proceedings and the like. Order 49, rule 3 of the Code of Civil Procedure undoubtedly applies to the trial of suits; but the question is not one merely of power but of exercise of judicial discretion in the exercise of that power. The function of a judicial trial is to hear and decide a matter in contest between the parties in open Court in the presence of parties according to the procedure prescribed for investigation of the dispute, and the rules of evidence. The conclusion of the Court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure.

We may assume that the learned Trial Judge was satisfied that the claim of the plaintiff deserved to be decreed. But the judgment of the learned Trial Judge was not final: it was subject to appeal and unless there was a reasoned judgment recorded by the Trial Judge, an appeal against the judgment may turn out to be an empty formality. A Court of appeal generally attaches great value to the views formed by the Judge of First Instance who had seen the witnesses and noted their demeanour. How the Judge who tried the suit reacted to the evidence of a witness may not always be found from the printed record.

The plaintiff's case was founded upon extracts of Bank accounts: the extracts however do not evidence the agreement under which the money passed from the plaintiff to Ghosh. The plaintiff had to prove not only that money passed from him to Ghosh; he had to prove that money passed under the agreement pleaded by him. Oral testimony of the plaintiff had to be examined in the context of several weighty circumstances, *e.g.*, complete absence of documentary evidence in the handwriting of Ghosh; absence of correspondence relating to the transactions between Ghosh and the plaintiff; absence of books of account in support of the transactions; improbability of a transaction of the nature pleaded between an Attorney and the plaintiff; absence of any previous business or professional relationship between Ghosh and the plaintiff; absence of vouchers supporting the alleged payment of interest and repayment of part of the principal and other important circumstances. In reaching a conclusion the Court had to consider the probabilities and the circumstances in which the plaintiff alleged that he had deposited the two sums of money with Ghosh. It was essentially a case in which there should have been a full record of the reasons which persuaded the learned Trial Judge to reach the conclusion he did. A mere order directing payment of the money, not supported by reasons, does not do duty for a judgment according to law.

We are, therefore, constrained to come to the conclusion that there has been no real trial of the defendants' case. It is a very unfortunate state of affairs that eighteen years after the date on which the suit was instituted, we have to remand the suit for trial according to law. But we see no other satisfactory alternative.

The decree passed by the High Court is set aside.' The suit stands remanded to the Court of First Instance for trial according to law. It will be open to the learned Judge who tries the suit to proceed on the evidence already on the record. If the parties desire to lead any additional evidence, he will give them opportunity in that behalf. If the learned Judge is of the opinion that the witnesses should be examined over again before him, he may adopt that course.

As costs till now incurred are thrown away on account of circumstances for which the parties may not be held responsible, we direct that there will be no order as to costs till this date.

We may state that the observations made by us in the course of this judgment are not intended to express any opinion by this Court on the merits of the dispute.

V.M.K.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND A. N. GROVER, JJ.

Jai Jai Ram Manohar Lal

.. Appellant*

v.

National Building Material Supply, Gurgaon

.. Respondent.

Civil Procedure Code (V of 1908), section 153 and Order 6, rule 17—Amendment of pleading—Granting of—Suit instituted by plaintiff in the name in which the business was carried on—Amendment of plaint to describe plaintiff as the Proprietor—Whether can be granted—Limitation.

Rules of Procedure are intended to be handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of Procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting *mala fide* or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. All amendments should be permitted as may be necessary for the purpose of determining the real question in controversy between the parties, unless by permitting the amendment injustice may result to the other side. There is no rule that unless in an application for an amendment of the plaint, it is expressly averred that the error, omission or misdescription is due to *bona fide* mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations.

On facts held, that the order passed by the trial Court in granting the amendment was right.

It was further held, since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff, on the date on which it was originally instituted.

Appeal by Special Leave from the Judgment and Order, dated the 9th November, 1964 of the Allahabad High Court in First Appeal No. 257 of 1953.

S. C. Manchanda, Senior Advocate (S. K. Mehta and K. L. Mehta, Advocates, with him), for Appellant.

Bishan Narain, Senior Advocate (Harbans Singh, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—On 11th March, 1950, Manohar Lal s/o. Jai Jai Ram commenced an action in the Court of the Subordinate Judge, Nainital, for a decree for Rs. 10,139/12 being the value of timber supplied to the defendant—the National Building Material Supply, Gurgaon. The action was instituted in the name of “Jai Jai Ram Manohar Lal” which was the name in which the business was carried on. The plaintiff Manohar Lal subscribed his signature at the foot of the plaint as “Jai Jai Ram Manohar Lal, by the pen of Manohar Lal”, and the plaint was also similarly verified. The defendant by its written statement contended that the plaintiff was an unregistered firm and on that account incompetent to sue.

On 18th July, 1952, the plaintiff applied for leave to amend the plaint. Manohar Lal stated that “the business name of the plaintiff is Jai Jai Ram Manohar Lal and therein Manohar Lal the owner and proprietor is clearly shown and named. It is a joint Hindu family business and the defendant and all knew it that Manohar Lal whose name is there along with the father’s name is the proprietor of it. The name is not an assumed or fictitious one.” The plaintiff on those averments applied for leave to describe himself in the cause title as “Manohar Lal proprietor of Jai Jai Ram Manohar Lal” and in paragraph 1 to state that he carried on the business in timber in the name of Jai Jai Ram Manohar Lal. Apparently no reply was filed to this application by the defendant. The Subordinate Judge granted leave to amend the plaint. He observed that there was no doubt that the real plaintiff was Manohar Lal himself, that it was Manohar Lal who intended to file and did in fact file the action, and that the “amendment was intended to bring what in effect had been done in conformity with what in fact should have been done.”

The defendant then filed a supplementary written statement raising two additional contentions—(1) that Manohar Lal was not the sole owner of the business and that his other brothers were also the owners of the business, and (2) that in any event the amendment became effective from 18th July, 1952, and on that account the suit was barred by the law of limitation.

The trial Judge decreed the claim for Rs. 6,568/6/3. Against that decree an appeal was preferred to the High Court of Allahabad. The High Court being of the view that the action was instituted in the name of a “non-existing person” and Manohar Lal having failed to aver in the application for amendment that the action was instituted in the name of “Jai Jai Ram Manohar Lal” on account of some *bona fide* mistake or omission, the Subordinate Judge was incompetent to grant leave to amend of the plaint. The High Court after making an extensive quotation from the judgment of this Court in *Purushottam Umedbhai & Company v. Messrs. Mamlal & Sons*,¹ observed that the action could not be instituted by the plaintiff in the business name; it should have been instituted in the name of the *karta* of the Hindu undivided family in his representative capacity or else all the members of the joint family must join as plaintiffs. The Court then observed:

“The suit instituted by the joint Hindu family business in the name of an assumed business title “was a suit by a person, who did not exist and was, therefore, a nullity. Hence there could be no amendment of the description of such a plaintiff who did not exist in the eye of law. The Court below was in obvious error in thinking otherwise and allowing the name of Manohar Lal to be added as proprietor of the original plaintiff Jai Jai Ram Manohar Lal, which was neither a legal entity nor an existing person who could have validly instituted the suit.”

The High Court was also of the opinion that the substitution of the name of Manohar Lal as a plaintiff during the pendency of the action took effect from 18th July, 1952, and the action must be deemed to be instituted on that date: the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. The plaintiff has appealed to this Court with Special Leave.

1. (1961) 1 M.L.J. (S.C.) 38: (1961) 1 An.W.R. 982.
(S.C.) 38: (1961) 1 S.C.J. 283: (1961) 1 S.C.R.

The order passed by the High Court cannot be sustained. Rules of procedure are intended to be handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting *mala fide*, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of cost. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. In *Amulakchand Mewaram and others v. Babulal Kanadal Taliwala*¹, Beaumont, C J., in delivering the judgment of the Bombay High Court set out the principles applicable to cases like the present and observed :

“.....the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought in the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, *prima facie*, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs.”

In *Amulakchand Mewaram's case*¹, Hindu undivided family sued in its business name. It was not appreciated at an early stage of the suit that in fact the firm name was not of a partnership, but was the name of a joint Hindu family. An objection was raised by the defendant that the suit as filed was not maintainable. An application to amend the plaint, by substituting the names of the three members of the joint family for the name of the family firm as plaintiffs, was rejected by the Court of First Instance. In appeal the High Court observed that a suit brought in the name of a firm in a case not within Order 30, Civil Procedure Code being in fact a case of misdescription of existing persons, leave to amend ought to have been given.

This Court considered a somewhat similar case in *Purushottam Umedbhai's case*². A firm carrying on business outside India filed a suit in the firm name in the High Court of Calcutta for a decree for compensation for breach of contract. The plaintiff then applied for amendment of the plaint by describing the names of all the partners and striking out the name of the firm as a mere misdescription. The application for amendment was rejected on the view that the original plaint was no plaint in law and it was not a case of misnomer or misdescription, but a case of a non-existent firm or a non-existent person suing. In appeal, the High Court held that the description of the plaintiff by a firm name in a case where the Code of Civil Procedure did not permit a suit to be brought in the firm name should properly be considered a case of description of the individual partners of the business and as such a misdescription which in law can be corrected and should not be considered to amount to a description of a non-existent person. Against the order of the High Court an appeal was preferred to this Court. This Court observed (at p. 994):

“Since, however, a firm is not a legal entity the privilege of suing in the name of a firm is permissible only to those persons who, as partners, are doing business in India. Such privilege is not extended to persons who are doing business as partners outside India. In their case they still have to sue in their individual names. If, however, under some misapprehension, persons doing business as partners outside India do file a plaint in the name of “their firm they are misdescribing themselves, as the suit instituted is by them, they being known collectively as a firm. It seems, therefore, that a plaint filed in a Court in India in the name of of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purpose of the Code of Civil Procedure. In these circumstances, a civil Court could

1. (1933) 35 Bom.L.R. 569.

W.R. (S.C.) 38 : (1961) 1 S.C.R. 982 : (1961) 1

2. (1961) 1 M.L.J. (S.C.) 38 : (1961) An. S.C.J. 283.

permit, under the provisions of section 153 of the Code (or possibly under Order 6, rule 17, about which we say nothing), an amendment of the plaint to enable a proper description of the plaintiffs to appear in it in order to assist the Court in determining the real question or issue between the parties."

These cases do no more than illustrate the well-settled rule that all amendments should be permitted as may be necessary for the purpose of determining the real question in controversy between the parties, unless by permitting the amendment injustice may result to the other side.

In the present case, the plaintiff was carrying on business as commission agent in the name of "Jai Jai Ram Manohar Lal". The plaintiff was competent to sue in his own name as Manager of the Hindu undivided family to which the business belonged; he says he sued on behalf of the family in the business name. The observations made by the High Court that the application for amendment of the plaint could not be granted, because there was no averment therein that the misdescription was on account of a *bona fide* mistake, and on that account the suit must fail, cannot be accepted. In our view, there is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or misdescription is due to a *bona fide* mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitation.

Since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff, on the date on which it was originally instituted.

In our view, the order passed by the trial Court in granting the amendment was clearly right, and the High Court was in error in dismissing the suit on a technicality wholly unrelated to the merits of the dispute. Since all this delay has taken place and costs have been thrown away, because the defendant raised and persisted in a plea which had no merit even after the amendment was allowed by the trial Court, he must pay the costs in this Court and the High Court. The appeal is allowed and the decree passed by the High Court is set aside. It appears that the High Court has not dealt with the appeal on the merits. The proceedings will stand remanded to the High Court for disposal according to law on the merits of the dispute between the parties.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND A. N. GROVER, JJ.

S. Jhansi Lakshmi Bai and others

.. *Appellants**

v.

Pothana Appa Rao and others

.. *Respondents.*

Succession Act (XXXIX of 1925), section 105—Legacy—Legatee not surviving the testator—Lapse—Intention to exclude lapse, when can be inferred.

Bequest—Fund to be utilised in equal moieties for two purposes—Failure of one purpose if will result in a moiety of the amount devised falling into the residue.

The fund was devised for the construction of a Ramamandiram at Rajavaram village and for "celebrating the marriage and other auspicious functions" of Seetharatnam. Since no part of the fund was needed for the benefit of Seetharatnam, the legacy failed *pro tanto* and fell into the residue. Under the will Mangamma, wife of the testator was made the owner the residue, but by her death during the

lifetime of Appanna the residuary bequest lapsed and vested as on intestacy in the plaintiff and the 24th defendant. The devise of a moiety of the fund to be applied for the construction of a Ramamandiram however stands good and the trust must be carried out. Mangamma is dead, but on that account the charitable trust is not extinguished. The Trial Court must give appropriate directions for utilisation of that moiety for constructing a temple according to the direction of Appanna in the will.

Section 105 of the Indian Succession Act enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall on the legatee not surviving him go to some other person. It is difficult to agree that the intention of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his lifetime the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105 (1) does not say, nor does it imply, that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his lifetime and must have made a provision for that contingency.

Appeal by Special Leave from the Judgment and Order, dated the 9th March, 1964 of the Andhra Pradesh High Court in Letters Patent Appeal No. 2 of 1963.

M. G. Chagla, Senior Advocate, (*T. Satyanarayana*, Advocate with him), for Appellants.

P. Ram Reddy, Senior Advocate, (*K. Jayaram*, Advocate with him), for Respondents.

The Judgment of the Court was delivered by

Shah, J.—One Appanna died on 12th March, 1953, leaving him surviving no wife or lineal descendant. Subba Rao claiming to be the father's sister's son of Appanna instituted Suit No. 64 of 1953 in the Court of the Subordinate Judge, Eluru, for partition and separate possession of his half share in the properties described in Schedules A, B, C, D and E. The plaintiff claimed that Appanna died intestate, and that he and his brother Venugopala Rao were the nearest heirs entitled to the entire estate of Appanna. To this suit were impleaded Pothana Apparao (husband of the sister of Mangamma, wife of Appanna), his children, certain relations of Mangamma and the tenants on the lands in suit. Venugopala Rao was impleaded as the 24th defendant. The suit was defended by Pothana Apparao and others contending, *inter alia*, that Appanna had made and executed a will on 14th July, 1948, devising his property in favour of various legatees and the plaintiff's suit for a share in the property was on that account not maintainable. The trial Court held that Appanna of his free will and while in a sound state of mind had executed the will on 14th July, 1948, whereby he disposed of his properties described in Schedules A, B, C, D and E, but the Court held that the disposition of the property in Schedules C and E lapsed because Mangamma who was a legatee of the properties died before the testator, and that the direction in the will that whatever remained out of the Schedule E property after the lifetime of Mangamma shall pass to Venkataswamy and Seshagirirao defendants Nos. 3 and 2 respectively or their descendants was void and incapable of taking effect. The learned Judge accordingly passed a decree in favour of the plaintiff and the 24th defendant for possession of properties described in Schedules C and E.

In appeal to the High Court of Andhra Pradesh, Chandrasekhar Sastry, J., allowed the appeal filed by Pothana Apparao and his two sons Venkataswamy and Seshagirirao, and dismissed the claim of the plaintiff in respect of Schedules C and E properties. An appeal under the Letters Patent filed by the plaintiffs against the judgment of Chandrasekhar Sastry, J., was dismissed.

It has been concurrently found by all the Courts that when he was in a sound and disposing state of mind Appanna executed on 14th July, 1948, the will set up by

the defendants. In an appeal with Special Leave this Court will not ordinarily allow a question about due execution to be canvassed, and our attention is not invited to any exceptional circumstances which may justify a departure from the rule.

The only question which survives for consideration relates to the true effect of the dispositions made by the will in respect of Schedule C and Schedule E properties. The relevant provisions of the will may first be set out :

"I am now about forty years of age. I do not have male or female issue.
* * * My wife is alive. * * * and with the fear that I may not
survive I have made the following provisions in respect of my immovable and
movable properties to be given effect to.

* * * * *

I have given power to my wife Mangamma to sell the immovable property mentioned in the C Schedule hereunder and utilise the amount for celebrating the marriage and other auspicious functions of Tholeti Narasimha Rao's daughter Seetharatnam mentioned in the B Schedule and for constructing a *Ramamandiram* in Rajavaram village in my name.

* * * * *

The immovable property mentioned in the E Schedule hereunder shall be enjoyed by my wife Mangamma with all powers of disposition by way of gift, sale, etc. Whatever remains out of the said E Schedule mentioned immovable property after her lifetime, (the said property) shall pass either to the said Venkataswamy and Seshagiri or their descendants. * * * In the event of my wife taking a boy in adoption the property mentioned in the E Schedule hereunder shall pass to the said adoptee with all powers of disposition by way of gift, sale etc., after her lifetime. * * *

If, for any reason, the properties and rights do not pass to the individuals mentioned in the aforesaid paras, such properties and rights shall be enjoyed by my wife Mangamma with absolute rights."

Appanna had directed his wife Mangamma to sell the properties described in Schedule C and to utilise the proceeds for two purposes, "celebrating the marriage and other auspicious functions" of Seetharatnam, and "for constructing a *Ramamandiram* in Rajavaram village" in his name. But the marriage of Seetharatnam was celebrated during the lifetime of Appanna, and expenses in that behalf were defrayed by Appanna, and no expenses remained to be incurred after the death of Appanna. Mangamma had no beneficial interest in Schedule C property. She was merely appointed to sell the property and to utilise the proceeds for the purposes specified in the will. The trial Judge clearly erred in holding that the estate lapsed because Mangamma died during the lifetime of Appanna. In the view of Chandrasekhar Sastry, J., since there was a joint request for two purposes, and one of the purposes for which the Schedule C properties were devised was accomplished by Appanna the bequest in its entirety must enure for the remaining purpose, i.e., constructing a *Ramamandiram*, and the plaintiff's claim for possession of the C Schedule properties must fail. The learned Judges of the High Court agreed with that view.

But there was no "joint bequest" of the properties. In the absence of allocation of the amounts to be utilised for "celebrating the marriage and other auspicious functions" of Seetharatnam and for constructing a *Ramamandiram*, it must be presumed that the fund was to be utilised in equal moieties for the two purposes. Failure of one of the purposes will result in a moiety of the amount devised falling into the residue.

In *Jogeswar Narain Deo v. Ram Chund Dutt and others*¹ a devise under the will of a Hindu testator who had given a four-anna share of his estate to his daughter and her

1. (1896) L.R. 23 I.A. 37, 43 : 6 M.L.J. 75.

son for their maintenance with power of making alienation thereof by sale or gift fell to be construed. The Judicial Committee held that on a true construction of the will each took an absolute interest in a two-anna share in the estate. In dealing with the contention that there was a joint estate granted to the daughter and her son the Judicial Committee observed :

“ Mr. Branson * * * maintained, upon the authority of *Vydinada v. Nagammal*¹ that, by the terms of the will of the Rani and the appellant became, in the sense of English law, joint tenants of the 4-annas share of Silda, and not tenants in common ; and that her alienation of her share before it was severed, and without the consent of the other joint tenant, was ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here, and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family.”

That principle applies here. The fund was devised for the construction of a *Ramamandiram* at Rajavaram village and for “celebrating the marriage and other auspicious functions” of Seetharatnam. Since no part of the fund was needed for the benefit of Seetharatnam, the legacy failed *pro tanto* and fell into the residue. Under the will Mangamma was made the owner of the residue, but by her death during the lifetime of Appanna the residuary bequest lapsed and vested as on intestacy in the plaintiff and the 2nd defendant. The devise of a moiety of the fund to be applied for the construction of a *Ramamandiram* however stands good and the trust must be carried out. Mangamma is dead, but on that account the charitable trust is not extinguished. The trial Court must give appropriate directions for utilisation of that moiety for constructing a temple according to the direction of Appanna in the will.

The testator gave to his wife Mangamma an absolute interest in the E Schedule properties, for she was invested with all powers of disposition “by way of gift, sale, etc.” The will then proceeded to direct that whatever remained out of the E Schedule properties after her death shall pass to Venkataswamy and Seshagirirao. If Mangamma had survived Appanna, probably the devise in favour of Venkataswamy and Seshagirirao may have failed, but that question does not arise for consideration.

Section 105 of the Indian Succession Act, 1925, which applies to the wills of Hindus provides :

“(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator’s property, unless it appears by the will that the testator intended that it should go to some other person.

(2) * * * * *

Mr. Chagla for the plaintiffs contends that the estate in the E Schedule properties devised in favour of Mangamma lapsed, for, there was nothing in the will which expressly provided that in the event of Mangamma dying during the testator’s lifetime, the devise in favour of Venkataswamy and Seshagirirao shall be accelerated. Counsel relies upon the judgment of Wickens, V. C., in *Browne v. Hope*² and contends that a legacy does not lapse, if the testator does two things—he, in clear words, excludes lapse ; and he clearly indicates the person who is to take the legacy in case the legatee should die in his lifetime. In *Browne’s case*² the testator gave, by his will, the residue of his estate to trustees to pay and transfer the same to seven named

1. (1888) I.L.R. 11 Mad. 258.

2. L.R. 14 Equity Cases 343.

legatees in equal shares as tenants in common, and their respective executors, administrators and assigns and he declared that such shares shall be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married woman shall be for their separate use. It was held that the share of one of the legatees—a married woman—who died after the date of the will, but before the testator, did not belong to her husband, who was her legal personal representative, and it lapsed.

Counsel says that the rule of interpretation as enunciated by Vice-Chancellor Wickens is incorporated in section 105 of the Indian Succession Act, 1925. He submits that a legacy will not lapse only if the testator by express direction excludes lapse, and indicates clearly the person who shall take the legacy if the legatee dies during his lifetime.

We are concerned to construe the provisions of section 105 of the Indian Succession Act. That section enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall on the legatee not surviving him go to some other person. We are unable to agree that the intention of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his lifetime the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105 (1) does not say, nor does it imply, that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his lifetime and must have made a provision for that contingency.

In *In re. Lowman Devenish v. Pester*¹ a testator, who under a settlement was absolutely entitled to a moiety of the proceeds of a certain real estate under a trust for sale, by his will devised that real estate by its proper description, together with certain real estate of his own, to trustees, to the use of *H*, for life; with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first and other sons of *H* successively in tail male, with remainder to the use of the first and other sons of his niece *E* successively in tail male, with remainder to the use of the first and other sons of his niece *M* successively in tail male, with remainder to the use of the first and other sons of his niece *F* successively in tail male, with remainder over. *H* survived the testator and died a bachelor. *M* also survived the testator and died unmarried. *E* was still alive but unmarried and seventy years of age. *F* had two sons, the eldest of whom died before the testator. It was held that when there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken the effect of the failure of an earlier gift is to accelerate, not to destroy, the later gift.

This rule was applied in *In re. Dunstan, Dunstan v. Dunstan*². A testatrix by her will gave freeholds absolutely to *A*, subject to the bequest that whatever out of the freeholds should remain after *A*'s death shall be given to a named charity. It was held that if *A* had survived the testatrix the gift to the charity would have been repugnant and void, and *A* would have taken the freeholds absolutely. But since *A* died in the lifetime of the testatrix, the doctrine of repugnancy did not apply, and the gift to charity was accelerated and took effect.

Mangamma died during the lifetime of the testator: thereby the estate in Schedule E properties granted to Venkataswamy and his brother Sehagirirao was accelerated. The plaintiffs are therefore not entitled to any share in Schedule E properties.

The decree of the High Court is modified. It is declared that there is intestacy in respect of a half share in the fund arising by sale of Schedule C properties, and the

1. L. R. (1885) 2 Ch. 348.

2. L. R. (1918) 2 Ch. 304.

plaintiff and the 24th defendant are entitled to take that half share in the fund. It is directed that the Trial Court till issue appropriate directions for application of the other half of the fund arising by sale of Schedule C properties for constructing Ramamandiram at Rajavaram village as directed by the testator in his will. Subject to this modification the appeal will be dismissed. The appellant will pay 3/4th of the costs of the contesting respondents in this Court.

V.M.K.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT AND V. BHARGAVA, JJ.

The Tulsipur Sugar Co., Ltd.

.. Appellant*

v.

The State of Uttar Pradesh and others

.. Respondents.

U. P. Industrial Disputes Act (XXVIII of 1947), sections 6 and 6-A and Civil Procedure Code (V of 1908), section 152 and Industrial Disputes (Central) Rules (1957), R-28—Effect of section 6 and 6-A—Award by Labour Court—Correction—When can be made—Time limit for making such correction—Correctional Jurisdiction under section 6 (6) identical to section 152, Civil Procedure Code and Rule 28, Industrial Disputes Rules.

The provisions of section 6 and 6-A make it clear that whereas the former provides for the award becoming final, the latter provides for its enforceability and the time from which it has to be implemented the two characteristics of the award i.e. its finality on publication and its enforceability under section 6-A are distinct, having different points of time and should not be mixed up, for though, an award has become final on its publication under section 6 it becomes enforceable in accordance with and subject to the eventualities provided in section 6-A. There are thus three different stages in the case of an award (1) when it is signed by the adjudicating authority (2) when it is published by the State Government in the prescribed manner and (3) when it becomes enforceable. Even though an award may become final omits being published, it becomes enforceable subject to expiry of the different periods and events prescribed in section 6-A.

The scheme of sections 6 and 6-A is to retain a certain amount of control over award, including an arbitration award. An award does not become final as it ordinarily would be when the adjudicating authority signs it but becomes final when it is published in the manner prescribed by the State Government. The word 'subject to the provisions of section 6-A' in sub-section (5) of section 6 means that though an award has become final on its being published it does not immediately or automatically begin to operate as that finality is subject to the expiry of periods and the powers of the State Government under section 6-A.

The correctional jurisdiction is limited only to cases where clerical or arithmetical mistakes or errors arising from an accidental slip or omission have occurred. Sub-section (6) of section 6 does not lay down any in any express terms and time limit within which correctional jurisdiction is to be exercised. It contemplates a correction both before and after the publications of the award. Laying down by implication the time limit during which the correctional jurisdiction under section 6 (6) can be exercised upto the time of the award becoming final under section 6 (5) or becoming enforceable under section 6-A creates difficulties, besides, it would appear, being contrary to the provisions of these two sections and is therefore not commendable. The correctional jurisdiction conferred on the adjudicating authority under section 6 (6) is in terms identical with one conferred under section 152, Civil Procedure Code and rule 28 of the Industrial Disputes (Central) Rules, 1957 and is in consonance with the first and foremost principle that no party

should suffer any detriment on account of mistake or an error committed by an adjudicating authority. The circumstance that the proceedings before a Labour Court and a tribunal are deemed to be concluded under section 6-D where their award becomes enforceable or that thereupon they become *functus officio* would also be no ground for inferring any limitation of time in section 6 (6). *Held*, there are no compelling reasons to read into section 6 (6) any such limitation by implication.

It may be that the correction of an award might to a certain extent have an unsettling effect to what was already become settled, but the correction is not made due to any fault of the parties but of the adjudicating authority whose accidental slip or omissions cannot be allowed to prejudice the interest of the parties.

Held, On facts, There is no question that there was an error in the award due to an accidental omission on the part of the Labour Court, which error it undoubtedly had the jurisdiction to correct under section 6 (6). The error was that there was no direction in the award as to the date from which the fitment of the two workmen in the said grades and are revised scales should take effect, arising from an accidental omission to answer that part of the reference.

Appeal by Special Leave from the Judgment and Order, dated the 21st September, 1966 of the Allahabad High Court, Lucknow Bench in Special Appeal No. 76 of 1966.

Dr. L. M. Singhvi, Senior Advocate (*B. Datta* and *D. N. Misra*, Advocates, and *J. B. Dadachanji* and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

O. P. Rana, Advocate, for Respondents No. 1.

J. P. Goyal, *Sobhag Mal Jain* and *S. P. Singh*, Advocates, for Respondent No. 4.

The Judgment of the Court was delivered by

Shelat, J.—Two questions arise for determination in this appeal, by Special Leave, against the judgment of the Appellate Bench of the High Court of Allahabad, namely, (1) whether a correction in its award by the Labour Court, Lucknow, was one of an error arising from an accidental omission within the meaning of section 6 (6) of the U. P. Industrial Disputes Act, XXVIII of 1947 (hereinafter referred to as the Act), and (2) whether, even if it was so, it could so correct after its award was published and had become enforceable.

The Central Wage Board for sugar industry, appointed by the Union Government for determining a wage-structure, revision of categories of workmen, their fitment into such categories and for fixing the principles governing the grant of bonus, had made certain recommendations. Amongst its recommendations, the Wage Board had recommended that its decision should be brought into effect as from 1st November, 1960. By its notification, dated 27th April, 1961, the U. P. Government accepted those recommendations including the one that they should be brought into force with effect from 1st November, 1960. On a dispute having arisen between the appellant-company and its workmen on the company failing to implement the said recommendations, the State Government referred it to the Labour Court for adjudication under section 4 (k) of the Act. The dispute involved two questions (1) whether the company should fit the workmen named in the reference in the revised categories and in the new wage scales and (2) if so, with effect from what date. By its award dated 6th November, 1963 the Labour Court held that two of the said workmen should be fitted in Grade II (B) and Grade IV respectively and directed the company to do so within one month after the award became enforceable. It, however, omitted to fix the date from which such fitment should have the effect. On 7th December, 1963, the said award was published in the State Gazette. The company thereafter fitted the two workmen in the said two grades from a date, one month hence after the award became enforceable and not from 1st November, 1960. The workmen's union thereupon applied to the Labour Court to amend its award on the

ground that it had omitted to answer the second question arising under the reference and the Labour Court accordingly amended its award directing that the two workmen should be placed in the said grades with effect from 1st November, 1960. The order amending the said award was gazetted on 20th June, 1964. The company filed a petition in the High Court for *certiorari* and for quashing the said order of amendment. Nigam, J., who heard the petition in the first instance dismissed it holding that (1) the Labour Court made an error arising from an accidental omission to answer the said second question and therefore had the power to correct it under section 6 (6) of the Act, and (2) even if there was no such error arising from accidental omission, the amendment merely provided what was already contained in the notification, dated 27th April, 1961, that once the Labour Court had directed the company to fit the workmen in the said grades, such fitment had, under the force of that notification, to take effect from 1st November, 1960, and that that result was arrived at not by reason of the correction of the award but by force of the original award read with the said notification. On a Letters Patent Appeal having been filed against the said judgment, the Appellate Bench of the High Court agreed with Nigam, J., that the correction amounted to one of an error arising from the accidental omission to answer the said second question within the scope of section 6 (6) of the Act. The Appellate Bench, however, proceeded to examine the various provisions and the scheme of the Act and held : (1) that the jurisdiction of the Labour Court under the Act was of a limited character, (2) that it gets seisen of an industrial dispute only when its jurisdiction is invoked by a reference under section 4 (k) or by a voluntary reference to arbitration under section 5-B, (3) that under section 4-D proceedings before it are deemed to commence from the date of such reference and are deemed to be completed on the date when its award becomes enforceable, (4) that its jurisdiction which emanates from the reference gets exhausted on the completion of the proceedings before it and the Labour Court itself becomes *functus officio* on the date when its award becomes final and enforceable, (5) that it cannot thereafter reconstitute itself or take seisen of a dispute, which it has already adjudicated and proceedings relating to it have become concluded, without a fresh reference and (6) that, therefore, its correctional jurisdiction under section 6 (6), unlike that of a civil Court under section 152 of the Code of Civil Procedure, is not unlimited. The Appellate Bench on this reasoning held that the two extreme points during which the Labour Court could correct its award were the date of its signing it and the date when the award becomes final and enforceable. Consequently, the Labour Court held no jurisdiction to correct the award after it became final and enforceable, i.e., after 7th January, 1964, on expiry of 30 days from 7th December, 1963, when it was published and the correction therefore was in excess of its jurisdiction and invalid. The Appellate Bench however declined to issue the writ on the ground that the correction did no more than doing justice to the workmen by ordering implementation of the said notification on 27th April, 1961, and observing that equity was on the side of the two workmen dismissed the appeal as also the said petition.

Dr. Singhvi, who, on behalf of the company, disputed the correctness of the judgment contended that (a) no clerical or arithmetical error through any accidental slip or omission had arisen, that section 6 (6), therefore, did not apply to the facts of this case and if at all, the application ought to have been under section 11-B, which however, was never invoked ; (b) that power under section 6 (6) could be exercised only until the date on which the said award became enforceable and not thereafter that the correctional jurisdiction under section 6 (6) is not without any limit as to time within which it could be invoked or exercised and expired or exhausted itself when the award became final ; (c) that the principles of industrial law postulate the finality of an award made under it and that subject to exceptions as in section 6-A once the award had become final it did not contemplate any disturbance of it by amendment or otherwise and (d) that the High Court was in error in refusing remedy on a supposed consideration of equity once it found lack of jurisdiction in the Labour Court as it in fact did and therefore ought to have issued the remedial writ and quashed the impugned order of correction.

As already stated, the Wage Board had recommended revised wage scales, revised categories and fitment of workmen in their respective categories on the revised wage scales as from 1st November, 1960. The State Government had accepted those recommendations fully including the date of their implementation and the consequent fitment of workmen in appropriate categories and revised wage scales. Its notification made it clear that such fitment on the revised wage scales should be as recommended by the Wage Board as from 1st November, 1960. In the belief, perhaps, that the said recommendations and their acceptance by the Government were not binding on it, the company did not implement them and hence the union raised the dispute which was ultimately referred to the Labour Court. The terms of that reference leave no doubt that it comprised of two questions (1) of fitment and (2) the date from which it was to have effect. The award of the Labour Court that the company was liable to fit the two workmen in grades II and IV respectively and pay them at the revised scales in respect of these grades was binding and therefore the company was liable to carry out the fitment and pay the revised scales in accordance with such fitment. But the award did not decide or fix the date from which the said fitment when made, was to have effect. As rightly held by the High Court, the Labour Court thus omitted to answer the second question as it was bound to do and the reference remained partly unadjudicated. The Labour Court, no doubt, did direct that the award should be implemented within one month after it became enforceable under the Act, i.e., on or before 7th February, 1964. But that direction meant only that the company should fit the two workmen in the two grades it had ordered and still left the question, as to the date from which such fitment was to have effect, unanswered. Thus, the fact that the Labour Court failed to answer the second question admits of no doubt. There can also be no doubt that since the first question was answered by it in accordance with the Wage Board's recommendations and the Government's notification accepting them fully, if its attention had been drawn it would in all probability have answered the second question also in consonance with these recommendations and the said notification. There is, therefore, no question that there was an error in the award due to an accidental omission on the part of the Labour Court, which error it undoubtedly had the jurisdiction to correct under section 6 (6). The error was that there was no direction in the award as to the date from which the fitment of the two workmen in the said grades and the revised scales should take effect, arising from an accidental omission to answer that part of the reference.

The next question is whether there is under the Act any time limit within which the correction of the award can be made. The impugned correction, no doubt, was made by the Labour Court after its award had become final and enforceable. The principal premise in the High Court's reasoning as also in that of Counsel for the company was that the jurisdiction of the Labour Court to correct the award ceased when the award became final and enforceable. It may be observed that the very outset that no time limit within which such correction can be made had been laid down in any express terms in section 6 (6). The question, therefore, is whether any such time limit can be inferred either from section 6 or from the other provisions of the Act. Section 4 (k) enables the State Government to refer an industrial dispute which either exists or is apprehended to the Labour Court if the matter of the industrial dispute is one of those contained in the First Schedule to the Act or to a Tribunal if it is one contained in the first or the Second Schedule. Even if the dispute relates to a matter in the second Schedule, if it is not likely to affect more than 100 workmen, the Government can, if it so thinks fit, refer such a dispute to the Labour Court. Under section 5-B where any industrial dispute exists or is apprehended and the employer and the workmen agree, they may refer the dispute to arbitration of such person or persons including the presiding officer of a Labour Court or a Tribunal as may be specified in the arbitration agreement. Section 6 (1) enjoins upon the Labour Court and the Tribunal to which an industrial dispute is referred for adjudication to hold its proceedings expeditiously and submit its award to the State Government as soon as it is practicable on the conclusion thereof. Sub-section 3

provides that subject to the provisions of sub-section 4 every arbitration award and the award of a Labour Court or a Tribunal shall, within 30 days from the date of its receipt by the State Government, be published in such manner as the State Government thinks fit. Sub-section 4 to which sub-section 3 is made subject, authorises the State Government before publication of an award of a Labour Court or a Tribunal to remit it for its reconsideration and provides that after such reconsideration it shall submit its award to the Government and the State Government shall thereupon publish it in the manner provided in sub-section 3. Sub-section 5 provides that subject to the provisions of section 6-A an award published under sub-section 3 shall be final and shall not be called in question in any Court in any manner whatsoever. Section 6-A, to the provisions of which section 6 (5) is made subject, provides by its sub-section 1 that an award, including an arbitration award, shall become enforceable on the expiry of 30 days from the date of its publication. The first proviso thereof empowers the State Government, if it is of the opinion that it is inexpedient on public grounds affecting national or State economy or social justice to give effect to the whole or any part of the award, to declare by notification in the official Gazette that it shall not become enforceable on the expiry of the said period of 30 days. The second proviso provides that an arbitration award shall not become enforceable if the State Government is satisfied that it was given or obtained through collusion, fraud or misrepresentation. Thus, even though an award has been published under section 6 (3) and has become final and would ordinarily become enforceable on expiry of 30 days from such publication, the State Government can make a declaration under the first proviso and under sub-section 2 can within 90 days from its publication make an order either rejecting or modifying it, in which event it has to lay the award and its said order before the State Legislature. Sub-section 3 provides that if an award is rejected or modified by an order under sub-section 2 and is laid before the Legislature, it shall become enforceable within 15 days from the date it is so laid. But where no such order under sub-section 2 has been made, it shall become enforceable on the expiry of 90 days referred to in sub-section 2. Sub-section 4 provides that subject to sub-sections 1 and 3, an award shall come into operation with effect from such date as may be specified therein but where no such date is specified it shall come into operation on the date when the award becomes enforceable under sub-section 1 or sub-section 3, as the case may be. The provisions of section 6 and section 6-A thus make it clear that whereas the former provides for the award becoming final, the latter provides for its enforceability and the time from which it has to be implemented. The two characteristics of the award, i.e., its finality on publication and its enforceability under section 6-A, are distinct, having different points of time and should not, therefore, be mixed up, for, though an award has become final on its publication under section 6 it becomes enforceable in accordance with and subject to the eventualities provided in section 6-A. There are thus three different stages in the case of an award ; (1) when it is signed by the adjudicating authority, (2) when it is published by the State Government in the prescribed manner and (3) when it becomes enforceable. Even though an award may have become final on its being published, it becomes enforceable subject to the expiry of the different periods and the events prescribed in section 6-A.

The scheme of sections 6 and 6-A is to retain a certain amount of control over award, including an arbitration award, with the State Government. An award, therefore, does not become final as it ordinarily would be when the adjudicating authority signs it but becomes final when it is published in the manner prescribed by the State Government. Before such publication the Government is given the power to remit it to the adjudicating authority for reconsideration and the State Government has to publish it on its being resubmitted to it. In spite of its becoming final on such publication it becomes enforceable only on the expiry of 30 days after it has become final as laid down by sub-section (1) of section 6-A. But it does not so become enforceable if the Government were to make a declaration under the first provision and an order under sub-section (2) or the award specifies a date which is later than 30 days after its publication. Therefore, the word "subject to the provi-

sions of section 6-A" in sub-section (5) of section 6 must mean that though an award has become final on its being published it does not immediately or automatically begin to be operative as that finality is subject to the expiry of periods and the powers of the State Government under section 6-A.

Having seen the effect of the provisions of sections 6 and 6-A, we have next to consider the scope of the correctional jurisdiction conferred on the adjudicating authority under sub-section 6 of section 6. As already observed, the sub-section does not lay down in any express terms any time limit within which such jurisdiction is to be exercised. It contemplates a correction both before and after the publication of the award, i.e., after it has become final. If it is corrected before its publication the correction would be carried out without anything further having to be done. But if it is corrected after its publication and after it has become final, a copy of the order of correction has to be sent to the State Government and the provisions as to publication of an award under section 6 (3) are *mutatis mutandis* applicable. The correctional jurisdiction is limited only to cases where clerical or arithmetical mistakes or errors arising from an accidental slip or omission have occurred. Though section 6 (6) does not expressly provide for any time limit, the High Court appears to have been much impressed by section 6-D which lays down the two points as to the commencement and the completion of proceedings before a labour Court and a tribunal. From these two limits it came to the conclusion that though no time limit is expressly provided in section 6 (6) it must be inferred that the correctional jurisdiction under section 6 (6) can only be exercised upto the time that the award becomes final and enforceable. It will be observed that though section 6 (6) empowers all the three adjudicating authorities, namely, a labour Court, a tribunal and an arbitrator, to correct the award, section 6-D lays down the two points of commencement and completion of proceedings only in the case of a labour Court and a tribunal. Section 6-D, therefore, does not furnish an indication or a ground for inferring a time limit in section 6 (6) in the case of an award by an arbitrator. Would that mean that though, according to the High Court, there is a period within which a labour Court and a tribunal can exercise the correctional jurisdiction, there would be no such limit in the case of an award by an arbitrator? In our view no such result could have been contemplated. It would thus, appear that the two extremities of time provided in section 6-D cannot be used as a ground for inferring a time-limit for the correctional jurisdiction under section 6 (6).

Acceptance of the High Court's reasoning becomes still more difficult when we examine the premises of that reasoning. The High Court does not appear to be sure whether the limit as to time is to be the date of finality of the award or its enforceability, for, it states that the correctional jurisdiction can be exercised until the award has become final and enforceable. As already stated, the concepts of finality and enforceability of an award are distinct and have been dealt with by the Legislature separately in sections 6 and 6-A. If it is to be reasoned that the correctional jurisdiction can be exercised till the date when the award is published and becomes final, such a reasoning would be contrary to the provisions of section 6 (6) themselves which envisage correction of an award even after it is published and has become final. Sub-section 6 expressly provides that when so corrected, the order correcting it has to be published in the manner prescribed under and within the time provided in section 6 (3). It is, therefore, manifest that the date when an award becomes final cannot be the date within which the power under section 6 (6) has to be exercised. If, it is to be held, on the other hand, that the power to correct is to be exercised until the award has become enforceable, the difficulty would be that there is nothing either in section 6 or section 6-A or section 6-D which warrants such a limitation by implication. Is it that an award is really final when it becomes enforceable? Such a conclusion would, firstly, be contrary to the clear language of section 6 and, secondly, would lead to a curious result though it has become final on publication, it is not really so, as that finality is subject to the provisions of section 6-A. In that case, an award can be challenged in a Court during the interval between its publication and the date when it becomes enforceable. That would be

so, despite the clear language of section 6 (5) that an award becoming final on publication cannot thence be challenged in any Court whatsoever. Laying down by implication the time limit during which the correctional jurisdiction under section 6 (6) can be exercised upto the time of the award becoming final under section 6 (5) or becoming enforceable under section 6-A creates difficulties, besides, it would appear, being contrary to the provisions of these two sections and is therefore not commendable. The correctional jurisdiction conferred on the adjudicating authority under section 6 (6) is in terms identical with the one conferred under section 152 of the Code of Civil Procedure and rule 28 of the Industrial Disputes (Central) Rules, 1957 and is in consonance with the first and foremost principle that no party should suffer any detriment on account of a mistake or an error committed by an adjudicating authority. The circumstance that the proceedings before a labour Court and a tribunal are deemed to be concluded under section 6-D when their award becomes enforceable or that thereupon they become *functus officio* would also be no ground for inferring any limitation of time in section 6 (6), for, that would also be the case in the case of a civil Court or an adjudicating authority under the Industrial Disputes Act, 1947, even without a provision like section 6-D and yet the legislature has not chosen in the case of either of them to lay down any limitation of time for exercising its correctional jurisdiction. In our view, there are no compelling reasons to read into section 6 (6) any such limitation by implication.

We are also not impressed with the difficulty which the High Court supposed would result in case section 6 (6) is interpreted as not having by implication any time limit within which the correctional power can be exercised by any of the three adjudicating authorities. The High Court felt that if there is no such time limit an award, even after it has become enforceable and in some cases even implemented, would be rendered unsettled. But as already stated, the power is a limited one which can be exercised only in cases where a mistake clerical or arithmetical or an error arising from an accidental slip or omission has occurred. The award thus would have to be corrected only within this circumscribed field. It may be that the correction of an award might to a certain extent have an unsettling effect to what has already become settled, but the correction is made not due to any fault of the parties but of the adjudicating authority whose accidental slip or omission cannot be allowed to prejudice the interests of the parties. We do not visualise any substantial hardship resulting from the exercise of this power which the High Court thought might arise if an award is allowed to be amended even after it has become enforceable or even if it has been enforced. A similar difficulty can also be imagined when a civil Court exercises a similar power under section 152 of the Code of Civil Procedure. But no one has so far suggested that because of that difficulty a limitation must be inferred in that section. A similar difficulty would also arise under rule 28 of the Industrial Dispute (Central) Rules, 1957. But so far no one has read a similar limitation in the correctional power provided by that rule.

In our view the error which the Labour Court corrected clearly fell within section 6 (6) and could be corrected even after the award had become final as a result of its having been published and had become enforceable under section 6-A. In this view it is not necessary to consider section 11-B or its effect especially as it is nobody's case that it was at any stage invoked or resorted to. In the view that we have taken it was section 6 (6) and not section 11-B which could on the facts of this case be resorted to. The appeal, therefore, is dismissed though for reasons different from those given by the High Court. The appellant-company will pay the costs of this appeal to the respondents.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. G. SHAH AND A. N. GROVER, JJ.

Mani Mani and others

.. Appellants *

v.

Mari Joshua

.. Respondent.

Succession Act (XXXIX of 1925), section 180—Doctrine of election—Applicability of—Principle of compensation not recognised.

The rule which has been embodied in section 180 of the Indian Succession Act does not recognise the Principle of Compensation. Under its provisions if the legatee has been given any benefit under the will and his own property has also been disposed of by that very will he must relinquish all the claims under the will if he chooses to retain his property.

Held, on facts after reading this will carefully, that the testator intended to include properties gifted to Joshua by the Settlement of 1935 in the bequest which he made to Mani of the entire residence. Joshua was thus put to election and could not claim those properties if he wished to take the benefit under the will. It was further held, on fact, that a correct reading of the will (Exhibit 3) yields the only result that the testator Uthupu treated the entire Properties which had formed the subject matter of gift or otherwise as his and which could be disposed of by him as he liked.

Appeal by Special Leave from the Judgment and Order dated the 3rd February, 1965 of the Kerala High Court in Appeal Suit No. 86 of 1960.

S.F. Gupta, Senior Advocate (*A.S. Nambiar*, Advocate, with him) for Appellants.

Sarjoo Prasad, Senior Advocate (*P. Kesava Pillai*, *M.R.K. Pillai* and *Miss Lily Thomas*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the Kerala High Court by which the suit instituted by the respondent for recovery of properties described in Schedule A of the plaint and for mesne profits etc. was decreed in reversal of the decree of the trial Court, dismissing the suit.

Uthupu Mani who died in the year 1943 had three sons. The eldest son Uduppu died sometimes between 1929 and 1935. The second son Joshua is the respondent herein, the appellants being the third son Mani. Mani and Mariamma their mother and the widow of Uthupu. Uthupu left some daughters also and appellant No. 3 Mani Achamma is one of the daughters. The controversy in the suit out of which the appeal has arisen was confined to a residential house in an area of 10 cents in Kottayam town. This property along with several other properties originally belonged to Uthupu who made certain settlements followed by wills. The first settlement was made in the year 1102 ME corresponding to 1927 AD when Uduppu was alive and Mani Mani was not born. On 9th October 1935 by means of another registered document (Exhibit A) called *Udambody* Uthupu settled properties thus : Those comprised in a Schedule were given to Mariamma, in B. Schedule to Joshua and in C Schedule to Mani. The Schedules contained the following properties—

“To Mariamma (A Schedule)

Building constructed as Hall and the Cart-shed on 2 cents.

To Joshua (B Schedule)

Storied building and 30 cents garden land.

To Mani Mani (C Schedule)

Four rooms facing West and 36 cents of garden land."

It appears and it has been so found that mutations were effected of the properties so settled in favour of the donees. Later on Uthupu executed a will which he put in an envelope and deposited it in the office of the District Registrar, Kottayam in January, 1943. He executed a second will in April, 1943 and kept it in custody of the District Registrar. He executed a third will (Exhibit 3) on 31st May, 1943 which was his last will and testament. In this will he made a mention of the two settlements and the two previous wills and declared that the last will would be final and operative. His other declarations and statements in the will (Exhibit 3) will be presently considered as the entire controversy in the present litigation centres on a correct assessment and appraisal of their true scope and effect. It may be mentioned that by this will he left five items of properties to Joshua. These items included the properties in C Schedule which had been given to Mani by the settlement of 1935 and the cartshed on two cents of land contained in Schedule A which had been given to Mariamma by that settlement. There was no specific mention in the will (Exhibit 3) to the B Schedule properties which had been settled on Joshua in 1935.

In 1955, Joshua filed a suit laying claim to the B Schedule properties settled on him in the year 1935. His case was founded principally on the allegation that B Schedule properties which had been settled on him in 1935 vested in him by virtue of the settlement and he was the owner thereof and that the five items of properties which were left by the will (Exhibit 3) were quite independent of and separate from the aforesaid B Schedule properties. In other words he asserted that he had a right under the will to get the five items bequeathed to him therein in addition to the B Schedule properties which had been settled on him in the year 1935 and which could not form the subject-matter of any bequest by Uthupu by reason of the said settlement. The position taken up on behalf of Mariamma, Mani etc.—the defendants—was that the plaintiff had accepted the benefit under the will by taking the five items of properties bequeathed to him thereby which included the properties originally allotted under the settlement of 1935 to Mariamma and Mani. He had thus exercised his right of election to take the properties under the will and was precluded from asserting any right to properties given to him under the settlement of 1935.

A number of issues were framed on the pleadings of the parties. The main question for consideration, however, was whether the settlement of 1935 had been given effect to and whether the plaintiff's suit merited dismissal on account of the applicability of the doctrine of election embodied in section 180 of the Indian Succession Act (XXXIX of 1925). The trial Court held that the settlement of 1935 had been given effect to and mutations had been duly made in the revenue register in accordance with the settlement deed. It was found that the plaintiff had obtained title to and possession of the suit properties comprised in B Schedule in the settlement of 1935. The suit was dismissed on the ground that the will (Exhibit 3) clearly showed that the testator purported to cancel the arrangement by the deed of settlement of 1935 and had made bequests under the will to the plaintiff of some of the properties which had been settled on Mariamma and Mani in the year 1935. This attracted the rule contained in section 180 of the Succession Act and since the plaintiff had elected to accept the benefit under the will he was not entitled to claim any right on the basis of the deed of settlement of 1935.

The High Court acceded to the argument pressed on behalf of Joshua who was the appellant before it that on a proper reading of the will it could not be held that the testator professed to dispose of the suit properties which had been gifted to the plaintiff by means of the settlement deed of 1935. The High Court was influenced by the fact that there was no specific mention of these properties in the will and according to it mere general words of disposition could not be taken to contain an intention to deal with the properties belonging to a third party, namely, the plaintiff. The following part of the judgment may be reproduced :

"Having due regard to these passages in the various text-books based upon judicial decisions and which have been placed before me by Mr. T. S. Krishnamoorthy Iyer and Mr. M. U. Isaac in my view, the decision rendered by the learned Subordinate Judge that section 180 of the Indian Succession Act applied and that the appellant has elected to take the benefit under the will and therefore he cannot claim any further benefits on the basis of Exhibit A, cannot certainly be sustained. So far as I could see, there is no specific disposition of the property already given to the plaintiff under Exhibit A, by the father in Exhibit 3. No doubt the father has dealt with an item which was given under Exhibit A to the first defendant and a part of the item given to the 2nd defendant under Exhibit A in Exhibit 3. If at all the question of the doctrine of election and the applicability of section 180 of the Indian Succession Act comes into play, in my view, the election will really have to be made, not, by the plaintiff, but by really defendants one and two."

As the applicability of the doctrine of the rule of election will depend on a correct and true reading of the will (Exhibit 3) we proceed to notice the main recitals and other prominent features to be found in it. The testator in the very beginning referred to the two settlements made by him in the years 1927 and 1935 and the two wills executed by him in the year 1943 which were deposited with the District Registrar, Kottayam. He said that by the first will which he had executed he had invalidated the two deeds of settlement. He then made the second will as he thought that some changes were necessary. The third will (Exhibit 3), was made because he felt pity for Joshua whom he had apparently left no or very little property by his previous wills. This is what the testator said :

"But, since there originated in me an idea, on seeing the desperate look and repentant attitude of my son Joshua, that it is highly necessary to nullify certain historic statements made in the previous will and also to alter the conditions, such as share of my assets will not be given to Joshua and to his children in case he begets any, laid down by me owing to the ill-will I had towards Joshua, the eldest among the male children I have at present and towards the members of his wife's house - because of certain reasons which I don't now purport to describe herein, this will is executed again afresh; and this alone will come into force after my life-time."

He further said that he had seven children alive at the time when the will was made, namely, two sons and five daughters out of whom two were married. He directed that after his death his wife Mariamma would take the entire income from his properties for meeting family expenses and payment of revenue dues, etc. Then he made dispositions about payments in cash on the occasion of the marriages of his other daughters, with the exception of Achamma, who was described to be weak in health, and in his opinion, should not contract matrimony. An amount of Rs. 3,000 was to be deposited in her name which she was entitled to withdraw if she was married. During the period she remained unmarried she was entitled to take interest on that deposit for personal expenses. He gave other directions about arrangements for her residence etc., in case she remained unmarried. Then he proceeded to make the provision about bequests in these words :

"Though I had provided in my previous will that my eldest son Joshua shall have only some right in the nature of a life interest over my assets in respect of some petty items of profits; Therefore I have forgiven him and I hereby allow him to enjoy for ever the immovable properties described hereunder; and my younger son Mani Mani shall alone be the sole heir of the remaining entire assets belonging to me. But, my two sons shall become entitled to the properties allotted to them only after my two daughters are married and the deposit is made in Achamma's name and all the litigations in which I am a party are ended; and till that time my wife Mariamma shall take and conserve all the profits as described above in the status of an undivided family."

The only other declaration or statement in the will which deserves notice is the following :—

“This will is executed by resolving as these and totally changing all the deeds registered by me prior to this and the will kept in custody; and this will alone shall, unless I act otherwise, be and ought to be in force in future.”

Now it is quite clear that the testator was somehow under the impression that he was competent to cancel and revoke not only the previous wills but also the two settlements including the one made in the year 1935. It appears that although by the registered deed of 1935 he had gifted certain properties to his wife and two sons he thought that he could undo what he had done by making a will by which he left virtually no property to Joshua since he was annoyed with him. That is apparently the reason why he clearly stated in the will (Exhibit 3) in the very beginning that he had executed a will “on 9th Makarom this year in accordance with law, invalidating the above two deeds.”

He relented in favour of Joshua and that is the reason why he made the will (Exhibit 3) but his state of mind continued to be the same, namely, he considered that he was fully competent and entitled to cancel all previous settlements and wills and start, as if it were, on a clean slate. The detailed bequests which he made (Exhibit 3) indicate that he meant to dispose of the entire estate including the properties which had been the subject-matter of the settlement made in the year 1935. There are two strong indications in the will (Exhibit 3) of his having dealt with the entire property which he thought he could dispose of or in respect of which he could make bequests and leave legacies on the footing that no title had passed to any of the donees under the settlement of 1935. The first is the recital both in the beginning and towards the concluding part of Exhibit 3 that he had cancelled the previous settlements and wills and that the only document which would govern the disposition of properties would be Exhibit 3. Even if it be assumed, as has been suggested, by learned Counsel for Joshua—respondent—that the declaration about invalidating the two deeds of settlement was confined to the first will executed in January, 1943, the statement made towards the conclusion of the will (Exhibit 3) leaves no doubt that the testator sought to revoke not only the previous wills but also the registered deeds which clearly meant the deeds of settlement executed in 1927 and 1935 respectively. The second significant fact is that the testator purported to give to Joshua five items of property which included certain properties which had been given by the settlement of 1935 to Mariamma and Mani. If the testator did not want to make any disposition of those properties which formed the subject-matter of gift in 1935 there was no reason why he should have given to Joshua properties which had been gifted to Mariamma and Mani. All this could have happened only if the testator was treating the settlement of 1935 as non-existent having been revoked by him. We are satisfied that a correct reading of the will (Exhibit 3) yields the only result that the testator Uthupu treated the entire properties which had formed the subject-matter of gift or otherwise as his and which could be disposed of by him as he liked. The High Court was in error in disagreeing with the trial Court on this matter.

The argument of learned Counsel for the respondent is that the testator predominantly intended to make better provision for Joshua with whom he had been annoyed for various reasons and whom he had left comparatively less or no property by the wills executed prior to Exhibit 3. It is suggested that the testator could not have intended to have taken away what had already been gifted to Joshua in the year 1935 of which mutation had taken place and possession had passed. It is further pointed out that the testator did not specifically say that the properties which had been gifted to Joshua in 1935 were now being left by the will (Exhibit 3) to Mani. A great deal of reliance has been placed on the statement in the text books on which the High Court relied and certain decisions for the view that no case for election can arise where the testator does not dispose of the properties in question specifically and has merely used general words of devise. In such circumstances, it has been stated, the testator should be taken to have disposed of only that property which was his own and which he was entitled to deal with and bequeath in law. It is urged that, in the present case, the testator had already made a valid and legal settlement in 1935

of the suit property. He could not have thus dealt with or bequeathed that property and in the absence of express and specific mention in Exhibit 3 that he was doing so the rule of election would not be attracted.

The circumstances in which election takes place are set out in section 180 of the Indian Succession Act. According to its provisions "where a person by his will professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will". The English law, however, applies the principle of compensation also to election. It means the electing legatee has to compensate the disappointed legatee out of the property given to him. As pointed out in the Indian Succession Act by N.C. Sen Gupta, page 295, the rule which has been embodied in section 180 does not recognise the principle of compensation. Under its provisions if the legatee has been given any benefit under the will and his own property has also been disposed of by that very will he must relinquish all his claims under the will if he chooses to retain his property. It is not disputed, in the present case, that if the testator has, by Exhibit 3, disposed of the property which had been gifted to Joshua the rule embodied in section 180 would become applicable and Joshua cannot take the property which had been gifted to him if he has chosen to retain the property bequeathed to him by the will. The question is whether the testator having omitted to state in Exhibit 3 that he was giving away the properties which had been gifted to Joshua in the year 1935 to Mani to whom only a residuary bequest of the entire remaining assets had been made the principle of election will become inapplicable.

Our attention has been invited on behalf of Joshua to the following observation of the Master of Rolls in *Miller v. Thurgood*¹:

"If a testator, having an undivided interest in any particular property, disposes of it specifically, and gives to the co-owner of the property a benefit under his will the question of election arises. But if he disposes of it, not specifically, but only under general words, no question of election arises."

But as pointed out in para. 1097, page 592, Halsbury's Laws of England, Vol. 14, in order to raise a case of election under a will it must be clearly shown that the testator intended to dispose of the particular property over which he had no disposing power. This intention must appear on the face of the will either by express words or by necessary conclusion from the circumstances disclosed by the will. The presumption, however, is that a testator intends to dispose of his own property and general words will not usually be construed so as to include other property. In *Whitley v. Whitley* the wife of the testator was entitled to a share of the produce of the R. estate, which had been directed to be sold. By his will the testator gave all "his share, estate and interest" in the R. estate to his daughter and benefit out of his own estate to his widow. It was held that the will raised a case for election as against the widow. The Master of the Rolls (Sir John Romilly) said that the testator intended to dispose of the property by will which was not his but belonged to his wife and she having taken and enjoyed the benefit provided for her under his will must be considered as having elected. The property, must, therefore go as if it had been the testator's property. This case illustrates how the rule of election has been applied where, even though, general words had been used but by necessary conclusion from the circumstances disclosed by the will it was inferred that the testator intended to dispose of the property which belonged to his wife and not to him. According to the footnote in Halsbury's Laws of England, Vol. 14 (supra), in the case of a will one may even gather an intention by the testator to include property belonging to another in a gift of residue for it is necessary to construe a will as a whole. Reference has been made to *Re Allen's Estate, Prescott v. Allen and Beaumont*², where a gift of the "residue of my property" was construed as the residue of the testator's ostensible property. A

1. (1864) 33 Beau. 496; 33 L.J. Ch. 511; 10 L. T. 255.

2. (1862) 31 Beau. 173; 54 L.R. 1104.

3. (1945) 2 All E.R. 264.

fairly strict approach in such cases has been indicated by Chitty, J. in *Re Booker Booker v. Booker*¹, in these words:

“A great safeguard in applying that doctrine is this—that you are not merely to strain words to make them include that which does not belong to the testator ; but you must be satisfied beyond all reasonable doubt that it was his intention to include that which was not his own, and that you cannot impute to him after having read his will any other intention.”

It is thus necessary to look at the will and read at carefully which has been done by us and we have no manner of doubt that Uthupu the testator, intended to include properties gifted to Joshua by the settlement of 1935 in the bequest which he made to Mani of the entire residue. Joshua was thus put to election and could not claim those properties if he wished to take the benefit under the will.

In the result the appeal is allowed and the judgment of the High Court is set aside and that of the trial Court restored with costs in this Court.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BAGHAWAT AND K. S. HEGDE, JJ.

Mohd. Hussain Umar Kochra etc.

.. Appellants *

v.

K. S. Dalipsinghi and another etc.

.. Respondents.

Sea Customs Act (VIII of 1878), section 167 (81), Penal Code (XLV of 1860), section 120-B and Foreign Exchange Regulation Act (VII of 1947), section 8 (1) and section 23-A—Import of gold in contravention of section 8 (1) of the Foreign Exchange Regulation Act—Criminal conspiracy to evade restriction—Punishable under section 167 (81) Sea Customs Act and section 120-B, Penal Code (XLV of 1860).

Penal Code (XLV of 1860), section 120-A—Criminal conspiracy—Agreement gist of offence—General conspiracy—Ingredients.

Evidence Act (I of 1872), section 124—Claim of privilege.

Criminal Procedure Code (V of 1898), section 503—Issue of commission to examine witness—No indication that witness is willing to be examined on commission—Address not given—Application not bona fide—Party not entitled to issue of commission.

Evidence Act (I of 1872), sections 133 and 144, illustration (b)—Conviction on accomplice evidence—Corroboration necessity of—Corroboration must be from independent source—Several statements of accomplices—When amount to corroboration.

Criminal Procedure Code (V of 1898), section 540—Recall witness—Inherent power.

The law since the passing of the Customs Act, 1962 admits of no doubt. The import and export of goods by sea, land and air may be prohibited absolutely or subject to conditions under section 11, Customs duties are leviable under section 12 on all goods so imported or exported. The fraudulent evasions of duties and of prohibitions are punishable under section 135.

(Regarding the law in force before 1962). The effect of the section 23-A of the Foreign Exchange Regulation Act, 1947, was that the contravention of the notification under section 8 (1) attracted to it each and every provision of the Sea Customs Act, 1878 in force for the time being including section 167 (81) of the Sea Customs Act, 1878 which was inserted by the Amending Act XXI of 1955. This section created the fiction that the restriction had been imposed under section 19 of the Sea Customs Act, 1878, so that all the provisions of that Act would be attracted to a breach of the notification. But the statutory

fiction did not cut down the wide ambit of the notification or limit its application to imports and exports by sea and land only. An import of gold by air without the permission of the Reserve Bank was a breach of the notification, and the breach attracted to it the provisions of section 167 (81) of the Sea Customs Act, 1878.

When the Sea Customs Act, 1878 was passed, goods could be imported, or exported by sea and land only. Transport by air was unknown. There is force in the contention that the import or export by air is a species of import or export by land. The aircraft carrying goods lands or takes off from land. The prohibition or restriction on the import or export of goods by land is a prohibition or restriction on the import or export by aircraft, landing or taking off from land. A fraudulent evasion of the restriction imposed by the notification under section 8 (1) of the Foreign Exchange Regulation Act, 1947 was punishable under section 167 (81) of the Sea Customs Act, 1878 and Criminal Conspiracy to evade the restriction was punishable under section 120-B of the Indian Penal Code.

Criminal conspiracy as defined in section 120-A of the Indian Penal Code is an agreement by two or more persons to do or cause to be done an illegal Act or an act which is not illegal by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in general conspiracy though he may not know all its secrets or the means by which are common purpose is to be accomplished. The each scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators, then is to work for the furtherance of the common design of his group only. (on facts held, there was a single general conspiracy to smuggle gold into India from foreign countries).

On facts held, the privilege was not properly claimed under section 124 of the Evidence Act. It is difficult to say that the other cable addresses and cables were communications to a Public Officer in official confidence. The other cables and cable addresses were not relevant to the defence and their non-disclosure has not occasioned any failure of justice.

The application for the issue of a commission was misconceived and proper grounds for the issue of the commission under section 503 of the Code of Criminal Procedure has not been made out. The defence did not produce any letter from Pedro or any other material indicating that he was willing to be examined on commission. Even this address was not given. The Court could not issue a roving commission to a Court or authority either in Switzerland or in United Kingdom or in Pakistan. The application was not made in good faith and was liable to be rejected on this sole ground alone.

The combined effect of sections 133 and 114 illustration (b) of the Evidence Act is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material

particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another.

A *particeps criminis* in respect of the actual crime charged is an accomplice. The witness concerned may not confers to his participation in the crime, but it is for the Court to decide on a consideration of the entire evidence whether he is an accomplice.

If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating one accused the Court may accept the several statements as corroborating each other. But it must be established that the several statements of accomplices were given independently and without any previous concert.

The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. On facts held that there was no material upon which the Court could be so satisfied and that the Magistrate rightly disallowed the prayer for recalling the witness.

Appeals by Special Leave from the judgment and Order, dated the 18th April, 1966 of the Bombay High Court in Criminal Appeals Nos. 1646, 1631, 1652, 1629, 1628 and 1626 of 1963 respectively.

Porus A. Mehta, B. M. Parikh and Janendra Lal, Advocates, and J. R. Gagrati and B. R. Agarwala, Advocates of M/s. Gagrati & Co., for Appellant (In Cr. A. No. 139 of 1966).

A. K. Sen, Senior Advocate, Porus A. Mehta, B. M. Parikh, M. V. Rao and Janendra Lal, Advocates, and J. R. Gagrati and B. R. Agarwala, Advocates of M/s. Gagrati & Co., with him), for Appellant (In Cr. A. No. 140 of 1966).

R. Jethmalani, M. V. Rao and Janendra Lal, Advocates, and J. R. Gagrati and B. R. Agarwala, Advocates of M/s. Gagrati & Co., for Appellant (In Cr. As. Nos. 141 and 142 of 1966).

R. Jethmalani and Janendra Lal, Advocates, and J. R. Gagrati and B. R. Agarwala, Advocates of M/s. Gagrati & Co., for Appellant (In Cr. As. Nos. 143 and 144 of 1966).

H. G. Khendelawala, A. B. Pandya, H. R. Khanna and R. N. Sachthey, Advocates, for Respondents (In all the Appeals).

The Judgment of the Court was delivered by

Bachawat, J.—The six appellants are A-8, Mohamed Hussain Omer Kochra alias Mr. Buick alias Naznen, A-12, Maganlal Narauji Patel, A-16, N. B. Mukherji, A-15, N. S. Rao, A-14, Parasuram T. Kanel, A-6, Lakshmandas Chaganlal Bhatia alias Sham. In this judgment "A" means accused. Forty persons including the appellants were jointly prosecuted for criminal conspiracy to import and deal in gold punishable under section 120-B of the Indian Penal Code read with section 167 (81) of the Sea Customs Act, 1878 and for substantive offences punishable under section 167 (81).

A-1 to 5, A-18 to 35 and A-37 are absconding or being foreigners are not amenable to the processes of the Court. A-1 Jamal Shuhaibar, A-2 George Shuhaibar and A-3 Jawadat Shuhaibar of Beirut and A-4 Yusuf Mohamed Lori alias Abdulla of Bahrain sent gold from the Middle East. A-5 Juan Castaner Casanovas and A-18 Bernardo Szs of Geneva are foreign collaborators. A-19 Hamad Sultan and A-37 Chumilal alias Professor Kamal alias Dwarkadas of Bombay were concerned in the smuggling of gold. A-20 to A-35 Mrs. Gisele Minot, B. J. Lupi, J. P. Hoffman, Jacques Minot, Geoffire Allan, M. Torrens, Mrs. Mora Margaret, Armand Yavercowaski, Gran Powell, G. J. Flamant, Mrs. A. Ramel, Mrs. S. B. Taylor, J. C. Catino, E. D. Gill, A. J. Mascardo and A. A. Grant are foreigners and are said to have carried gold from foreign countries to India by air.

The trial proceeded against A-6 to 17, A-36, A-38, A-39 and A-40. A-6 Lakshmandas is a financier. A-14 Parasuram is his brother-in-law. A-7, Rabiya Bai Usman *alias* Grandma is the mother of A-9 Rukaiyabai Mohamed Hussain Kochra, A-10 Abidabai Usman and A-38 Hassan Usman. A-8 Kochra is the husband of A-9. A-11 Murad Asharnoff remitted funds to foreign countries. A-12 Maganlal Naranji Patel and A-13 Mafatlal Mohanlal Parekh are bullion merchants of Bombay. A-15 N. S. Rao, A-16 N. B. Mukherji, A-17 Timothy Miranda, A-39 D. K. Deshmukh and A-40 Jacob Miranda *alias* Tambaku were mechanics in the employ of the Air India International. A-36 Francis Bello was a co-conspirator. The Additional Chief Presidency Magistrate, Third Court, Esplanade, Bombay, acquitted A-9, 10, 13, 39 and 40 of all the charges. He convicted A-6, 7, 8, 11, 12, 14, 15, 16, 17, 36 and 38 of criminal conspiracy and substantive offences under section 167 (81) and passed sentences of imprisonment and fine.

All the convicted persons filed appeals in the High Court. During the pendency of the appeal A-11 absconded. The High Court upheld the convictions of A-36 and A-7 but directed that A-36 be released on probation and that A-7 do pay a fine of Rs. 4,000 and undergo simple imprisonment for a day only. The High Court dismissed the appeals of A-6, 8, 11, 12, 14, 15, 16 and 17. The present appeals have been filed by A-6, 8, 12, 14, 16 and 15 after obtaining Special Leave.

The first count charged that all the 40 accused persons along with Mohamed Yusuf Merchant, Pedro Fernandez and other persons at Bombay and other places from 1st November, 1956 to 2nd February, 1959 were parties to a continuing criminal conspiracy to acquire possession of, carry remove deposit harbour keep conceal and deal in gold and knowingly to be concerned in fraudulent evasion of duty chargeable on gold and of the prohibition and restriction applicable thereto and committed an offence punishable under section 120-B, Indian Penal Code read with section 167 (81) of the Sea Customs Act, 1878. The other counts charged the accused persons individually with offences punishable under section 167 (81).

In broad outline the prosecution case is as follows : Before 1st November, 1956 some of the accused persons along with others were concerned in the illegal importation of gold. In or about November, 1956 Pedro Fernandez and Yusuf Merchant hatched the present conspiracy to which A-11 Murad Ahaharanoff was a party. The scheme was that necessary finances would be arranged, remittances to foreign countries would be made through Murad, gold would be sent by air from foreign countries to Bombay, Delhi, Calcutta and other air ports and the smuggled gold would be sold in India. A-6 Lakshmandas, A-8 Kochra and A-7 Rabiya Bai were approached for the necessary finances. Between 3rd February and 8th July, 1957 eleven carriers brought gold by air from Switzerland. Lakshmandas financed the first four transactions and his telegraphic address "Subhat" was used for receipt and despatch of cables. On 3rd February, 1957 the first carrier Gisele Minot came to Bombay. On 25th February, 1957, the second carrier B. J. Lupi and on 9th March, 1957 the third carrier J. P. Hoffman came to Delhi. The fourth carrier Jacques Minot went to Colombo. Kochra and Rabiya Bai financed the subsequent transactions and allowed the use of his telegraphic address "Nazneen". Cables used to be sent in codes known as the "Private Dictionary", "the new Geneva Code" and "the Beirut Code", and "the Behrein Code". Lakshmandas ceased to be a financier but continued to participate in the disposal of gold. On 8th April, 1957 the fifth carrier Mora Margaret went to Colombo. On 19th April, 1957 the sixth carrier Geoffire Allan and on 3rd May, 1957 the seventh carrier came to Bombay. At about this time A-12 is said to have joined the conspiracy. On 21st May, 1957 the eighth carrier Grant Powell came to Delhi. On 9th June, 1957 the ninth carrier Mora Margaret and on 24th June, 1957 the tenth carrier Armand Yavercowaski came to Bombay. On 8th July, 1957 the 11th carrier Grant Powell came to Calcutta. A-37 Chunilal who was despatched to contact the carrier disappeared with the gold. Thereafter the smuggling of gold stopped for sometime.

In August, 1957 Yusuf and A-38 Hassan representing Kochra and Rabiyaibai went to Beirut and induced A-; to A-3, Jamal Shuhaibar and his two brothers to join the conspiracy. The scheme was that the Shuhaibar brothers would send gold from the Middle East, Kochra and Rabiyaibai would remit the necessary fund and that A-19, Hamad Sultan would have an interest in the venture. Pedro also came to Beirut. Accounts between him and Yusuf were settled. It was decided that Pedro would continue to send gold from Switzerland, that Kochra and Rabiyaibai would supply the necessary finances and that Pedro would receive a half share of Yusuf's profits in the smuggling of gold from the Middle East. Between 7th November, 1957 and 13th February, 1958, eleven carriers of gold sent by Pedro came to Bombay. On 24th February, 1958, the twelveth carrier A.J. Mascardo was arrested in Delhi. Simultaneously gold was sent from the Middle East. On 3rd November, 1957, Grant Powell carrying gold sent by the Shuhaibar brothers came to Calcutta, but he was arrested. In November, 1957, A-4, Yusuf Mohamed Lori of Bahrein acting for Shuhaibar brothers came to India and it was decided that gold would be hidden in the body of Air India International planes by a mechanic at Beirut or Bahrein and would be removed in Bombay by another mechanic and that Kochra and Rabiyaibai would supply funds on the guarantee of Murad. From time to time the services of the mechanics, A-15 N. S. Rao, A-39 D. K. Deshmukh, A-40, Jacob Miranda, A-17 Timothy Miranda and other mechanics were requisitioned. Between 12th December, 1957 and 15th January, 1958, 4 or 5 consignments of gold concealed inside the belly of aircrafts were sent by Lori to India. From February, 1958, 7 or 8 consignments of gold concealed in the rear left bathroom of the aircrafts were sent to Lori to Bombay. Due to disturbances in the Middle East the smuggling of gold stopped for some time. Since October, 1958 eleven consignments of gold were sent to Bombay. On 1st February, 1959 the "Rani of Jhansi" carrying the 11th consignment of gold was searched by the Customs Officers at the Santacruz airport, Bombay and the gold was seized.

On 2nd February, 1959 the residence of Yusuf Merchant was searched and many incriminating articles were seized. From time to time Yusuf was interrogated, and his statements were recorded. On 24th October, 1959 the investigation was completed. The trial started in July, 1960. The prosecution examined P.W. 2, Yusuf Merchant and other accomplices, and witnesses and exhibited numerous documents. Yusuf Merchant, the main witness on behalf of the prosecution implicated all the appellants in the crime. The Courts below accepted his testimony, found that it was corroborated in material particulars, and convicted the appellants.

All the appeals were heard together. We shall note only those arguments which were raised in this Court by Counsel. Having regard to those arguments the following general questions affecting all the appellants arise for decision :—

(1) was the import of gold in contravention of section 8 (1) of the Foreign Exchange Regulation Act, 1947, punishable under section 167 (81) of the Sea Customs Act, 1878 ;

(2) did the prosecution establish the general conspiracy laid in charge No. 1 ;

(3) did the learned Magistrate wrongly allow a claim of privilege in respect of the disclosure of certain addresses and cables and if so, with what effect ;

(4) did he wrongly refuse to issue commission for the examination of Pedro Fernandez ; and

(5) did he wrongly refuse to recall P.W. 50, Ali for cross-examination ?

As to the first question, the law since the passing of the Customs Act, 1962 admits of no doubt. The import and export of goods by sea, land and air may be prohibited absolutely or subject to conditions under section 11. Customs duties are leviable under section 12, on all goods so imported or exported. The fraudulent evasions of duties and of prohibitions are punishable under section 135.

In the present case we are concerned with the law in force before 1962. The Sea Customs Act, 1878, contained a number of prohibitions on imports by land or

sea (section 18) and authorized the imposition of further prohibitions and restrictions on import or export by sea or by land (section 19). The Act also provided the machinery for the enforcement of prohibitions and restrictions by means of search, seizure, confiscation and penalties. Several other statutes contained further prohibitions and restrictions on the import or export of goods. Section 8 of the Foreign Exchange Regulation Act, 1947, is one such enactment. A notification, dated 25th August, 1948, as amended up to date issued under section 8 (1) of this Act directed that "except with the general or special permission of the Reserve Bank, no person shall bring or send into India (a) any gold coin, gold bullion, gold sheets or gold ingot whether refined or not....." Section 23-A of the Act provided that the restrictions imposed by section 8 (1) "shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly....." The effect of section 23-A was that the contravention of the notification under section 8 (1) attracted to it each and every provision of the Sea Customs Act, 1878, in force for the time being including section 167 (81) of the Sea Customs Act, 1878, which was inserted by the Amending Act XXI of 1955.

It is to be noticed that section 19 of the Sea Customs Act, 1878, authorised the imposition of prohibitions and restrictions on the import or export of goods by sea and land only. But the notification, dated the 25th August, 1948, issued under section 8 (1) of the Foreign Exchange Regulation Act, 1947, restricted the bringing into India of gold from any place outside India by land, sea and air. Section 23-A of the Foreign Exchange Regulation Act, 1947 created the fiction that the restriction had been imposed under section 19 of the Sea Customs Act, 1878, so that all the provisions of that Act would be attracted to a breach of the notification. But the statutory fiction did not cut down the wide ambit of the notification or limit its application to imports and exports by sea and land only. An import of gold by air without the permission of the Reserve Bank was a breach of the notification, and the breach attracted to it the provisions of section 167 (81) of the Sea Customs Act, 1878.

The matter may be looked at from another point of view. When the Sea Customs Act, 1878, was passed, goods could be imported or exported by sea and land only. Transport by air was unknown. After the Second World War traffic by air began. There is force in the contention that the import or export by air is a species of import or export by land. The aircraft carrying goods lands or takes off from land. The prohibition or restriction on the import or export of goods by land is a prohibition or restriction on the import or export by aircraft, landing or taking off from land. A fraudulent evasion of the restriction imposed by the notification under section 8 (1) of the Foreign Exchange Regulation Act, 1947 was punishable under section 167 (81) of the Sea Customs Act, 1878, and criminal conspiracy to evade the restriction was punishable under section 120-B of the Indian Penal Code.

In this connection a question arose whether customs duty was leviable on imports and exports by air and whether a fraudulent evasion of the duty was punishable under section 167 (81). The Sea Customs Act, 1878, and the rules and notifications made thereunder set up a complete machinery for the levy of sea customs duties. Section 20 provided for a levy of customs duties on goods imported or exported by sea. Payment of the duty was enforced by compelling all foreign trade to pass through certain ports. Drastic powers were given for detection, prevention and punishment of evasions of duty. The Land Customs Act, 1924, set up the machinery for the levy of land customs duties, and section 9 of the Act applied for the purpose of this levy several provisions of the Sea Customs Act, 1878, with suitable modifications and adaptations. Rules 53 to 64 contained in para. IX of the Indian Aircraft Rules, 1920, framed under sections 3 and 6 of the Indian Aircraft Act, 1911, provided for the levy of air customs duties. The duty was leviable under rules 58 and 59 on goods imported or exported by air "as if such goods were chargeable to duties under the Sea Customs Act, 1878". Rule 63 provided that all persons importing or exporting goods into and from India "shall, so far as may be observed, comply with

and be bound by the provisions of the Sea Customs Act, 1878," with certain adaptations. The Indian Aircraft Act, 1934, repealed the Indian Aircraft Act, 1911 but the Indian Aircraft Rules, 1920 continued in force in view of section 24 of the General Clauses Act, 1897. The Indian Aircraft Rules, 1937, framed under sections 5 and 8 of the Indian Aircraft Act, 1934, preserved and continued Para. IX of the Indian Aircraft Rules 1920. Until the passing of the Customs Act, 1962, Part IX of the Indian Aircraft Rules, 1920 continued to be the basic law for the levy of air customs duties. On behalf of the appellants it was argued that (1) Rules could not authorise the levy of a tax, (2) Rules could not create a new offence punishable under section 167 (81) of the Sea Customs Act, 1878, (3) a contravention of the Rules was punishable under section 10 of the Indian Aircraft Act, 1934, and not under section 167 (81). On behalf of the respondent our attention was drawn to section 16 of the Indian Aircraft Act, 1934 which provided :—

"The Central Government may, by notification in the official gazette, declare that any or all of the provisions of the Sea Customs Act, 1878, shall, with such modifications and adaptations as may be specified in the notifications apply to the import and export of goods by air."

Counsel for the respondent argued that (1) the notification dated 23rd March, 1937, continuing Part IX of the Aircraft Rules, 1920 was a sufficient declaration under section 16 ; (2) section 16 was a piece of conditional legislation, and by force of section 16 and on the declaration being made the duty became leviable on goods imported and exported by air, and a fraudulent evasion of duty became punishable under section 167 (81) of the Sea Customs Act, 1878. We do not think it necessary to express any opinion on these questions having regard to our conclusion that a fraudulent evasion of the restriction imposed by section 8 (1) of the Foreign Exchange Regulation Act, 1947, was punishable under section 167 (81).

As to the second question the contention was that the evidence disclosed a number of separate conspiracies and that the charge of general conspiracy was not proved. Criminal conspiracy as defined in section 120-A of the Indian Penal Code, is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. The cases illustrate the distinction between a single general conspiracy and a number of unrelated conspiracies. In *S.K. Khetwani v. State of Maharashtra*¹, *S. Swaminatham v. State of Madras*², the Court found a single general conspiracy while in *R. v. Griffiths*³, the Court found a number of unrelated and separate conspiracies.

In the present case, there was a single general conspiracy to smuggle gold into India from foreign countries. The scheme was operated by a gang of international crooks. The net was spread over Bombay, Geneva, Beirut and Bahrein. Yusuf Merchant and Pedro Fernandez supplied the brain power, Murad Asharanoff re-

1. (1967) M.L.J. (Cril) 609 : (1967) 2 S.C.J. 178; (1967) 1 S.C.R. 595; A.I.R. 1967 S.C. 450.

2. A.I.R. 1957 S.C. 340.
3. (1965) 2 All E.R. 448.

mitted the funds. Lakshmandas Kochra and Rabiyaibai supplied the finances, Pedro Fernandez and the Shuhaibar brothers sent the gold from Geneva and the Middle East, carriers brought the gold hidden in jeckets, mechanics concealed and removed gold from aircrafts and others helped in contacting the carriers and disposing of the gold. Yusuf, Pedro and Murad and Lakshmandas were permanent members of the conspiracy. They were joined later by Kochra, the Shuhaibar brothers and Lori and other associates. The original scheme was to bring the gold from Geneva. The nefarious design was extended to smuggling of gold from the Middle East. There can be no doubt that the continuous smuggling of gold sent by Pedro from Geneva during February, 1956 to February, 1958 formed part of a single conspiracy. The settlement of accounts between Yusuf and Pedro at Beirut did not end the original conspiracy. There can also be no doubt that the smuggling of gold from Beirut by the Shuhaibar brothers and from Bahrein by their agent Lori were different phases of the same conspiracy. The main argument was that the despatch of gold from Geneva was the result of one conspiracy and that the despatch of gold from the Middle East was the result of another separate and unrelated conspiracy. The Courts below held, and in our opinion rightly, that there was a single general conspiracy embracing all the activities. Pedro had a share in the profits of the smuggling from Geneva. He got also a share of Yusuf's profits from the smuggling of the Middle East gold. Apparently Shuhaibar brothers and Lori had no share in the profits from the smuggling of the Geneva gold but they attached themselves to the general conspiracy originally devised by Yusuf and Pedro with knowledge of its scheme and purpose and took advantage of its existing organization for obtaining finances from Kochra and Rabiyaibai and for remittances of funds by Yusuf. Each conspirator profited from the general scheme and each one of them played his own part in the general conspiracy. The second contention is rejected.

As to the third question, we find that on or about 22nd February, 1962 the prosecution took out a summons to the Deputy Accountant-General Telegraphs Check Office, Calcutta, for the production of all records pertaining to 15 cable addresses including "Subhat" and "Nazneen" together with the summons under section 171-A previously issued by the customs officers to the Telegraphs Check Office, for the production of the cables and the receipts given by the customs officers to the Telegraphs Check Office for the cables so produced. Pursuant to the summons issued on 22nd February, 1962 Mr. Madhavan, Superintendent of the Telegraphs Check Office, Calcutta, produced in Court the cables, summons and receipts. All the cables relating to the aforesaid 15 cable addresses, and two more addresses with which the appellants were concerned were exhibited at the trial. The summons under section 171-A was a consolidated summons issued by the customs officer to the Telegraphs Check Office for the production of the cables relating to the investigations in the present case and several other cases. The receipt was a consolidated receipt for the cables produced under the summons. Affidavits were filed by Mr. P.C. Kalla, Senior Deputy Accountant, Post and Telegraphs and Mr. S.K. Srivastava, an Additional Collector of Customs, Calcutta, claiming privilege under section 124 of the Evidence Act in respect of the disclosure of the other cable addresses mentioned in the summons and receipts and the cables sent to those addresses. The learned Magistrate upheld this claim of privilege. In our opinion, the privilege was not properly claimed under section 124. It is difficult to say that the other cable addresses and cables were communications to a public officer in official confidence. However, we find that the other addresses and cables were required in connection with investigations unconnected with the present case and did not relate to any person or persons concerned in the offences for which the appellants were being tried. The other cables, and cable addresses were not relevant to the defence, and their non-disclosure has not occasioned any failure of justice.

As to the fourth question it appears that Pedro Fernandez was a material witness. In 1959 he wrote a letter to Yusuf stating that he was willing to come to India and to be examined as a witness. The prosecution tried to contact him but his whereabouts

could not be traced. On 18th April, 1962 the defence applied for the issue of a commission "to the appropriate authority or Court either in Switzerland or in United Kingdom or in Pakistan for examination of Pedro Fernandez and Gimness as witnesses for the defence". Except stating that the defence undertook to pay all expenses and supply all relevant information, the application did not give any other particulars. The learned Magistrate rejected the application. He held and in our opinion rightly that the application was misconceived and proper grounds for the issue of the commission under section 503 of the Code of Criminal Procedure had not been made out. The defence did not produce any letter from Pedro or any other material indicating that he was willing to be examined on commission. Even his address was not given. The Court could not issue a roving commission to a Court or authority either in Switzerland or in United Kingdom or in Pakistan. The application was not made in good faith and was liable to be rejected on this ground alone.

As to the last question, we find that examination-in-chief of P.W. 50 Ali commenced on 7th October, 1960 and was concluded on 10th October, 1960. His cross-examination commenced on 21st August, 1961 and was concluded on 4th September, 1961. On 6th March, 1962 and again on 21st June, 1962 the defence applied for recalling Ali for cross-examination. The learned Magistrate rejected the two applications. According to the defence Ali was repentant and wanted to say that he had given false evidence. In our opinion, no ground was made out for recalling Ali. There was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case there was no material upon which the Court could be so satisfied. The learned Magistrate rightly disallowed the prayer for recalling Ali.

Mr. Jethmalani argued that the rough notes of statements given by Yusuf to the customs officers had been destroyed and that the defence was thereby prejudiced. This point was not taken either in the trial Court or in the High Court. In our opinion, Counsel ought not to be allowed to raise this new point for the first time in this Court.

On the merits, we find that the two Courts have recorded concurrent findings of fact. Normally this Court does not re-appraise the evidence unless the findings are perverse or are vitiated by any error of law or there is a grave miscarriage of justice. The Courts below accepted the testimony of the accomplice Yusuf Merchant. Section 133 of the Evidence Act says :—

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) to section 114 says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The combined effect of sections 133 and 114 *Illustration (b)* is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another, see *Bhiva Doulv Patil v. State of Maharashtra*¹, *R. v. Baskerville*². In this light we shall examine the case of each appellant separately.

Case of Accused No. 8 Mohamed Hussain Umar Kochra.

(*Gr.A. No. 139 of 1966*)

Yusuf Merchant deposed that Kochra and his mother-in-law, A-7 Rabiya Bai acted as financiers after the fourth transaction, that Kochra's cable address "Naz-

1. (1963) M L J. (Cr.) 450 : (1963) 2 S.C.J. 327 : (1963) 3 S.C.R. 830.

2. (1916) 2 K.B. 658.

neen" at 19, Erskine Road and his telephone was used in connection with the gold-smuggling activities. The arrangement was that cables addressed to "Nazneen" would be received at No. 19, Erskine Road and would then be forwarded to the Warden Road residence of Rukiyabai or the Napean Sea Road, residence of Kochra and that on receiving phone messages Yusuf would collect the cables. Yusuf's testimony has been corroborated in material particulars.

Kochra's mother resided at 10, Erskine Road, 4th floor, Esmail Building, Bombay-3. Exhibit Z-70 dated 19th February, 1957 is the application for the registration of "Nazneen". This document purports to have been signed by Ismail Kader, a domestic servant of Kochra's mother. It was proved that the signature "Ismail Kader" and the address 19, Erskine Road, 4th floor, Esmail Building, Bombay-3 on Exhibit Z-70 were in the handwriting of Rajabali Karmalli, another servant of Kochra's mother. Rajabali Karmalli lived in Kochra's garage in Napean Sea Road. Kochra's mother was invalid and Kochra held a power-of-attorney from her for management of the family property. Rajabali Karmalli was under Kochra's control and was his trusted servant. Kochra had his office in the ground floor of the building at 19, Erskine Road and his denial that he had no office there is false. Both Rajabali Karmalli and Ismail Kader have now disappeared and cannot be traced. Several cables sent to "Nazneen" in connection with the gold smuggling have been exhibited. The other cables could not be traced. Kochra registered "Nazneen" because he desired to join the conspiracy and received the cables sent to this address. The registration of "Nazneen" was not procured by Yusuf in collusion with Rajabali Karmalli or Ismail Kader. Though Yusuf surreptitiously used other addresses for the receipt of his cables. "Nazneen" was used with the full knowledge and approval of Kochra.

On or about 13th August, 1957 Yusuf and Hassan went to Beirut for inducing the Shuhaibar brothers to join the conspiracy. About 15th August Kochra's wife Rukaiyabai and Hassan's wife reached Beirut. A cable (Z-745) dated 6th August, 1957 was sent from Beirut informing "Nazneen" that Rukaiyabai had arrived safely. On a consideration of the materials on the record including the written statements of Kochra and Rukaiyabai the Courts below have found that this cable was received by Kochra. The cable Z-745 was produced by P.W. 207 on 4th April, 1962 after the examination of Yusuf Merchant had been concluded. An application for recalling Yusuf filed on the same date was rejected. A point was made that Kochra was prejudiced by the rejection of this application. Counsel suggested that Yusuf sent the cable Z-745 from Beirut and that this fact could be established if Yusuf was recalled for cross-examination. We shall assume that Yusuf despatched the cable. But the fact remains that the cable was received at "Nazneen". It was an intimation of the safe arrival of Rukaiyabai at Beirut and was obviously meant for her husband. The Courts below rightly held that the cable was received by Kochra, and that there was no substance in the defence case that he was not aware of the existence of "Nazneen." The rejection of the application for recalling Yusuf did not prejudice Kochra.

The carrier Grant Powell arrived in Calcutta on 3rd November, 1957 and was arrested. P.W. 127 Chandiwalla and Jagbinderhudas were sent to Calcutta to contact the carrier. Yusuf's brother P.W. 50 Ali also went to Calcutta. On 6th November, Ali sent a telephone message to Kochra informing him of a message from Chandiwalla that there was a raid in his room by the custom officials and that the carrier had not come. Kochra received the message on his telephone No. 72328 at his residence. Exhibit Z-459 dated 7th November, 1957 is a copy of the bill for this telephone call. Thereafter Kochra contacted Chandiwalla on the telephone and assured him that nothing would happen and asked him to return to Bombay immediately. On 7th November, 1958 Ali sent a phone message to Kochra at his telephone No. 72328 informing him that Chandiwalla was returning to Bombay. Exhibit Z-459 dated 7th November, 1957 is the copy of the bill for this telephone call. Taking into account Kochra's statement, Exhibit Z-703 para. 6 and his written statement para. 72 the

Courts below rightly held that Kochra received the two telephone messages from Ali relating to matters connected with the gold smuggling. Even after the receipt of these messages Kochra allowed the use of "Nazneen" for receipt of cables from Pedro and acceptance of cables by Yusuf. P.W. 31 Mastakar, proved that Kochra did not send any complaint to the telegraphic office that "Nazneen" was registered or was used without his authority.

Mr. Mehta suggested that (a) "Nazneen" was used before Kochra joined the conspiracy and that (b) Kochra did not join the conspiracy on or about 8th April, 1957 when the fifth carrier came and in this connection read to us several documents. The Courts below rejected this contention and we find no reason for re-appraising the evidence. It may be pointed out that by the cable Exhibit Z-69 dated 14th March, 1957 and the letter Exhibit Z-71 dated 17th March, 1957 Yusuf informed Pedro of the registration of "Nazneen" and by the cable Exhibit Z-77 dated 17th March, 1957 Yusuf asked him to send the cables to the new address. The materials on the record show that Kochra had then joined the conspiracy and the address "Nazneen" was used for despatch and receipt of cables after 17th March, 1957. Mr. Mehta commented on the fact that Yusuf implicated Kochra for the first time in his statement given on 30th April, 1957 and that Yusuf had not referred to Kochra in his earlier statements. Yusuf at first wanted to shield his friend Kochra. The customs officers discovered the existence of "Nazneen" on or about 20th April, 1959. On being then questioned with regard to "Nazneen", Yusuf was compelled to disclose his connection with Kochra and the circumstances under which "Nazneen" came to be registered.

The materials on the record clearly establishes the connection of Kochra with the conspiracy and materially corroborates the testimony of Yusuf Merchant. The Courts below rightly convicted Kochra.

Case of Accused No. 12. Maganlal Naranji Patel.

(Cr. A. No. 140 of 1966).

The prosecution case is that since 3rd May, 1957 Maganlal was buying the smuggled gold from Yusuf Merchant and that when consignments of gold bearing the mark "chaisso" and having the fineness of about 99.99 came from Beirut, Yusuf Merchant and Maganlal had the gold melted in the silver refinery of P.W. 127 Chandiwala at Bandra by his employees Bahadulla and Shankar in December, 1957 and Ram Naresh and Mohamed Rafique in February, 1958 with a view to remove the mark "chaisso" and to reduce the fineness of the gold. The mark "chaisso" and the 99.99 fineness indicated that the gold was of foreign origin. The object of melting the gold and reducing the fineness was to destroy the tell-tale evidence of its origin. For the purpose of implicating Maganlal the prosecution relied on the testimony of P.W. 2 Yusuf Merchant, P.W. 127 Mohamed Chandiwala and P.W. 68 Mohamed Rafique. It is common case that Yusuf and Chandiwala are accomplices. The question in issue is whether P.W. 69 Mohamed Rafique was also an accomplice. The two Courts held that Rafique was not an accomplice but we are unable to agree with this finding. The melting was done late in the night after normal working hours. The melting of gold in the silver refinery was unusual. On no other occasion gold was melted in the refinery. Rafique was asked to keep the matter secret. For two hours' secret work, he got about Rs. 10 though his daily wage was Rs. 3 only. Once, the gold was brought in a jacket usually worn for carrying smuggled gold. In his statement Exhibit 25-K Yusuf admitted that of the two workmen Rafique had more intimate knowledge of the reason for the secret handling of the gold. The secrecy of the job, the unusual hours, the special remuneration, the carriage of gold in jackets the user of silver refinery for the melting of gold, the inside knowledge of Rafique of the purpose of the melting, lead to the irresistible conclusion that Rafique was knowingly a party to melting of smuggled gold with intent to destroy the evidence of its foreign origin and to evade the restrictions on its import. He was clearly a *participes criminis* in respect of the offences with which Maganlal was charged and was liable to

be tried jointly with him for those offences. As pointed out by Lord Simonds in *Davis v. Director of Public Prosecution*¹ a *participes crimines* in respect of the actual crime charged is an accomplice. The witness concerned may not confess to his participation in the crime, but it is for the Court to decide on a consideration of the entire evidence whether he is an accomplice. Rafique was an accomplice, and his evidence cannot be used to corroborate the evidence of Yusuf and Chandiwalla, the other accomplices. There is no corroboration of the evidence, of the accomplices from an independent source. On the materials on the record it is not safe to convict Maganlal of the offences with which he is charged.

We may also point out that the positive case of Yusuf and Chandiwalla was that Rafique melted the gold in February, 1958. The books of Chandiwalla shows that in February, 1958 Rafique did not work in the refinery. In his place one Kedar worked there. Chandiwalla suggested that Kedar was another name of Rafique. This is an impossible story. Rafique himself did not say that his other name was Kedar. Thumb impressions of the workers used to be taken on the muster roll of the refinery but that document was not produced and the identity of Rafique with Kedar was not established. The High Court rightly held that Kedar and Rafique were different persons. The High Court made a new case for the prosecution and held that Rafique might have melted the gold towards the latter part of December, 1958. Mr. Khandelwala frankly stated that he could not support this finding. In this Court Mr. Khandelwala maintained that the gold was melted by Rafique in February, 1958 and that Rafique was also known as Kedar. For the reasons given above, we are unable to accept this case. In our opinion, Criminal Appeal No. 140 of 1966 should be allowed and accused No. 12 Maganlal Naranji Patel must be acquitted of all the charges.

Case of Accused No. 16 N.B. Mukherjee.

(Cr.A.No. 141 of 1966)

Mukherjee was the engineer-in-charge of Group A base maintenance. According to the prosecution Mukherjee was responsible for removing gold from aircrafts bringing gold from the Middle East, P.W. 2 Yusuf Merchant, P.W. 49 Maxie Miranda, P.W. 129 C.B. D'Souza, P.W. 143 Bhide and P.W. 148 Zahur, implicated Mukherjee. All these witnesses are accomplices. The High Court found that their evidence has been corroborated in material particulars from independent sources. We are unable to accept this finding. Mr. Khandelwala argued that the following circumstances corroborated the evidence of the accomplices :—

(1) the reference to Mukherjee in Exhibit Z-209, a letter dated 8th July, 1958, from Lori to Yusuf, and Exhibit Z-226, a letter dated 16th August, 1958, from Bello to Yusuf ;

(2) Mukherjee's leave application Z-558, dated 13th December, 1958, and Z-313, dated 18th January, 1959, a cable from Yusuf to Jamal ;

(3) simultaneous statements of a number of accomplices ; and

(4) Exhibit Z-697 the retracted confession of Bello. Mr. Khandelwala did not rely on any other circumstances.

In Exhibit Z-209 Lori referred to Bello's friend. Exhibit Z-226 is a letter of Bello to Yusuf referring to "our friend." These two letters do not refer to Mukherjee by name. There is no corroboration from any independent source, that Mukherjee was one of the co-conspirators referred to in these letters. The two letters cannot be regarded as a corroboration of Yusuf's evidence.

On 13th December, 1958, Mukherjee applied for leave from 19th January to 2nd February, 1959. The leave application Exhibit Z-558 was allowed on 14th December, 1958. This document is innocuous and does not implicate Mukherjee in the crime. Maxie Miranda now says that Mukherjee asked Maxie not to remove

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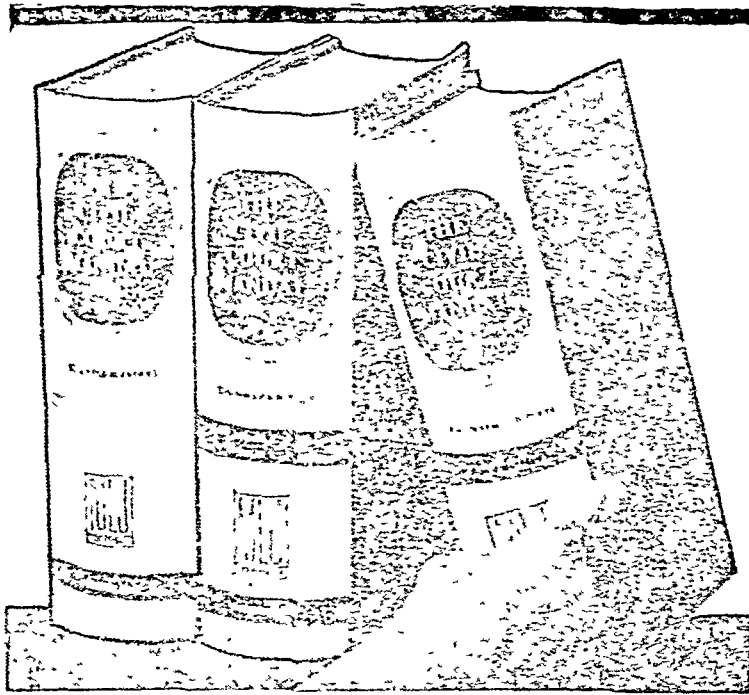
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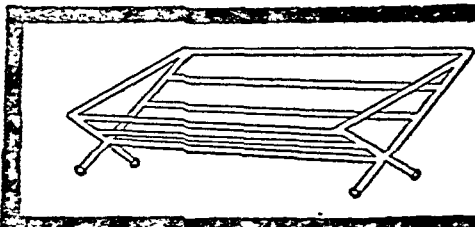
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the gold during his absence on leave, that Maxie desired to remove the gold surreptitiously without Mukherjee's knowledge and arranged for the change in the place of concealment of gold in aircrafts and that accordingly Z-213, a cable, dated 18th January, 1959 was sent by Yusuf to Jamal informing the latter that a new place of concealment had been airmailed. Exhibit Z-313 on the face of it does not implicate Mukherjee. The prosecution had to rely entirely on the evidence of Maxie Miranda and other accomplices for the purpose of implicating Mukherjee. Exhibit Z-558 and Exhibit Z-313 do not connect Mukherjee with the crime.

Section 114 of the Evidence Act says thus as to Illustration (b) : "A crime is committed by several persons, A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable." If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating the accused the Court may accept the several statements as corroborating each other, see *Haroon Haji Abdulla v. State of Maharashtra*¹. But it must be established that the several statements of accomplices were given independently and without any previous concert, see *Bhuboni Sahu v. The King*². In the present case the 'Rani of Jhansi' was searched on 2nd February, 1959. Yusuf gave his first statement on 3rd February, 1959. He did not then implicate Mukherjee. Maxie Miranda gave his statement on 4th February, 1959 implicating Mukherjee. No other accomplice made a statement on that date. There was ample opportunity thereafter for the accomplices meeting together and conspiring to implicate Mukherjee. On 8th February, 1959 C. B. D'Souza, Bhide and Yusuf made separate statements implicating Mukherjee. On 27th June, 1959 Zahur made a similar statement. These statements cannot be regarded as having been made independently and without any previous concert and do not amount to sufficient corroboration of the accomplice evidence.

On 11th February, 1959 Bello made a confession implicating Mukherjee. At the trial he retracted the confession. Under section 30 the Court can take into consideration this retracted confession against Mukherjee. But this confession can be used only in support of other evidence and cannot be made the foundation of a conviction, see *Bhuboni Sahu's case*², page 156. It cannot be used to support the evidence of the other accomplices.

In our view Criminal Appeal No. 141 of 1966 should be allowed and Mukherjee should be acquitted of all the charges.

Case of Accused No. 15 N. S. Rao (Cr.A. No. 142 of 1966).

In this case there is sufficient independent corroboration of Yusuf's testimony implicating Rao. Counsel for the appellant did not dispute the finding of the High Court that Rao is guilty of the offences with which he had been charged. The High Court rightly convicted N. S. Rao.

Case of Accused No. 14 Parasuram T. Kanel (Cr.A. No. 143 of 1966).

Counsel did not dispute the finding of the High Court that there is sufficient independent corroboration of accomplice evidence implicating Kanel. We have perused the records and we find that the High Court rightly convicted Kanel of the charges against him.

Case of Accused No. 6 Lakshmandas Chhaganlal Bhatia (Cr.A. No. 144 of 1966).

The Courts below accepted the testimony of Yusuf Merchant implicating Lakshmandas in the conspiracy and other specific charges against him. Lakshmandas acted as the financier in the first four transactions and subsequently participated in the disposal of gold. Yusuf's testimony has been corroborated in material particulars. It is sufficient to mention two circumstances which connects Lakshmandas with the criminal conspiracy and other charges against him.

1. (1968) 70 Bom.L.R. 240, 245 : (1968) 2 S.C.J. 534 : (1968) M.L.J. (Cr.) 591.

2. (1949) L.R. 76 I.A. 147, 156-7 : (1949) 2 M.L.J. 194.

Exhibit Z-20 shows that on 26th November, 1956 Lakshmandas had the telegraphic address "Subhat" registered. The application for registration of "Subhat" was signed by Lakshmandas. The address for the delivery of the cables was Lakshmandas Chhaganlal Bhatia, 8, Little Gibbs Road, Alimanor Building, 1st Floor, Bombay-6. Numerous cables with regard to the smuggling of gold were received by Lakshmandas at the telegraphic address "Subhat". The evidence shows that the address "Subhat" was registered for the purpose of the smuggling activities only. It does not appear that any cable relating to any legitimate business was received by Lakshmandas at this telegraphic address.

The third carrier, J. P. Hoffman arrived in Delhi. The contact of Lakshmandas with this carrier is clearly established. Exhibit is a cable dated 6th March, 1957 from Yusuf to Pedro stating that he was awaiting the party at Hotel Marina in Delhi and that the code name was captain. The passenger manifest of the Indian Airlines Corporation (Exhibit Z-566) shows that A-14 P. T. Kanel the brother-in-law of Lakshmandas travelled from Bombay to Delhi by flight No. 125 of 1966 on 7th March, 1957. The reservation Chart Z-566-A shows that the reservation for Kanel was made from telephone No. 70545 of Lakshmandas. The register of Hotel Marina, New Delhi, Exhibit Z-65 shows that Kanel arrived at the Hotel on 8th March, 1957 at 7-30 A.M. and occupied room No. 22. At the Hotel Kanel declared that Thambu Chetty Street, Madras, was his permanent address, though in fact he had no such address at Madras. The telephone register of Marina Hotel Exhibit Z-65-C shows that on 8th March, Kanel attempted to contact telephone No. 70545 but the call was cancelled. The passenger list of Indian Airlines Corporation Exhibit Z-567-A shows that a seat was booked for Bhatia by plane from Bombay to Delhi and the manifest shows that he travelled by the plane on 9th March, 1957. The manifest of K. L. M. Airways Exhibit Z-489 shows that Hoffman travelled by plane from Geneva and arrived at Palam Airport, New Delhi, on 9th March. The register of Hotel Marina Exhibit Z-66 shows that Hoffman arrived at the Marina Hotel on 8th March, at 1-40 A.M. and occupied room No. 39. The bill of Hotel Marina Exhibit Z-65-B shows that Kanel was charged Rs. 3-8-0 extra for a guest and that he left the Hotel on 10th March. The passenger manifest Exhibit Z-537 shows that on 10th March, 1957 Kanel and Lakshmandas travelled by the same plane from Delhi to Bombay and their ticket Nos. were 194885 and 194886. There is nothing to show that Kanel and Lakshmandas came to Delhi for any legitimate business. The documentary evidence completely corroborates Yusuf's testimony that Kanel came to Delhi, and later he was joined by Lakshmandas and that the object of their visit was to contact the carrier Hoffman and to receive from him the smuggled gold. The Courts below rightly convicted Lakshmandas of the charges against him.

Counsel for the appellants pleaded for a mitigation of the sentences. The Courts below passed on them sentences of rigorous imprisonment on the charge of conspiracy and on the individual charges for which they were convicted and directed that the sentences on all the charges except the charge of criminal conspiracy would run concurrently. Counsel argued that a separate punishment on the conspiracy charge was not justified and referred us the following passage in *Ghanville Williams' Criminal Law*, 2nd Ed., (General Part), Article 220, page 685 :—

"Conspiracy is a useful feature on which to seize for punishing inchoate crime ; it is not, in general, an aggravating factor when crime has been committed. Where there is a prosecution for a consummated crime and for conspiracy to commit it, no separate punishment would be justifiable on the conspiracy count. However, the fact that criminals are organized professionally for crime may be taken into consideration in determining the punishment for the crime."

We find that the offence under section 167 (81) of the Sea Customs Act, 1878 was punishable with imprisonment for a term not exceeding two years or to fine or to both. A party to a criminal conspiracy to commit this offence was punishable under section 120-B (1) of the Indian Penal Code in the same manner as if he had abetted the offence. A criminal conspiracy is a separate offence, punishable sepa-

rately from the main offence. The sentences passed by the Courts below cannot be said to be illegal. However, in the present case, Yusuf and Pedro, the ring leaders of the conspiracy, have escaped punishment. There has been a prolonged trial commencing in July, 1960 and ending in conviction on 30th September, 1963. Considering all the circumstances, we think, that the sentences on all the charges should run concurrently.

In the result, Criminal Appeal No. 140 of 1966 is allowed and Maganlal Naranji Patel is acquitted of all the charges. Criminal Appeal No. 141 of 1966 is also allowed and N. B. Mukherjee is acquitted of all the charges.

Criminal Appeal Nos. 139 of 1966, 142 of 1966, 143 of 1966 and 144 of 1966 are allowed in part and we direct that all the sentences passed on the appellants will run concurrently. In other respects, the appeals are dismissed.

S.V.J.

Orders accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH AND G.K. MITTER, JJ.

T. G. Venkataraman etc.

... *Appellants**

v.

The State of Madras and Another etc.

... *Respondents.*

Madras General Sales Tax Act (I of 1959)—Constitution of India (1950), Articles 14 and 301—Imposition of tax on sale of 'cane jaggery' while exempting that on 'palm jaggery'—If discriminatory and violative of equality clause of the Constitution—Freedom of trade and commerce if impeded by the levy—Legislative power if has been colourably exercised in imposing the levy.

Since section 8 read with the Third Schedule of the Madras General Sales Tax Act (I of 1959) as amended by Madras Act II of 1968 exempts only "sugar" from liability to tax, sales of jaggery, cane and palm, now fall within the charging section. But the Government of Madras have in exercise of power under section 17 of Act I of 1959 exempted transaction of sale of "palm jaggery" from tax. It is true that between 1st April, 1958 and 31st October, 1967 transactions of sale of "cane jaggery" and "palm jaggery" were exempt from liability to pay sales tax under the Acts of 1939 and 1959, but it cannot be inferred therefrom that the Legislature treated "palm jaggery" and "cane jaggery" as the same commodity.

The evidence on the record clearly shows that "cane jaggery" and "palm jaggery" are commercially different commodities. "Cane jaggery" is produced from the juice of sugarcane; "palm jaggery" is produced from the juice of the palm tree. Production of "palm jaggery" in the State is small compared to "cane jaggery". The method of production of "palm jaggery" and "cane jaggery" are different; they reach the consumers through different channels of distribution; the prices at which they are sold differ and they are consumed by different sections of the community. It must therefore be held that "cane jaggery" and "palm jaggery" are not commodities of the same class, and in any event in imposing liability to tax on transactions of sale of "cane jaggery" and exempting "palm jaggery", no unlawful discrimination denying the guarantee of equal protection was practised.

Freedom of trade, commerce and intercourse guaranteed by Article 301 of the Constitution is protected against taxing statutes as well as other statutes, but by imposition of tax on transactions of sale of "cane jaggery" no restriction on the freedom of trade or commerce or in the course of trade with or within the State is imposed. The tax imposed on transactions of sale of "cane jaggery" does not affect the freedom of trade within the meaning of Article 301.

* C As. Nos. 281, 284, 363, 383 to 393 and 513 to 567 of 1969

There is no substance in the contention that the Act which imposes tax on "cane jaggery" and the notification which exempts "palm jaggery" from liability to tax imposes a colourable exercise of authority. If the Legislature has the power to impose the tax, its authority is not open to challenge on a plea of colourable exercise of power.

Appeals from the Judgment and Order dated the 6th December, 1968 of the Madras High Court in Writ Petitions Nos. 1659 of 1968, etc.

M. S. Sethu and A. V. V. Nair, Advocates for Appellant (In C. As. Nos. 281 and 363 of 1969.)

M. S. Sethu and P. Parameshwara Rao, Advocates, for Appellant (In C. A. No. 284 of 1969).

H. R. Gokhale, Senior Advocate (*K. Jayaram*, Advocate, with him), for the Appellant (In C. A. No. 383 of 1969).

K. Jayaram and T. S. Vishwanatha Rao, Advocates, for Appellant (In C. As. Nos. 384 to 393 and 513 to 567 of 1969.)

S. V. Gupte, Senior Advocate, (*S. Mohan and A. V. Rangam*, Advocates, with him), for Respondent (In C. A. No. 281 of 1969).

S. Mohan and A. V. Rangam, Advocates, for Respondents (In C.As. Nos. 284, 363, 383 to 393 and 513 to 567 of 1969.)

The Judgment of the Court was delivered by

Shah, J.—At the conclusion of the hearing of these appeals on 23rd April, 1969 we announced that "the appeals are dismissed with costs; reasons in support of the order will be delivered thereafter." We proceed to record the reasons in support of the order.

The appellants carry on business as dealers in "cane jaggery" in the State of Tamil Nadu. As a result of certain legislative and executive measures, transaction of sale in "cane jaggery" were made liable as from 1st January, 1968 to tax under the Madras General Sales Tax Act, 1959, and transactions of sale in "palm jaggery" remained exempt from sales tax. The appellants filed petitions in the High Court of Madras challenging the validity of the levy of tax on "cane jaggery", on three grounds:

(1) that the levy of tax on turnover from sale of "cane jaggery" was discriminatory and violated the equality clause of the Constitution;

(2) that the levy of tax imposes a restriction on trade and commerce contrary to the provisions of Part XIII of the Constitution; and

(3) there is excessive delegation of legislative authority to the executive and on that account the levy of tax pursuant to an order made in exercise of the powers under section 59 of the Madras General Sales Tax Act I of 1959 on "cane jaggery" is invalid.

The High Court rejected all the contentions.

Counsel for the appellants have in these appeals urged the first two grounds and have in addition submitted that in levying tax on turnover from sale of "cane jaggery" legislative power has been colourably exercised. The argument that there was excessive delegation to the executive of the legislative power was abandoned before the Court, because the State of Madras has enacted Act II of 1968 authorising levy of tax on sale of jaggery by amending Schedule III to Madras Act I of 1959.

Turnover from sale of jaggery—cane or palm—was subject to tax under section 3 (1) of the Madras Act IX of 1939 at three pies per rupee. By G.O. No. 651 dated 28th February, 1955 and G.O. No. 2780 dated 7th September, 1955 all sales of "palm jaggery" effected through Co-operative Societies and the Palm Gur Federation were exempted from tax. By another G.O. No. 1605 dated 19th August, 1956, all transactions of sale in "palm jaggery" were exempted from sales tax with effect from 1st April,

1956. Transactions of sale in "cane jaggery" therefore continued to remain liable to tax whereas sales of "palm jaggery" enjoyed the benefit of exemption from tax.

After the judgment of this Court in *The Bengal Immunity Company Ltd. v. The State of Bihar and others*¹, the Parliament amended Article 286 and entry 54 in List II of the Seventh Schedule and added a new Entry 92-A in List I in the Seventh Schedule by the Constitution (Sixth Amendment) Act. In exercise of the power under Entry 92-A List I the Parliament enacted the Central Sales Tax Act 74 of 1956. By Chapter IV of that Act the power reserved under the amended Article 286 Clause (3) was exercised by the Parliament and certain classes of goods were declared to be of "Special importance in inter-State trade or commerce". By section 15 certain modifications were declared in State Acts relating to the levy of taxes on sales and purchases of declared goods. However, in the list of goods of "special importance in inter-State trade or commerce" gur or jaggery was when the Act was enacted, not included.

The Parliament then enacted the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (Act 58 of 1957). Section 3 of that Act authorised the levy and collection of additional duties in respect of several classes of goods including "sugar". By section 4 it was provided that during each financial year, there shall be paid out of the Consolidated Fund of India to the States in accordance with the provisions of the second schedule, such sums, representing a part of the net proceed of the additional duties levied and collected during that financial year, as are specified in that Schedule. It was enacted by the proviso to clause (2) of the Schedule that if during that financial year there is levied and collected in any State specified in the Table a tax on the sale or purchase of sugar by or under any law of that State, no sums shall be payable to that State under sub-clause (ii) or sub-clause (iii) of clause (b) in respect of that financial year, unless the Central Government by special order otherwise directs. The expression 'sugar' was defined in section 2 (c) as having the same meaning as it has in the First Schedule to the Central Excise and Salt Act, 1944. The Governor of Madras issued Ordinance I of 1957 directing that transactions of sale of "cane jaggery" be liable to a single point tax at 5 per cent. with effect from 1st April, 1957. By virtue of the Central Sales Tax Act, 1956, as amended by Act 31 of 1958 "sugar as defined in Item No. 8 of the First Schedule to the Central Excises and Salt Act, 1944 was declared a commodity essential to the life of the community and tax could thereafter be levied on "sugar" at the rate of 2 per cent only. But in view of the definition contained in the Central Excise and Salt Act, 1944, there was some doubt whether the expression "sugar" included *gur*. The State of Madras being apparently of the opinion that "palm jaggery" and "cane jaggery" were subject to the provisions of the Additional Excise Act 58 of 1957, issued on 15th April, 1958, G. O. No. 1457 exempting all sales of "cane jaggery" from tax with effect from 1st April, 1958. Transactions of sale of "palm jaggery" were therefore exempt partially from sales tax from 28th February, 1955 and wholly from 1st April, 1956, and transactions of sale of "cane jaggery" were exempt from tax from 1st April, 1958.

The State Legislature enacted the Madras General Sales Tax Act I of 1959 with effect from 1st April, 1959. By section 3 every dealer whose total turnover was not less than Rs. 10,000 became liable to pay tax for each year at the rate of 2 per cent of his taxable turnover. By section 8 it was provided that subject to such restrictions and conditions as may be prescribed, a dealer who deals in goods specified in the Third Schedule shall not be liable to pay any tax under the Act in respect of such goods. Item 5 in the Third Schedule was "sugar including jaggery and *gur*." Section 17 of that Act authorised the State Government by notification to exempt or to make reduction in rate in respect of any tax payable under the Act on the sale or purchase of any specified goods or class of goods at all points or specified points in respect of sales by successive dealers or by any specified class of dealers in respect of

the whole or any part of their turnover. By section 59 (1) of the Act the State Government was authorised by notification, to alter, add or cancel any of the Schedules.

On 1st April, 1959 transactions of sale of "sugar including jaggery and gur" were exempt from liability to pay tax under the Madras General Sales Tax Act I of 1959. The exemption applied to all transactions of sale of "cane jaggery" and "palm jaggery". On 10th September, 1965 the Government of India advised the State Government that "jaggery" was not included in the expression "sugar" in the Additional Duties of Excise Act 58 of 1957. The State of Madras in exercise of the power under sub-section (1) of section 59 of the Madras General Sales Tax Act, issued G. O. No. 2261 dated 30th December, 1967, that :

"In the said (Third) Schedule in item, 5 for the word 'including' the words but not including, shall be substituted."

The State simultaneously issued another notification that—

"In exercise of powers conferred by section 17 (1) of the Madras General Sales Tax Act, 1959, the Governor of Madras granted exemption in respect of tax payable under the Act on all sales of palm jaggery."

In consequence of the two notifications turnover from transactions of sale of "cane jaggery" which was till then exempt from tax became liable to tax under section 3 of the Madras Act I of 1959 whereas sale of "palm jaggery" remained exempt from liability to pay sales tax.

In support of the plea that the State had practised unlawful discrimination between sales of "palm jaggery" and "cane jaggery" it was urged that "cane jaggery" and "palm jaggery" which were identical commodities and were treated similarly under the successive Sales Tax Acts of the State for many years past were without any rational nexus with the object sought to be served by the Madras General Sales Tax Act, 1959, differently treated and on that account the notification issued under section 59 sub-section (1) which modifies the Third Schedule is *ultra vires*.

It may be recalled that the notification under section 59 (1) which was issued in exercise of executive authority has received legislative sanction by Madras Act 2 of 1968. Amendment in the Third Schedule now flows from the exercise of legislative authority and not executive authority.

Since section 8 read with the Third Schedule as amended by Madras Act 2 of 1968 exempts only "sugar" from liability to tax sales of jaggery, cane and palm, now fall within the charging section. But the Government of Madras have in exercise of powers under section 17 of Act I of 1959 exempted transactions of sale of "palm jaggery" from tax. It is true that between 1st April, 1958 and 31st October, 1967 transactions of sale of "cane jaggery" and "palm jaggery" were exempt from liability to pay sales tax under the Madras General Sales Tax Acts of 1959 and 1959, but it cannot be inferred therefrom that the Legislature treated "palm jaggery" and "cane jaggery" as the "same commodity". For nearly three years before 1st April, 1958 sales of "palm jaggery" were exempt from tax but sales of "cane jaggery" were not.

The evidence on the record clearly shows that "cane jaggery" and "palm jaggery" are commercially different commodities. "Cane jaggery" is produced from the juice of sugarcane; "palm jaggery" is produced from the juice of the palm tree. Mr. Raghupathy, Deputy Secretary to the Government of Madras (Commercial Taxes) has stated in his affidavit that "palm jaggery" industry comes under the purview of Khadi and Village Industries Board and is one of the cottage industries which gives employment mainly to poor tappers. The tappers, according to Mr. Raghupathy, collect "neera" from palm and other trees and prepare jaggery by the traditional method of boiling "neera" in their huts and produce jaggery without the aid of any machinery. Production of "palm jaggery" in the State compared to "cane jaggery" is small. The price of "palm jaggery" and "cane jaggery" differ widely and apparently "palm jaggery" and "cane jaggery" are consumed by different sections of the community. It is clear that the method of production of

"palm jaggery" and "cane jaggery" are different; they reach the consumers through different channels of distribution; the prices at which they are sold differ and they are consumed by different sections of the community.

In a recent judgment *N. Venugopala Ravi Varma Rajah v. Union of India and another*¹, this Court observed :

".....tax laws are aimed at dealing with complex problems of infinite variety necessitating adjustment of several disparate elements. The Courts accordingly admit, subject to adherence to the fundamental principles of the doctrine of equality a larger play to legislative discretion in the matter of classification. The power to classify may be exercised so as to adjust the system of taxation in all proper and reasonable ways; the Legislature may select persons, properties, transactions and objects and apply different methods and even rates for tax, if the Legislature does so reasonably.** If the classification is rational, the Legislature is free to choose objects of taxation impose different rates, exempt classes of property from taxation, subject different classes of property to tax in different ways and adopt different modes of assessment. A taxing statute may contravene Article 14 of the Constitution if it seeks to impose on the same class of property, persons, transactions or occupations similarly situate, incidence of taxation, which leads to obvious inequality."

It was also said by the Court that :

"It is for the Legislature to determine the objects on which tax shall be levied, and the rates thereof. The Courts will not strike down an Act as denying the equal protection merely because other objects could have to been, but are not, taxed by the Legislature."

We are accordingly of the view that "cane jaggery" and "palm jaggery" are not commodities of the same class, and in any event in imposing liability to tax on transactions of sale of "cane jaggery" and exempting "palm jaggery," no unlawful discrimination denying the guarantee of equal protection was practised.

No serious argument was advanced in support of the plea that the freedom of trade and commerce guaranteed by Part XIII of the Constitution is infringed by the imposition of tax on "cane jaggery". Freedom of trade, commerce and intercourse guaranteed by Article 301 of the Constitution is protected against taxing statutes as well as other statutes, but by imposition of tax on transactions of sale of "cane jaggery" no restriction on the freedom of trade or commerce or in the course of trade with or within the State is imposed. The tax imposed on transaction of sale of "cane jaggery" does not affect the freedom of trade within the meaning of Article 301. As observed by this Court in *The State of Madras v. N. K. Nataraja Mudali*,² "a tax may in certain cases directly and immediately restrict or hamper the free flow of trade, but every imposition of tax does not do so."

There is no substance in the contention that the Act which imposes tax on "cane jaggery" and the notification which exempts "palm jaggery" from liability to tax imposes a colourable exercise of authority. If the Legislature has the power to impose the tax, its authority is not open to challenge on a plea of colourable exercise of power: *K. C. Gajapati Narayan Deo & Others v. The State of Orissa*³.

There will be one hearing fee.

V.K.

Appeals dismissed.

1. (1969) 2 I.T.J. 590 : (1969) 2 S.C.J. 721.

28 : A.I.R. (1969) S.C. 147.

2. (1969) 1 A.L.J. 318 : 22 S.T.C. 376 : (1969) 1 M.L.J. (S.C.)

3. (1954) S.C.R. 1 : (1953) S.C.J. 592.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting C. J.*, V. RAMASWAMI AND A. N. GROVER, JJ.

M/s. Kurapati Venkatasatyanarayana and Brothers .. Appellants*

v.

The State of Andhra Pradesh .. Respondent.

*Constitution of India (1950), Article 286 (1) (a), Explanation—Madras General Sales Tax Act (IX of 1939), Section 22 (a), (i) Explanation—Scope—When attracted.**Sales Tax—Single order of assessment for a particular year—Part of assessment illegal—Assessment if invalid in toto.*

If the goods were as a direct result of a sale delivered outside the State for the purpose of consumption in the State of first delivery the assessee would be entitled to the exemption from sales tax by virtue of the Explanation to Article 286 (1) (a) of the Constitution and it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination.

In the present case though there is a single order of assessment for the assessment year 1949-50, the assessment could be split up and dissected and the items of sale separated and taxed for different periods. It is quite easy in this case to ascertain the turnover of the appellant for the pre-Constitution and post-Constitution periods for these figures are furnished in the plaint by the appellant himself. It is open to the Supreme Court in these circumstances to sever illegal part of the assessment and give a declaration with regard to that part alone instead of declaring the entire assessment void.

Appeal from the Judgment and Decree dated the 11th March, 1965 of the Andhra Pradesh High Court in A. S. Nos. 169 and 93 of 1957.

Rajeshwara Rao and B. Parthasarathi, Advocates, for Appellant.

D. Munikammiah, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate from the judgment of the High Court of Andhra Pradesh dated 11th March, 1965 in A.S. Nos. 93 and 169 of 1957.

The appellant was a firm of dealers in pulses at Vijayawada. It was sending pulses like green gram and black gram to other States viz: Bombay, Bengal, Madras and Kerala by rail in the course of their business. The consignments were addressed to 'self' and the railway receipts were endorsed in favour of Banks for delivery against payments. The purchasers obtained the railway receipts after payments and took delivery of the goods. The total turnover of the business of the appellant for the year 1949-50 was Rs. 17,05,144-2-2. Of the said turnover a sum of Rs. 3,61,442-7-3 represented the turnover of sales effected outside the then Madras State. For the assessment year 1949-50 the Deputy Commercial Tax Officer collected sales-tax on the total turnover without exempting the value of the sales effected outside the State. The appellant was permitted to pay sales tax under rule 12 of the Madras General Sales Tax (Turnover and Assessment) Rules. The appellant submitted monthly returns and paid sales tax without claiming any such exemption till the end of January, 1950. But in the returns for the months of February and March, 1950 the appellant claimed exemption on sales effected outside the State. The appellant submitted a consolidated return Exhibit A-18 to the Deputy Commercial Tax Officer on 30th March 1950 claiming exemption in respect of a sum of Rs. 10,37,334-7-9

being the value of the sales effected outside the State for the period commencing from 1st April, 1949 and ending 31st January, 1950. The Deputy Commercial Tax Officer fixed the taxable turnover of the appellant at Rs. 17,05,144-2-2 and issued a notice Exhibit A-23, dated 24th October, 1950 to show cause why the appellant should not be assessed accordingly. The appellant was thereafter held liable to pay tax amounting to Rs. 26,642-14-0 on a net turnover of Rs. 17,05,144-2-2. The appellant preferred an appeal to the Commercial Tax Officer and a revision petition to the Board of Revenue, Madras but was unsuccessful. The appellant, therefore brought a suit for the recovery of Rs. 21,270-13-0 being the amount of tax illegally collected from him together with interest, contending that the sales effected outside the State could not be taxed under Article 286 (1) (a) of the Constitution of India. The State of Madras contested the suit on the ground that the sales were taxable as they fell within the purview of explanation 2 to section 2 (h) of the Madras General Sales Tax Act, 1939 (hereinafter referred to as the Act). The Subordinate Judge held that for the period from 1st April, 1949 to 25th January 1950 the appellant was not entitled to impeach the assessment on the turnover relating to sales outside the State. As regards the period from 26th March, 1950 to 31st March 1950, the Subordinate Judge took the view that the part of the turnover relating to outside sales was not liable to sales-tax but as there was a single order of assessment for the entire period the entire assessment was illegal. Against the judgment of the Subordinate Judge both the appellant and the respondent filed appeals A.S. No. 93 of 1957 and A.S. No. 169 of 1957 to the High Court of Andhra Pradesh. By its order dated 18th April, 1960 in Appeal No. 169 of 1957 the High Court called for a finding from the trial Court as to whether the appellant was able to prove the facts entitling him to invoke the explanation to Article 286 (1) (a). By its order dated 21st July, 1962 the trial Court submitted a finding to the effect that in view of the decision of the Supreme Court in *India Copper Corporation Ltd. v. The State of Bihar*¹, the burden of proof was not on the appellant and that the finding will have to be given in its favour. But by its order dated 5th March, 1963 the High Court directed the Subordinate Judge to record a finding after considering the evidence adduced by the appellant as to whether the goods in question were delivered for consumption within the delivery States. In its order dated 22nd March, 1963, the trial Court, after considering the evidence given by the appellant's witnesses came to the conclusion that the deliveries were not made for by a common judgment dated 11th March, 1965 in A.S. Nos. 93 and 169 of 1957 held that the appellant could not claim the benefit under Article 286 (1) (a) of the Constitution in the absence of evidence as to how the wholesalers disposed of the goods after obtaining delivery and therefore the entire turnover for the year 1949-50 would be assessable to tax. In the result A.S. No. 169 of 1957 filed by the respondent was allowed and A.S. No. 93 of 1957 filed by the appellant was dismissed.

The Madras General Sales Tax Act, 1939 was enacted in exercise of the legislative authority conferred upon the Provincial Legislatures by Entry 48 of List II read with section 100 (3) of the Government of India Act, 1935. The explanation to section 2 (h) of this Act is as follows :

“Notwithstanding anything to the contrary in the Indian Sale of Goods Act 1930 the sale or purchase of any goods shall be deemed, for the purpose of this Act to have taken place in this Province, wherever the contract of sale or purchase might have been made.

(a) If the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made or,

(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made.”

Under Entry 48 of List II of the Government of India Act, 1935 the Provincial Legislatures could tax sales by selecting some fact or circumstance which provided a

1. (1961) 1 S.C.J. 457 : (1961) 2 S.C.R. 276 : (1961) 12 S.T.C. 56.

territorial nexus with the taxing power of the State even if the property in the goods sold passed outside the Province or the delivery under the contract of sale took place outside the Province. Legislation taxing sales depending solely upon the existence of a nexus, such as production or manufacture of the goods, or presence of the goods in the Province at the date of the contract of sale, between the sale and the legislating Province could competently be enacted under the Government of India Act, 1935. [See *Tata Iron and Steel Co. Ltd. v. The State of Bihar*¹ and *Poppatlal Shah v. The State of Madras*]².

By Article 286 of the Constitution certain fetters were placed upon the legislative powers of the States as follows:

“(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State ; or

(b) in the course of the import of the goods, into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.”

Therefore, by incorporating section 22 of the Madras Act read with Article 286, notwithstanding the amplitude of the power otherwise granted by the charging section not with the definition of ‘ sale ’, a cumulative fetter of triple dimension was imposed upon the taxing power of the State. The Legislature of the Madras State could not since 26th January, 1950, levy a tax on sale of goods taking place outside the State or in the course of import of the goods, into, or export of the goods out of, the territory of India, or on sale of any goods where such sale took place in the course of inter State trade or commerce. By the Explanation to Article 286 (1) (a) which is incorporated by section 22 of the Madras Act a sale is deemed to take place in the State in which the goods are actually delivered as a direct result of such sale for the purpose of consumption in that State even though under the law relating to sale of goods the property in the goods has by reason of such sale passed in another State. In the *State of Bombay and another v. The United Motors (India) Ltd.*³, it was held that since the enactment of Article 286 (1)(a) a sale described in the Explanation which may for convenience be called an “Explanation sale” is taxable by that State alone

1. (1958) S.C.J. 818 : (1958) S.C.R. 1355.

2. (1953) S.C.R. 677 : (1953) S.C.J. 369 :
(1953) 1 M.L.J. 739.

3. (1953) S.C.R. 1069 : (1953) S.C.J. 373 :
(1953) 1 M.L.J. 743.

in which the goods sold are actually delivered as a direct result of sale for the purpose of consumption in that State.

With a view to impose restrictions on the taxing power of the States under the pre-Constitution statutes, amendments were made in those statutes by the Adaptation of Laws Order. As regards the Madras Act the President issued on 2nd July, 1952 the Fourth Amendment inserting a new section, section 22 in that Act. It runs as follows :

“Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place—

(a) (i) outside the State of Madras, or

(ii) in the course of import of the goods into the territory of India or of the export of the goods out of such territory, or

(b) except in so far as Parliament may by law otherwise provide, after the 31st March, 1951, in the course of inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly.

Explanation.—For the purposes of clause (a) (i) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.”

By this amendment the same restrictions were engrafted on the pre-Constitution statute as were imposed by Article 286 of the Constitution upon post-Constitution statutes.

As regards the sales for the period from April, 1949 to 25th January, 1950, it was admitted before the Deputy Commercial Tax Officer that the goods were actually in the Madras State at the time the contract of sale was concluded. It was for this reason that the Deputy Commercial Tax Officer negatived the claim which the appellant made in respect of those sales. It appears that in the trial Court the appellant challenged the constitutional validity of explanation to section 2 (h) of the Act. But in view of the decision of this Court in the *Tata Iron & Steel Co's case*¹, and *Poppallal Shah's case*², counsel on behalf of the appellant did not seriously dispute the validity of the assessment in regard to sales from 1st April, 1949 to 25th January, 1950.

With regard to the period from 26th January, 1950 to 31st March, 1950 the contention of the appellant is that the High Court was in error in holding that the burden of proof was on the appellant to show that there was not only delivery of goods for consumption within the delivery States but there was actual consumption of the goods in those States. In our opinion the argument is well-founded and must be accepted as correct. In *India Copper Corporation's case*³, it was pointed out by this Court that if the goods were as a direct result of a sale delivered outside the State of Bihar for the purpose of consumption in the State of first delivery, the assessee would be entitled to the exemption from sales-tax by virtue of the Explanation to Article 286 (1) (a) of the Constitution and it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination.

In the present case the Subordinate Judge has, upon a consideration of the evidence adduced by the parties stated in his report dated 27th January, 1962 that the intention of the appellant was that the sale and delivery should be for the purpose of consumption in the delivery States. It is true that in his subsequent report dated 22nd March, 1963 the Subordinate Judge gave a different finding. But it is obvious that the subsequent report of the Subordinate Judge is vitiated because the principle

1. (1958) S.C.J. 818: (1958) S.C.R. 1355.

2. (1953) S.C.J. 369 : (1953) S.C.R. 677 : (1953) 1 M.L.J. 739.

3. (1961) 1 S.C.J. 457: (1961) 2 S.C.J. 276: (1961) 12 S.T.C. 56.

laid down by this court in *India Copper Corporation's case*¹, has not been taken into account. Having regard to the evidence adduced by the appellant in this case we are satisfied that the part of the turnover which related to sales from 26th January, 1950 to 31st March, 1950 was not liable to sales-tax and the levy of sales-tax from appellant to this extent is illegal.

The next question arising in this appeal is whether the assessment order of the Deputy Commercial Tax Officer for the year 1949-50 is illegal in its entirety notwithstanding the fact that the State Government had a right to levy sales-tax on outside sales which were effected prior to 26th January, 1950. It was argued for the appellant that the assessment must be treated as one and indivisible and if a part of the assessment is illegal the entire assessment must be deemed to be infected and treated as invalid. In support of this argument reference was made to the decision of this Court in *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*² in which this Court observed as follows :

"The necessity for doing so is, however, obviated by reason of the fact that the assessment is one composite whole relating to the pre-Constitution as well as the post-Constitution periods and is invalid in toto. There is authority for the proposition that when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation renders the assessment invalid in toto."

The Court cited with approval a passage from the judgment of the Judicial Committee in *Bennett & White (Calgary) Ltd. and Municipal District of Sugar City No. 5*.³

"When an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items, and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dismissible as '*de minimis*') is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In *Montreal Light, Heat & Power Consolidated v. City of Westmount*⁴ the Court (see especially per Anglin, C.J.) in these conditions held that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid in toto."

Applying the principle to the special facts and circumstances of the case the Court set aside the orders of assessment and directed that the case should be remanded to the Assessment Officer for re-assessment of the appellants in accordance with law. The same principle was applied but with a different result in the later case the *State of Jammu and Kashmir v. Caltex (India) Ltd.*⁵ in which the question arose as regards the validity of an assessment of sales-tax of retail sales of motor spirit. The Petrol Taxation Officer assessed the respondent to pay sales-tax for the period January, 1955 to May, 1959 under section 3 of the Jammu & Kashmir Motor Spirit (Taxation of Sales) Act, 2005. The respondent applied under section 103 of the Constitution of Jammu and Kashmir and a single Judge of the High Court held that the respondent was liable to pay sales-tax only in respect of the sales which took place during the period January to September, 1955 and issued a writ restraining the appellants from levying tax for the period October, 1955 to May, 1959. On appeal a Division Bench of the High Court quashed the assessment for the entire period. On appeal to this Court it was held that though there was one order of assessment for the period 1st January, 1955 to May 1959 the assessment could be split up and dissected and the items of sale could be separated and taxed for different periods. It was pointed out

1. (1961) 1 S.C.J. 457: (1951) 2 S.C.R. 276:
(1961) 12 S.T.C. 56.

2. (1955) 2 M.L.J. (S.C.) 302 : (1955) S.C.J.
808 at P. 815 : (1955) 2 S.C.R. 483 : (1955) 6
S.T.C. 627 at 637.

3. (1961) A.C. 786 at p. 816.

4. (1926) S.C.R. (can) 515.

5. (1966) 2 S.C.J. 755 : (1966) 3 S.C.R. 149:
(1966) 17 S.T.C. 612.

that the sales-tax was imposed in the ultimate analysis on receipts from individual sales or purchases of goods effected during the entire period, and, therefore, a writ of *mandamus* could be issued directing the appellant not to realise sales-tax with regard to transactions of sale during the period from 7th September, 1955 to May 1959.

A similar question arose for determination in an American case [*Frank Ratterman v. Western Union Telegraph Co.*¹]. The question in that case was "whether a single tax, assessed under the Revised Statutes of Ohio, section 2778 upon the receipts of a telegraph company which receipts were derived partly from interstate commerce and partly from commerce within the State but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that the said receipts were derived from interstate commerce." It was held unanimously by the Supreme Court of the United States that the assessment was not wholly invalid but it was invalid only in proportion to the extent that such receipts were derived from interstate commerce. It was observed that where the subjects of taxation can be separated so that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the Court will act upon this distinction, and will restrain the tax on interstate commerce, while permitting the State to collect that upon commerce wholly within its own territory. The principle of this case has been consistently followed in American cases : (see *Bowman v. Continental Company*²). This case has been cited with approval by this Court in *The State of Bombay v. The United Motors (India) Ltd.*³, wherein it was observed that the same principle should be applied in dealing with taxing statutes in this country also.

In the present case we are of opinion that though there is a single order of assessment for the period from 1st April, 1949 to 31st March, 1950 the assessment could be split up and dissected and the items of sale separated and taxed for different periods. It is quite easy in this case to ascertain the turnover of the appellant for the pre-Constitution and post-Constitution periods for these figures are furnished in the plaint by the appellant himself. It is open to the Court in these circumstances to sever the illegal part of the assessment and give a declaration with regard to that part alone instead of declaring the entire assessment void. For these reasons we hold that the appellant should be granted a declaration that the order of assessment made by the Deputy Commercial Tax Officer for the year 1949-50 is invalid to the extent that the levy of sales-tax is made on sales relating to goods which were delivered for the purpose of consumption outside the State for the period from 26th January, 1950 to 31st March, 1950. The result is that the appellant is entitled for refund of the amount illegally collected from him for the period from 26th January, 1950 to 31st March, 1950. The trial Court has already found that the appellant is entitled to claim exemption with regard to turnover for this period to the extent of Rs. 3,34,107-15-6 and the tax payable on this sum is Rs. 5,220-7-0. The appellant is therefore, entitled to a decree for the refund of Rs. 5,220-7-0. The appellant is also entitled to interest at 6 per cent. per annum from the date of suit till realisation of this amount.

For these reasons we allow this appeal and set aside the judgment of the Andhra Pradesh High Court dated 11th March, 1965 in A.S. Nos. 93 and 169 of 1957 and allow this appeal to the extent indicated above.

There will be no order with regard to costs.

V.K.

Appeal allowed in part.

1. 127 H.S. 411.
2. 250 H.S. 642.

3. (1953) S.C.R. 1069 at 1097 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH, *Acting Chief Justice* AND G.K. MITTER, J.Ram Chand (*dead*) by his legal representatives... *Appellant**

v.

Thakur Janki Ballabhji Maharaj and another

... *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 33—Scope—Pujari—Removal from the temple and its properties—Deity not a public trust—Court, if could frame a scheme for management of the temple and its properties.

The pujari has committed several acts of mismanagement and misappropriation of the temple and its properties. He has set up a personal title to the temple properties and has converted the properties to his own use. He is therefore not fit to remain in possession as *pujari* or as manager of the temple and therefore he is liable to be ejected from the temple and its properties.

The property of the temple was not property or a public trust of a religious or charitable nature. Yet, civil Court could in the exercise of the powers under Order 41, rule 33 of the Civil Procedure Code direct that the Court of first instance to frame a scheme of management of the temple collections and the income and disbursement of expenses, etc.

Appeal by Special Leave from the Judgment and Order dated the 22nd September, 1964 of the Allahabad High Court in First Appeal No. 39 of 1952.

J. P. Goyal and Sobhag Mal Jain, Advocates, for Appellants.

K. B. Mehta, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Shah, Acting C.J.—Suit No. 41 of 1947 was filed in the Court of the Civil Judge, Mathura by the deity Thakur Janki Balabhji Maharaj, acting through its manager—L. Tulsiram, authorised agent of the Bharatpur State, for a decree for possession of the temple of the deity at Brindaban in U.P. ; and of the temple properties and for an order calling upon the defendant, Ramchand, to account for the realisations of the estate of the deity.

The case of the plainriffs was that the Ruler of the State of Bharatpur built the temple at Brindaban and installed the idol of Thakur Janki Ballabhji Maharaj and dedicated the temple to the deity ; that the *Shebait* of the deity who was a paid employee of the State was appointed by the Ruler of the State of Bharatpur ; that one Chhotelal was appointed a priest to perform the worship in the temple under a written agreement dated 8th April, 1936 ; that after the death of Chhotelal on 13th May, 1912 Ramchand was appointed the priest of the temple on condition that he shall execute the usual agreement in favour of the State ; that Ramchand entered upon the duties as *pujari* but failed to execute the agreement, and in course of time raised various constructions of his own on the premises in dispute and converted them into private residential buildings, and illegally used the temple as a lodging house for pilgrims “ to the utter detriment, loss and desecration of the deity ” and thereby acquired “ illegal benefit to himself out of the temple properties ” ; and that Ramchand was not performing the *seva puja* of the deity.

The suit was resisted by Ramchand. He denied that the temple was built at the expense of the Ruler of the State of Bharatpur or that he—Ramchand—was appointed to be a priest of the temple by the Ruler of Bharatpur. He contended that one Ram Narain Kedar Nath had taken a piece of land at Brindaban on rent from the temple of Govindji and after constructing a temple thereon and installing the Thakurji had given it as an offering to Sitaram, ancestor of Ramchand, and had appointed Sitaram as the Manager of the temple ; that the temple had since then remained in the manage-

ment of the descendants of Sitaram, and that he (Ramchand) was in possession of the temple and its properties as "Manager and proprietor."

The trial Court dismissed the suit holding that the Ruler of Bharatpur was never the owner of the temple or of the articles mentioned in Schedules A and B of the plaint, that the Ruler was also not the founder of the temple nor its *shebait*; and that the Ruler had never appointed any *pujari* of this temple and was not authorised to appoint or dismiss such a *pujari*.

In appeal against the decree passed by the Court of First instance it was urged before the High Court of Allahabad that the trial Court erred in dismissing the suit merely on the finding that the Ruler of the State of Bharatpur "had no concern with the construction of the temple or with the installation of the idol in the temple", and that in the suit filed by the deity, having regard to the acts of mismanagement and misappropriation committed by the defendant Ramchand, a decree should have been made in favour of the deity. Counsel for Ramchand contended that the suit being of the nature of a suit under section 92 of the Code of Civil Procedure could not be instituted without obtaining the sanction in writing of the Advocate-General and that in any event the second plaintiff, the State of Bharatpur, could not file the suit, since it was not a *shebait* or the settlor of the temple.

It was common ground before the High Court that the property of the temple was not property of a public trust of a religious or charitable nature. From the averments, made in the plaint it is clear that the suit was filed by the deity against the person in management and it was not a suit filed by the relators. Section 92 of the Code of Civil Procedure had no application to the suit and the sanction of the Advocate-General was not a condition of the initiation of the suit. The High Court therefore rightly rejected the contention that the suit was not maintainable without the sanction of the Advocate-General.

The High Court held that it was open, even to a worshipper, if he possesses sufficient qualifying interest, to start a suit to protect the property of the deity. Observing that the defendant Ramchand had raised residential buildings of his own in the temple premises and that he was lodging pilgrims in a part of those buildings and was asserting a proprietary title to them and was on that account guilty of conduct detrimental to the interest of the deity and had rendered himself liable to be ejected from the temple and its properties, and that he was unfit to act as *pujari*, the High Court reversed the decree passed by the trial Court and decreed the plaintiffs' suit for possession of the temple and its properties and restrained the defendant Ramchand by an injunction from interfering with the management of the temple and performance of worship of the deity. With Special Leave Ramchand has appealed to this Court.

Ramchand has committed several acts of mismanagement and misappropriation of the temple and its properties. He has set up a personal title to the temple properties and has converted the properties to his own use. Ramchand is therefore not fit to remain in possession as *pujari* or as manager of the temple. The suit is filed by the deity acting through the Manager. Granting that it is not proved that the Ruler of Bharatpur established the temple and installed the deity, there is abundant evidence that the State of Bharatpur had made from time to time large donations for the maintenance of the temple. The Ruler of Bharatpur had therefore clearly a substantial interest to maintain the suit on behalf of the deity to protect the property. There is no merit in the appeal and therefore it must fail.

It is, however, necessary to make an effective decree in this appeal. It may be noticed that even though the suit has been filed and prosecuted on behalf of the State of Bharatpur and later by the State of Rajasthan through its District Magistrate, the temple is situate within the State of Uttar Pradesh and it would be difficult for the District Magistrate or any other authority acting on behalf of the State of Rajasthan to look after the administration of the temple and to protect its properties from misappropriation. This is undoubtedly a private trust but the civil Courts have

jurisdiction to frame a scheme for the management of the temple which is not a public trust. The Judicial Committee of the Privy Council in *Pramatha Nath, Mullick v. Pradyumna Kumar Mullick*¹, directed that a scheme be framed for the regulation of the worship of the idol even though there was no public trust. In *Asha Bibi and others v. Nabissa Sahib and others*² the Madras High Court held that a suit for removing the trustees of a private trust and for framing a scheme was maintainable. A similar view was also taken by the Calcutta High Court in *Shri Mahadeo Jew and another v. Balkrishna Vyas & another*³.

The civil Court has therefore jurisdiction to frame a scheme for management of the temple and its properties. The present is, in our judgment a case in which in exercise of the powers under Order 41, rule 33 of the Code of Civil Procedure we should direct that the Court of first instance to frame a scheme of management of the temple collections and the income and disbursement of expenses, application of the surplus if any and for that purpose to appoint a manager of the property of the deity and its properties, with authority to take possession of the temple and the properties from the defendant Ramchand and to administer the property and its income under the directions of the Court. We direct accordingly. The Court will also take an account of his dealings with the property of the deity from Ramchand and determine his liability and recover the amount found due from him on taking accounts. The Court will pass appropriate orders with regard to the constructions made by Ramchand and will prevent the property being used for the private benefit of Ramchand or any other person. The scheme to be framed will be consistent with the law relating to private religious endowments, if any, in force in the State of Uttar Pradesh.

Subject to this modification, the appeal is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S.M. SIKRI AND V. RAMASWAMI, JJ.

Nanak Chand

... *Appellant**

v.

Chandra Kishore Aggarwal and others

... *Respondents.*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), section 4 and Criminal Procedure Code (V of 1898), section 488—Scope—section 4 (b) of the Maintenance Act, if repeals section 488, Criminal Procedure Code.

Criminal Procedure Code (V of 1898), section 488—"Child"—Meaning of—A major child "unable to maintain itself", if comes within the purview of the section.

There is no inconsistency between the Hindu Adoptions and Maintenance Act, 1956 and section 488, Criminal Procedure code. Both can stand together. The maintenance Act is an act to amend and codify the law relating to adoptions and maintenance among Hindus. The law was substantially similar before and nobody ever suggested that Hindu Law, as in force immediately before the commencement of this Act, in so far as it dealt with the maintenance of children, was in any way inconsistent with section 488, Criminal Procedure Code. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Therefore, it has to be held that section 4 (b) of the Maintenance Act does not repeal or affect in any manner the provisions contained in section 488, Criminal Procedure Code.

Held also that, If the concept of majority is imported into section 488, Criminal Procedure Code, a major child who is an imbecile or otherwise handicapped will

1. L.R. (1925) 52 I.A. 245 : 49 M.L.J. 30.

2. A.I.R. 1957 Mad. 583.

3. A.I.R. 1952 Cal. 763.

* CrI. A. No. 6 of 1969.

fall outside the purview of this section. If this concept is not imported, no harm is done for the section itself provides a limitation by saying that the child must be unable to maintain itself. The older a person becomes the more difficult it would be to prove that he is unable to maintain himself. It is true that a son aged 77 may claim maintenance under the section from a father who is 97. It is very unlikely to happen but if it does happen and the father is able to maintain while the son is unable to maintain himself no harm would be done by passing an appropriate order under section 488. Therefore, the word "child" in section 488 does not mean a minor son or daughter and the real limitation is contained in the expression "unable to maintain itself."

Appeal from the Judgment and Order dated the 2nd May, 1968 of the Delhi High Court in Criminal Revision Nos. 339-D of 1965 and 185-D of 1968.

Sardar Bahadur Saharya, and Yougindra Khushalani, Advocates, for Appellant.

S. C. Mazumdar and Yogeshwar Dayal, Advocates, for Respondents.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by certificate of fitness granted by the High Court of Delhi arises out of an application under section 488, Criminal Procedure Code, filed on 4th September, 1963, in the Court of Magistrate, 1st Class, Delhi, by four children of the respondent, Nanak Chand. The first applicant, Chandra Kishore, was born on 23rd January, 1942, the second, Ravindra Kishore, was born on 23rd September, 1943, the third Shashi Prabha, was born on 23rd February, 1947, and the fourth, Rakesh Kumar, was born on 21st September, 1948. The first two applicants were thus majors at the time of the application, the third though a minor at the time of the application was a major on the date of the order passed by the Magistrate, i.e., on 26th March, 1965. The learned Magistrate allowed the application and ordered the respondent, Nanak Chand, to pay Rs. 35 Per mensem to Chandra Kishore for four months only, Rs. 35 Per mensem to Ravindra Kishore for 3 years only in case he continued his medicine studies, Rs. 45 Per mensem to Shashi Prabha as her maintenance allowance and education expenses and Rs. 45 Per mensem to Rakesh Kumar as his maintenance allowance and education expenses, from 26th March, 1965.

Both the applicants and the respondent, Nanak Chand, filed revisions against the order of the Magistrate, to the Additional Sessions Judge, who dismissed the revision petition filed by the respondent, Nanak Chand, and accepted the revision petition of the applicants. The Additional Sessions Judge submitted the case to the High Court with the recommendation to enhance the maintenance allowance of the applicants in terms of the proposals made by him. The Additional Sessions Judge observed that the maintenance under section 488 did not include the costs of college education, and therefore he did not propose to allow Chandra Kishore and Ravindra Kishore the expenses of their College education. But taking into consideration the income of the respondent and the status of the family, the Additional Sessions Judge proposed to allow Chandra Kishore and Ravindra Kishore Rs. 100 Per mensem each as maintenance allowance until they finished their courses of M. com. and M. B. B. S. respectively. He further proposed to allow to Rakesh Kumar and Shashi Prabha each a monthly maintenance allowance of Rs. 50 until Shashi Prabha was able to earn or was married, whichever was earlier, and until Rakesh Kumar was able to maintain himself.

The High Court accepted the reference made by the learned Additional Sessions Judge and dismissed the criminal revision filed by the respondent. The High Court granted the certificate under Article 134 (1) (c) of the Constitution because there is conflict of opinion on the question of the interpretation to be given to the word child in section 488, Criminal Procedure Code.

The learned Counsel for Nanak Chand has raised three points before us : first, that section 488, Criminal Procedure Code, stands impliedly repealed by section 4 of the Hindu Adoptions and Maintenance Act, 1956 (LXXXVIII of 1956) hereinafter referred to as the Maintenance Act—insofar as it is applicable, to Hindus; secondly, that the

word child in section 488 means a minor ; and thirdly, that the maintenance fixed for Chandra Kishore and Ravindra Kishore was based on wrong principles and was excessive inasmuch as expenses for education have been taken into consideration.

Section 4 of the Maintenance Act reads :

“ 4. Save as otherwise expressly provided in this Act,—

(a)

(b) Any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provision contained in this Act.”

The learned Counsel says that section 488 Criminal Procedure Code, in so far as it provides for the grant of maintenance to a Hindu, is inconsistent with Chapter III of the Maintenance Act, and in particular, section 20, which provides for maintenance to children. We are unable to see any inconsistency between the Maintenance Act and section 488, Criminal Procedure Code. Both can stand together. The Maintenance Act is an act to amend and codify the law relating to adoptions and maintenance among Hindus. The law was substantially similar before and no body ever suggested that Hindu Law, as in force immediately before the commencement of this Act, in so far as it dealt with the maintenance of children, was in any way inconsistent with section 488, Criminal Procedure Code. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Recently the question came before the Allahabad High Court in *Ram Singh v. State*¹, before the Calcutta High Court in *Mahabir Agarwalla v. Gita Roy*², and before Patna High Court in *Nalini Ranjan v. Kiran Rani*³. The three High Courts have, in our view, correctly come to the conclusion that section 4 (b) of the Maintenance Act does not repeal or affect in any manner the provisions contained in section 488, Criminal Procedure Code.

On the second point there is sharp conflict of opinion amongst the High Courts and indeed amongst the Judges of the same High Court. In view of this sharp conflict of opinion we must examine the terms of section 488 ourselves. Section 488 (1) reads as follows :

“ 488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.”

We may also set out sub-section (8) of section 488, because some Courts have placed reliance on it :

“ 488 (8). Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.”

The word ‘ Child ’ is not defined in the Code itself. This word has different meanings in different contexts. When it is used in correlation with father or parents, according to Shorter Oxford Dictionary it means :

“ As correlative to parent, I. The offspring, male or female, of human parents.”

Beaumont, C. J., in *Shaikh Ahmed Shaikh Mahomed v. Ra Fatma*⁴, observed :

“ The word ‘ child according to its use in the English language has different meanings, according to the context. If used without reference to parentage. it is generally synonymous with the word ‘ infant ’ and means a person who has not attained

1. A.I.R. (1963) All. 355.
2. (1962) 2 Cri. L.J. 528.

3. A.I.R. (1965) Pat 442.
4. I.L.R. (1943) Bom. 38; 40.

attained the age of majority... Where the word 'child' is used with reference to parentage, it means a descendant of the first degree, a son or a daughter and has no reference to age. In certain contexts it may include descendants of more remote degree, and be equivalent to 'issue.' But, at any rate, where the word 'child' is used in conjunction with parentage, it is not concerned with age. No one would suggest that a gift 'to all my children' or 'to all the children of A' should be confined to minor children. In section 488 of the Criminal Procedure Code, the word is used with reference to the father. There is no qualification of age; the only qualification is that the child must be unable to maintain itself. In my opinion, there is no justification for saying that this section is confined to children who are under the age of majority."

We agree with these observations and it seems to us that there is no reason to depart from the dictionary meaning of the word.

As observed by Subba Rao, J., as he then was, speaking for the Court in *Jagir Kaur v. Jaswant Singh*¹, "Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose." If the concept of majority is imported into the section a major child who is an imbecile or otherwise handicapped will fall outside the purview of this section. If this concept is not imported, no harm is done for the section itself provides a limitation by saying that the child must be unable to maintain itself. The older a person becomes the more difficult it would be to prove that he is unable to maintain himself. It is true that a son aged 77 may claim maintenance under the section from a father who is 97. It is very unlikely to happen but if it does happen and the father is able to maintain while the son is unable to maintain himself no harm would be done by passing an appropriate order under section 488. We cannot view with equanimity the lot of helpless children who though major are unable to support themselves because of their imbecility or deformity or other handicaps. and it is not as if such cases have not arisen. As long ago as 1873, Pearson, J., in *the matter of the Petition of W.B. Todd*², had to deal with a major son who was deaf and dumb, and he had no hesitation in granting an order of maintenance. The same conclusion was arrived at by Chevis, J., in 1910 in *Bhagat Singh v. Emperor*³, and he allowed maintenance to a young man of about 20 who was very lame having a deformed foot. We have seen no case in which a man of 77 has claimed maintenance and we think, with respect that unnecessary emphasis has been laid on the fact that it might be possible for a man of 77 to claim maintenance.

It is not necessary to review all the case law. The latest judgment which was brought to our notice is that of the Madras High Court in *Anirthammal v. Marimuthu*⁴ in which Natesan, J., has written a very elaborate judgment. He has referred to all the Indian cases and a number of English cases and statutory provisions both in England and in India. We are unable to derive any assistance from the statutory provisions referred to by him or from the English Law on the point. He relied on the use of the word "itself" in section 488 as showing that what was meant was a minor child. We are unable to attach so much significance to this word. It may well be that it is simpler or more correct to use the word "itself" rather than use the words "himself or herself."

We may mention that Das Gupta, J., in *Smt. Purnashi Devi v. Nagendra Nath*⁵ and Mudholkar, J., in *State v. Ishwar Lal*⁶, came to the same conclusion as we have done.

In view of the reasons given above we must hold that the word "child" in section 488 does not mean a minor son or daughter and the real limitation is contained in the expression "unable to maintain itself."

1. (1964) 1 S.C.J. 336 : (1964) M.L.J. (Cri.) 254 : (1964) 2 S.C.R. 73, 84.

2. (1873) 5 H.W.P. High Court Reports 237.

3. (1910) 6 I.C. 1960.

4. (1966) 2 M.L.J. 506 : (1966) M.L.J. (Cri.)

832 : I.L.R. (1963) 1 Mad. 692 : A.I.R. (1967) Mad. 77.

5. A.I.R. (1950) Cal. 455.

6. I.L.R. (1951) Nag. 474.

Coming to the third point raised by the learned Counsel we are of the view that the learned Additional Sessions Judge and the High Court were right in taking into consideration the existing situation, the situation being that at the time the order was passed Chandra Kishore was a student of M. COM. and Ravindra Kishore was a student of M. B. B. S. course. We need not decide in this case whether expenses for education can be given under section 488 because no such expenses have been taken into consideration in fixing the maintenance in this case. It has not been shown to us that the amount fixed by the learned Additional Sessions Judge and confirmed by the High Court is in any way excessive or exorbitant.

In the result the appeal fails and is dismissed.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND K. S. HEGDE, JJ.

Madan Raj Bhandari

... *Appellant**

v.

State of Rajasthan

... *Respondent.*

Penal Code (XLV of 1860), sections 314 and 109—Charge of abetting R. To cause miscarriage of the deceased (women) accused convicted for abetting the deceased to cause miscarriage—Charge of abetment, if fails because the substantive offence is not established against the accused.

The appellant was charged and tried for the offence of abetting Mst. Radha to cause abortion of the child in the womb of the deceased but curiously enough he was convicted for abetting the deceased to cause miscarriage. Abetment as defined in section 107 of the Indian Penal Code can be by instigation, conspiracy or intentional aid. If the abetment was that of Mst. Radha, it could have been only by instigation of conspiracy but if it was an abetment of the deceased, it could either be by instigation or by conspiracy or by intentional aid. Throughout the trial the accused was asked to defend himself against the charge on which he was tried. At no stage he was notified that he would be tried for the offence of having abetted the deceased to cause miscarriage. It is now well settled that the absence of charge or an error or omission in it is not fatal to trial unless prejudice is caused. Therefore the essential question is whether there is any reasonable likelihood of the accused having been prejudiced in view of the charge framed against him. From the facts and circumstances of the case, one can reasonably come to the conclusion that the accused was likely to have been prejudiced by the charge on the basis of which he was tried. From the cross-examination of the prosecution witnesses, it is seen that the principal attempt made on behalf of the appellant was to show that he had nothing to do with the co-accused, Mst. Radha. He could not have been aware of the fact that he would be required to show that he did not in any manner abet the deceased to cause miscarriage. The charge of abetment fails when the substantive offence is not established against the principal but there may be exceptions.

Appeal by Special Leave from the Judgment and Order dated the 15th March, 1967 of the Rajasthan High Court in Criminal Appeal No. 219 of 1965.

Sobhag Mal Jain and V. S. Dave, Advocates, for Appellant.

K. B. Mehta, Advocate, for Respondent.

The Judgment of the Court was delivered by

Hegde, J.—The appellant's conviction by the learned Additional Sessions Judge, Jodhpur under section 314 read with section 109, Indian Penal Code, having been affirmed by the High Court of Rajasthan, he appeals to this Court after obtaining

Special Leave. The charge on the basis of which he was tried was that some days prior to 1st May, 1963, he abetted and Mst. Radha at Jodhpur to cause the miscarriage of one Miss Atoshi Dass alias Amola who as a result of administration of tablets and introduction of "laminaria dento" by the said Mst. Radha, died on 1st May, 1963. The case for the prosecution is that in about the years 1962-63, the appellant was the President of Oramotthan Pratishthan at Jalore. Miss Atoshi Dass was a teacher working in Indra Bal Mandir, Tikhi, an institution under the management of appellant. She was young and unmarried. Illicit relationship developed between the aforementioned Atoshi Dass and the appellant as a result of which Miss Atoshi Dass became pregnant. With a view to cause abortion of the child in her womb, the appellant took Miss Dass to Jodhpur and there attempted to cause the miscarriage mentioned above through one Mst. Radha. The attempt was not successful. The insertion of "laminaria dento" in the private parts of Miss Dass caused septicaemia as a result of which she died in the hospital on 1st May, 1963.

The appellant's case is that he had no illicit relation with Miss Atoshi Dass nor did he abet the alleged abortion. He denies that Miss Atoshi Dass died as a result of any attempt at abortion.

As seen earlier the appellant was charged and tried for the offence of abetting Mst. Radha to cause the miscarriage in question but he was ultimately convicted of the offence of abetting Miss Dass in the commission of the said offence.

It may be stated at this stage that one Mst. Radha was tried along with the appellant in the trial Court but she was acquitted on the ground that there was no evidence to show that she had anything to do with the abortion complained of.

Despite the contentions of the appellant to the contrary, we think there is satisfactory evidence to show that the death of Miss Dass was due to septicaemia resulting from the introduction of "laminaria dento" into her private parts. On this point we have the unimpeachable evidence of Dr. A. J. Abraham, P. W. 4.

There is also satisfactory evidence to show that the appellant was in terms of illicit intimacy with Miss Dass. It is true that the principal witness on this point is Miss Chhayadass, P. W. 6, the sister of the deceased a witness who has given false evidence in several respects. But as regards the illicit relationship between the appellant and Miss Atoshi Dass, her evidence receives material corroboration, from the evidence of P. W. 7 M. B. Sen and P. W. 5, Misri Lal. Further it also accords with the probabilities of the case. It is not necessary to go into that question at length as we have come to the conclusion that the appellant is entitled to an acquittal for the reasons to be stated presently.

While we are of opinion that there was illicit intimacy between the appellant and the deceased we are unable to accept the assertion of Miss Chhayadass that the appellant was her only paramour. Exhibit-D-3, conclusively proves that the deceased had illicit relationship with one Sood at Delhi. In the committal Court Miss Chhayadass admitted that the address on Exh. D-3 is in the handwriting of the deceased. In that Court she was positive about it; but in the trial Court she went back on that admission. In many other respects also she had deviated from the evidence given by her in the committal Court. Hence we are unable to accept her statement in the trial Court that the address found on Exhibit D-3, an inland letter is not in the handwriting of the deceased. Exhibit D-3, appears to be a self-addressed letter sent by the deceased to one Sood. The fact that the deceased had more than one paramour is not a material circumstance though it may indicate that the appellant could not have had any compelling motive to abet the abortion complained of. The fact that the appellant was in terms of illicit intimacy with the deceased, an unmarried girl and that later became pregnant through him is without more, not sufficient to connect the appellant with the crime.

From the evidence of Misrilal and Sengupta, it is clear that the appellant and the deceased had gone together to Jodhpur on 24th April, 1963. But from the evidence of Sengupta, it is also clear that the deceased had some work to attend to at Jodhpur. It is also clear from the evidence of Miss Chhayadass that the deceased and the appel-

lant were going together to Jodhpur and other places off and on. It may be noted that while returning from Jodhpur to his native place, the appellant left the deceased with Mr. and Mrs. Sengupta. Hence the circumstance that the appellant and the deceased went together to Jodhpur on 24th April, 1963, cannot be held to be an incriminating circumstance.

This leaves us with the evidence relating to the actual abetment. On this aspect of the case the only evidence brought to our notice is the evidence of Miss Chhayadass and the latter Exhibit P-4. Miss Chhayadass deposed in the trial Court that when the pregnancy of the deceased became noticeable, the appellant told the deceased in the presence of that witness that he would get the child aborted through Mst. Radha. As mentioned earlier Miss Chhayadass is a highly unreliable witness. She had admitted in the committal Court that she had been tutored by the police to give evidence. In fact she pointed out a police officer who was in the Court as the person who had tutored her. In the trial Court she denied that fact. There is no gainsaying the fact that she was completely under the thumb of the police. She deviated from most of the important admissions made by her during her cross-examination in the committal Court. Coming to the question of the abetment referred to earlier, this is what she stated during her cross-examination in the committing Court :

“ My sister did not tell Madan Raj about her illness (arising from her pregnancy) in my presence. On being enquired by me about my sister at Jalore I was informed that my sister had gone to Mst. Radha Nayan in the hospital for treatment. No talks about it were held before me prior to my talk at Jalore (talks between, Madanraj and my sister about treatment).”

According to the admissions made by her in the committal Court she came to know for the first time about her sister's intention to cause miscarriage only after her death. No reliance can be placed on the evidence of such a witness.

Now coming to Exhibit P-4, this is a letter said to have been written by the deceased sometime before her death intending to send the same to the appellant which in fact was not sent. It was found in her personal belongings after her death. There was some controversy before the Courts below whether the same is admissible under section 32 (1) of the Evidence Act and whether it could be brought within the rule laid down by the Judicial Committee in *Pakala Narayana Swami v. Emperor*¹. We have not thought it necessary to go into that question as in our opinion the contents of the said letter do not in any manner support the prosecution case that the appellant instigated the deceased to cause miscarriage. The letter in question reads thus ;

“ Santi Bhawan 28-4-63.

I went with your letter to the father. Since I could not get money from him, I dropped you a letter. I went to Mst. Radha and asked her to give me medicine. further said that the money would be received. She gave me a tablet and told me that injection would be given on receipt of full payment. This tablet is causing unbearable pain and bleeding but the main trouble will not be removed without the injection. How can I explain but the pain is intolerable. I have left Sen's residence. He and particularly neighbouring doctor would have come to know every thing by my condition, which is too serious. (*Meri is halat se unaki vishesker pas me Daktarji to sub kuch pata chal jati powon tak ulati ho jai*). Firstly I intended to proceed to Jalore but on reaching the Station I could not dare to proceed. I feel that you are experiencing uneasiness and trouble for me. I am causing monetary as well as mental worries to you. I have been feeling this for a considerable longer period. Please do not be annoyed.

It has become very difficult for me to stay alone for the last several days.

Had you accepted me as your better half you would have not left me alone in my such serious condition. You cannot know what sort of trouble I am experiencing. Had you been with me I would not have felt it so much. Please do not be annoyed. Perhaps no one has given you so much trouble.

I will write all these facts to my mother. I will also write about our marriage. Today is Sunday. I cannot book a trunk call to you in the Court. Today I tried on the phone number of Hazarimal but it was engaged, and later on it was cancelled. My Pranam.

Yours Ritu.

Today I have taken injection and have come from Shanti Bhawan."

No portion of that letter indicates that the appellant was in any manner responsible for the steps taken by the deceased for causing miscarriage. No other evidence has been relied upon either by the trial Court or by the High Court in support of the finding that the appellant was guilty of the offence of abetting the deceased to cause miscarriage.

For the reasons mentioned above we are of the opinion that there is no legal basis for the conviction of the appellant.

The learned Counsel for the appellant challenged the conviction of the appellant on yet another ground. As mentioned earlier he was charged and tried for the offence of abetting Mst. Radha to cause abortion of the child in the womb of the deceased but curiously enough he was convicted for abetting the deceased to cause miscarriage. Abetment as defined in section 107 of the Indian Penal Code, can be by instigation, conspiracy or intentional aid. If the abetment was that of Mst. Radha, it could have been only by instigation or conspiracy but if it was an abetment of the deceased, it could either be by instigation or by conspiracy or by intentional aid. Throughout the trial the accused was asked to defend himself against the charge on which he was tried. At no stage he was notified that he would be tried for the offence of having abetted the deceased to cause miscarriage. It is now well settled that the absence of charge or an error or omission in it is not fatal to a trial unless prejudice is caused—See *Willie (William) Slaney v. The State of Madhya Pradesh*¹. Therefore the essential question is whether there is any reasonable likelihood of the accused having been prejudiced in view of the charge framed against him. From what has been stated above one can reasonably come to the conclusion that the accused was likely to have been prejudiced by the charge on the basis of which he was tried. From the cross-examination of the prosecution witnesses, it is seen that the principal attempt made on behalf of the appellant was to show that he had nothing to do with the co-accused, Mst. Radha. He could not have been aware of the fact that he would be required to show that he did not in any manner abet the deceased to cause miscarriage. The facts of this case come within the rule laid down by this Court in *Faguna Kant Nath v. The State of Assam*². The case of *Gallu Sah v. The state of Bihar*³ relied by the High Court is distinguishable. Therein Gallu Sah was a member of an unlawful assembly. He was said to have abetted Budi to set fire to a house. One of the members of the unlawful assembly had set fire to the house in question though it was not proved that Budi had set fire to the house. Under those circumstances this Court held that the offence with which Gallu Sah was charged was made out. As observed by Calcutta High Court in *Umadasi Dasi v. Emperor*⁴ that as a general rule, a charge of abetment fails when the substantive offence is not established against the principal but there may be exceptions. *Gallu's case*³ was one such exception.

For the reasons mentioned above we allow the appeal and acquit the appellant. He is on bail. His bail bonds stand cancelled.

V.M.K.

Appeal allowed.

1. (1956) S.C.J. 182 : (1956) 1 M.L.J. (S.C.) 100 : (1955) 2 S.C.R. 1140.
2. (1959) S.C.J. 643 : (1959) 1 An. W.R. (S.C.) 18 : (1959) 1 M.L.J. (S.C.) 18 : (1959)

M.L.J. (Cri.) 365 : (1959) 2 S.C.R. (Supp.) 1.
3. (1958) S.C.J. 1257 : (1958) M.L.J. (Cri.) 970 : (1959) S.C.R. 861.
4. (1925) I.L.R. 52 Cal. 112.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND K. S. HEGDE, JJ.

Ram Prasad Sharma

... Appellant*

v.

State of Bihar

... Respondent.

Evidence Act (I of 1872), section 35—Scope—Hath chitha—No proof as to who made the entry or whether it was made in the discharge of any official duty—Hath chitha, if admissible in evidence.

The learned Additional Sessions Judge had rejected the version of the prosecution regarding the shooting of Kaleshwar Yadav mainly on the basis of entries in an attested copy of the chaukidar's *hath chitha* according to which the death of Kaleshwar took place in Gopalpur mauza on 12th August, 1960, that is, three days prior to the occurrence.

Is the *hath chitha* admissible in evidence ?

Held that: The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in discharge of his official duty, the probability of its being truly and correctly recorded is high. No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. As the High Court rightly pointed out, the Additional Sessions Judge should have dealt with the question of the admissibility of the document. Therefore, the document was inadmissible in evidence.

Appeal by Special Leave from the Judgment and Order dated the 22nd February, 1966, of the Patna High Court in Criminal Appeal No. 530 of 1962 and Government Appeal No. 44 of 1962.

A. S. R. Chari and M. K. Ramamurthi, Senior Advocates (G. Ramamurthy and Vineet Kumar, Advocates with them, for Appellant.

B. P. Jha, Advocate, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—Fourteen persons were tried by the learned Second Additional Sessions Judge, Bhagalpur, on various charges. Out of these 14 persons Sheo Prasad Sharma and Ram Prasad Sharma were charged under section 302, Indian Penal Code. Sheo Prasad Sharma was charged under section 302 for having intentionally caused the death of Qudrat Mian by shooting him down with his gun whereas Ram Prasad Sharma was charged under this section for having shot down with his gun Kaleshwar Yadav and thus having caused the murder of this person.

The Second Additional Sessions Judge, Bhagalpur convicted Sheo Prasad Sharma under sections 304, 324/34, 201, and 148 and sentenced him to seven years rigorous imprisonment. The appellant, Ram Prasad Sharma was convicted under sections 326/149, 324/34 201 and 148, Indian Penal Code and sentenced to four years rigorous imprisonment. Seven other accused were also convicted but it is not necessary to mention the sections under which they were convicted. Five of the accused persons, were acquitted by the learned Second Additional Sessions Judge.

Two appeals were filed before the High Court, one by the State and the other by the nine convicted persons, including Ram Prasad Sharma. Both the appeals were heard together. The High Court accepted the appeal of the State as far as Ram Prasad Sharma was concerned and convicted him under section 304 Indian Penal Code, in connection with the shooting and causing the death of Kaleshwar

and sentenced him to rigorous imprisonment for seven years. The convictions of seven others were altered from under sections 326/149 to one under sections 304/149 but the sentence of four years rigorous imprisonment was maintained. In other respects the convictions were maintained. The High Court, however, quashed the convictions under section 201, Indian Penal Code.

The nine convicted persons filed petition for special leave to appeal. This Court by its order dated 4th October 1966 rejected the petition except as regard Ram Prasad Sharma and his appeal is now before us.

The prosecution case as accepted by the High Court was, in brief, as follows. On 15th August, 1960, at about 1.30 or 2 p. m. by the side of a *Danr* (water channel) known as Chaksafia *Danr* at village Bindi about five miles away from police station, Banki, a serious occurrence took place. The Chaksafia *Danr* runs between village Bindi which is to its east and Banki which is to its west and then goes further north to village Bhadrar and other villages. Lands of several villages, namely, Bhadrar, Nayadih, Uprama, Basurara, Jitnagar, Majhiara, Banki, etc., are irrigated from the water of this *Danr* and there are detailed entries regarding the respective rights of the different villages in the *Ford Abpashi* which was prepared at the time of the last survey. It appears that the villagers of different villages who enjoy the above rights go in a body every year during the rainy season for clearing this *Danr* in order that there may not be any obstruction in the flow of water therein. On the date of occurrence, i.e., 15th August, 1960, a number of persons of villages Bhadrar, Nayadih, Uprama, Basura, Jitnagar and Bhatkunki went along with spades to clear this *Danr* in the usual course and some of them had lathis also with them. The total number of persons were estimated to vary from about 150 to about 400. When they reached the brick kiln, which exists in Malmala Tikar they were confronted by a mob of 40 to 50 persons including all the convicted persons. Sheo-Prasad Sharma and Ram Prasad Sharma were armed with guns and Patal Thakur was armed with a pharsa and the remaining accused except Dhanushari Mehta were armed with bhalas.

It may be mentioned that in the First Information Report Dhanusdhari Mehta was alleged to have been armed with a pistol but this allegation was subsequently given up. Dhanusdhari Mehta was a retired Inspector of Police; his son Ram Prasad Sharma was practising lawyer at Bhagalpur at the time of the occurrence in question.

On seeing this crowd of villagers, Sheo Prasad Sharma directed them to return and threatened to shoot them if they failed to do so. There was some exchange of hot words and brick-bats were thrown by both sides. Sheo Prasad Sharma thereafter fired one shot towards the sky but the villagers did not disperse. Then Dhanusdhari ordered his two sons Ram Prasad Sharma and Sheo Prasad Sharma to open fire on the villagers. On this both Ram Prasad Sharma and Sheo Prasad Sharma opened fire with their guns on the villagers. One shot fired by Sheo Prasad Sharma hit one Qudrat Mian and he fell down and died on the spot. One other villager was alleged to have been shot by Ram Prasad Sharma and he died on the spot. A number of villagers sustained gun shot injuries and as a result of the firing by Sheo Prasad Sharma and Ram Prasad Sharma, who are estimated to have fired about 12 rounds, the villagers dispersed. Sobhan Mandal, one of the injured person went to the police station with three other injured persons, namely, Chotan Rai, P. W. 5, Jagdeo Choudhary, P. W. 8 and Kishori Prasad Singh, P.W. 12, who had also sustained gun-shot injuries.

The learned Additional Sessions Judge had rejected the prosecution story that Kaleshwar Yadav was shot and killed during the occurrence. He had come to the conclusion that Kaleshwar Yadav had died prior to the date of occurrence. The High Court has accepted the prosecution version and it is this finding which is being seriously challenged by the learned Counsel for Ram Prasad Sharma, appellant.

The learned Additional Sessions Judge had rejected the version of the prosecution regarding the shooting down of Kaleshwar Yadav mainly on the basis of entries,

in an attested copy of the Chaukidar's *hath chitha* (Exhibited D.) according to which the death of Kaleshwar took place in Gopalpur mauza on 12th August, 1960, that is, three days prior to the occurrence. The learned Additional Sessions Judge had also relied on the First Information Report in which the name of Kaleshwar Yadav does not find mention.

Two points arise before us, first, whether the *hath chitha* is admissible in evidence, and secondly, whether on the evidence on record it is otherwise proved that Kaleshwar Yadav was shot down by the appellant Ram Prasad Sharma.

According to the entries in this document, Exhibit D, Kaleshwar Yadav died on 12th August, 1960, in Gopalpur mauza and in the remarks column of this register he is described as "Bahanoi (brother-in-law) of Asarfi Yadav." We looked at the attested copy produced in Court and we were unable to ascertain the date on which the attested copy had been obtained by the defence. The only dates this document bears are the date of attestation (15th October, 1960), by the District Statistical Officer, the date 22nd September, 1960, next to the signature of one Shukdeo Chowdhary, and the date of admission by the Additional Sessions Judge (25th June, 1962). As rightly pointed out by the High Court the learned Sessions Judge took this copy on record in an extraordinary manner. The prosecution evidence closed on 21st June, 1962 and on 25th June, 1962, this attested copy was admitted in evidence without any proof. On the same day an order was passed calling for the original. On the very next day the Public Prosecutor filed a petition objecting to the admission of this document and alleged that the document was bogus. The hearing of the argument thereafter proceeded on 4th July, 1962. The Public Prosecutor again filed a petition that this document be not taken in evidence. The learned Additional Sessions Judge disposed of this petition with the following order :

"Let the petition be placed with the record. The original has once against been called for. The matter will be discussed in the judgment."

It is pointed out by the High Court that there is no further reference to the document in the order sheet. After the arguments concluded on 7th July, 1962, the case was adjourned for judgment. The judgment of the learned Additional Sessions Judge shows that the original was subsequently received by him with letter dated 10th July, 1962, and he observed that he was satisfied about its genuineness. The High Court rightly pointed out that the Additional Sessions Judge should have dealt with the question of the admissibility of the document. The High Court, following *Sanatan Senapati v. Emperor*¹, and *Brij Mohan Singh v. Priya Brat Narain Sinha*², held that the document was inadmissible in evidence.

We agree with the conclusion arrived at by the High Court. Section 35 of the Evidence Act provides :

"An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

In this case it has not been proved that the entry in question was made by a public servant in the discharge of his official duties. As observed by this Court in *Brij Mohan Singh v. Priya Brat Narain Sinha*².

"the reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high."

No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. In the result we must hold that Exhibit D, the *hath chitha*, was rightly held by the High Court to be inadmissible.

1. A.I.R. (1945) Pat. 489.

2. (1964) 1 S.C.J. 644 : (1964) 2 M.L.J. (S.C.)

140 : (1964) 2 A.L.W.R. (S.C.) 140 : (1965) 3 S.C.R. 861, 864.

The High Court then dealt with the other evidence on the record and came to the conclusion that Kaleshwar was actually shot down by the appellant, Ram Prasad Sharma. The learned Counsel for the appellant has tried to assail these findings but he has not been able to show in what way the High Court has gone wrong in coming to the conclusion. The High Court states that ten witnesses have named Kaleshwar being the second person who was shot. Further, Kaleshwar's son and widow, P.Ws. 24 and 34, Chamak Lal Yadav and Karma Devi, deposed that on the day of occurrence Kaleshwar had left his house with a *Kudal* and had gone to Chaksafia *Danr* along with others. They further deposed that on the next day they learnt from Nandai Lal, Singh P. W. 17, that Kaleshwar had been killed. The High Court further accepted the explanation of P. W. 1, who had made the First Information Report that he had named Choltan as being the person shot and killed by Ram Prasad because he had heard a *hul'a* that Choltan had been murdered. It seems to us that the High Court came to a correct conclusion and was right in accepting the explanation of P. W. 1.

The learned counsel further contends that it was doubtful that 12 rounds would have been fired. He points out the number of injuries received by the villagers. But these injuries support the prosecution story. From the injuries on the various persons examined by Dwarka Nath Prasad, P. W. 41, apart from the persons who had died and whose bodies had been held to have been cremated by unidentified persons, it appears that 20 persons had received gun shot injuries. One of them had as many as 14 lacerated wounds and another had 10 lacerated wounds. Apart from that there is no reason to doubt the oral evidence given in this case that a number of rounds were fired.

In the result the appeal fails and is dismissed.

Appeal dismissed.

V. M. K.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.

... Appellant*

Agra Electric Supply Co., Ltd.

v.

... Respondents.

Alladin and Others

* *Standing Orders*—Certified and coming into operation—Whether governs employees of the company appointed long before—Prior award between the parties—Technical considerations of res judicata or principles analogous thereto—Applicability.

Probationer—Period of probation fixed—Stipulation, liable to be terminated during the period—If contravention of standing order—Finding of the Labour Court, 'colourable exercise of the power'—Termination without hearing the probationer—Validity.

Industrial Employment (Standing Orders) Act (XX of 1946), sections 3 to 7, 9 and 10 and schedule.

Standing Orders of the Company, Standing Orders 2, 14 and 32.

The provisions of sections 3 to 7, 9 and 10 of the Industrial Employment (Standing Orders) Act (XX of 1946) read with the Schedule thereto abundantly show that once the Standing Orders are certified and come into operation become binding on the employer (a company) and on the employees presently employed as also those employed thereafter in the establishment. This view is also in consonance with the object of the Act to have uniform Standing Orders for matters mentioned in the Schedule to the Act, applicable to all the employees.

Salem Erode Electricity Distribution Co., Ltd. v. Salem Erode Electricity Distribution Co., Ltd., Employees Union, (1966) 2 S.C.J. 480 ; (1966) 2 S.C.R. 498, relied on.

12th August. 1969.

The prior award between the appellant and the respondents on the question of application of standing order 32, to the contrary, was based on a misconception and misreading of a decision which was explained and clarified in the decision aforementioned and relied on, and it was clearly in error. The instant reference and the award passed by the Labour Court were made in circumstances different from what prevailed on the previous occasion, a factor making it doubtful the application of a principle such as *res judicata*. The consequence of holding that the appellant is barred by principle analogous to *res judicata* would be two sets of conditions of service, a consequence incompatible with the object of the Act. The order for retirement on superannuation was proper.

It is a well-settled principle of industrial adjudication that even if the impugned order is worded in the language of a simple termination of service industrial tribunals can look into the facts and circumstances of the case to ascertain if it was a colourable exercise of the power vested in the management to terminate the services of an employee. Under the provisions of Standing Order 2 (c) a probationer is an 'employee' and the period of probation 6 months which may be extended to 12 months. This would ordinarily mean that probationer's service cannot be terminated except for misconduct during that period. The provision as to termination in the letter of appointment during the period of probation has to be read subject to the management's power under the said Standing Order 2 (c) or under Standing Order 14. In the instant case grounds (a) to (f) of Standing Order 14 does not apply. The order of termination cannot be said to have been passed in conformity with the power to termination his service under the Standing Orders.

That apart the tribunal had come to the conclusion that the termination of service of the probationer was not a termination simpliciter and it was passed as a punishment and was therefore an order of dismissal; it is impossible to say that this finding of fact was perverse or such as could not have been arrived at on the evidence. Hence the order for reinstatement was proper and cannot be interfered with.

Appeal by Special Leave from Award dated the 24th July, 1968 of the Labour Court, Meerut in Case No. 92 of 1966.

S. V. Gupte Senior Advocate (D.N. Mukherjee and M.L. Car, Advocates, with him), for Appellant.

S. Mohan Kumaramangalam and M. K. Ramamurthi, Senior Advocates (Vineet Kumar, Mrs. Shyamlal Pappu and J. Ramamurthy, Advocates with them), for Respondents.

The Judgment of the Court was delivered by

Shelat, J.—In this appeal, by Special Leave, two questions arise : (1) whether standing orders govern the employees appointed before they are certified under the Industrial Employment (Standing Orders) Act, 20 of 1946, and (2) whether the appellant-company was entitled to terminate the service of a workman appointed as a probationer before the expiry of the period of probation except on the ground of misconduct.

The first question relates to 3 workmen, Alladin, Ram Prasad and Noorul Zaman who were employed in 1929, 1935 and 1937 respectively, long before the company's standing orders were certified and brought into force in 1951 and who were superannuated under Standing Order 32 of the said standing orders. Prior to 1951 there were no rules or conditions of service prescribing the age of superannuation. Standing Order 32 for the first time laid down 55 years as the age of superannuation. Relying on standing order 32 the company served on the three workmen notices dated 19th December, 1964, 20th November, 1963 and 27th January, 1964, who had by then attained the age of 58, 64 and 59 years, by which the company retired them with effect from 1st January, 1965, 20th December, 1963 and 1st March, 1964 respectively. The Labour Court, to which the dispute arising from the compulsory retirement was referred, held that the company's standing orders having been certified long after

these workmen were employed and the conditions of their employment not having provided any age of retirement, the company could not apply Standing Order 32 to them, and therefore, the orders of superannuation were bad, and directed their reinstatement and payment to them of their wages from the date of retirement till the date when they would be reinstated.

Thus, the question involved in this appeal is whether the company could retire by applying Standing Order 32 these three workmen, who admittedly had long passed the age of superannuation provided thereunder. Counsel for the company argued that once the standing orders are certified and come into operation, they would, subject to their modification as provided under the Act, bind all workmen, irrespective of whether they were employed before or after they came into force, and that therefore, the Labour Court was in error in holding to the contrary and ordering their reinstatement. Mr. Kumaramangalam, on the other hand, argued (1) that the company's action amounted to applying Standing Order 32 retrospectively, that that was not warranted for, if the standing orders were intended to be so applied, they would have so expressly provided, and (2) that in a previous reference, being Ref. No. 91 of 1964, between the appellant-company and its workmen, this very Labour Court had decided that these standing orders did not apply to workmen previously employed. That an appeal was sought to be filed in this Court against that order but no Special Leave was granted, and therefore, that order became final. Consequently, the company was not entitled to reargue the same question, as it was precluded from doing so by principles analogous to the principle of *res judicata*.

The question as to whether standing orders were retrospective in their application can obviously arise only if they do not in law bind workmen previously employed. Such a question can hardly arise if the provisions of the Act show, as contended by Counsel for the company, that once they are certified and come into force, they bind both the employer and all the workmen presently employed.

As observed in *Shahdara (Delhi) Saharanpur Light Railway Company Ltd. v. Shahdara-Saharanpur Railway Worker's Union*¹, the Act is a beneficial piece of legislation, its object being to require, as its preamble and its long title lay down, employers in industrial establishments to define with sufficient precision the conditions of employment of workmen employed under them and to make them known to such workmen. Before the passing of the Act, there was nothing in law to prevent an employer having different contracts of employment with workmen employed by him with different and varying conditions of service. Such a state of affairs led to confusion and made possible discriminatory treatment between employees and employers though all of them were appointed in the same premises and for the same or similar work. Such a position is clearly incompatible with the principles of collective bargaining and renders their effectiveness difficult, if not impossible. To do away with such diversity and bargaining with each individual workman, the Legislature provided by section 3 of the Act that every employer of an industrial establishment must, within 6 months from the date of the Act becoming applicable to his industrial establishment submit to the certifying authority under the Act Draft Standing Orders prepared by him for adoption in his industrial establishment providing therein for all matters set out in the Schedule to the Act, and where Model Standing Orders are prescribed to have such Draft Standing Orders in conformity with them. The Draft Standing Orders are to be accompanied by particulars of workmen employed in the establishment as also the name of the union, if any, to which they belong. This requirement clearly means particulars of the workmen in employment at the date of the submission of the Draft Standing Orders for certification and not those only who would be employed in future after certification. Under section 4, such draft orders are certifiable if they provide for all matters set out in the Schedule, are otherwise in conformity with the Act and are adjudicated as fair and reasonable by the certifying officer or the Appellate Authority. Section 5 requires the certifying officer to forward a copy of the draft standing orders to the union or in its absence to workmen in the prescribed manner with a notice requiring objections, if any, from the workmen.

1. (1969) 1 Lab. L.J. 734.

After giving the employer and the union or the workmen's representatives an opportunity of being heard, the certifying officer has to decide whether or not any modification or addition to the draft submitted by the employer is necessary and then certify the Draft Standing Orders and send copies thereof and of his order in that behalf of the employer, the union or the representatives of the workmen. Section 6 confers the right of appeal to any person aggrieved by such order to the Appellate Authority, who, by his order, can either confirm or amend the Standing Orders. Under section 7 such Standing Orders are to come into operation on the expiry of 30 days from the date on which their authenticated copies are sent by the Certifying Officer to the parties where no appeal against these orders is filed or where such appeal is filed on expiry of 7 days from the date on which copies of the Appellate Authority's order are sent as required by section 6 (2). Section 9 requires the employer to post the Standing Orders as finally certified on boards maintained for that purpose at or near the entrance through which the majority of workmen enter the industrial establishment and in all departments thereof. Section 10 confers the right to an employer or any of the workmen to apply for modification after expiry of 6 months from the date on which they or the last modification thereof came into operation. The Schedule to the Act sets out matters which the Standing Orders must provide for. These matters are classification of workmen, shift working, periods and hours of work, holidays, pay days, wage rates, conditions and procedure for applying for grant of leave, closing and reopening of sections of the industrial establishment, temporary stoppage of work, liabilities and rights of the employer and the workmen arising therefrom, termination of employment, disciplinary action, penalties etc.

The obligation imposed on the employer to have standing orders certified, the duty of the Certifying Authority to adjudicate upon their fairness and reasonableness, the notice to be given to the union and in its absence to the representatives of the workmen, the right conferred on them to raise objections, the opportunity given to them of being heard before they are certified, the right of appeal and the right to apply for modifications given to workmen individually, the obligation on the employer to have them published in such a manner that they become easily known to the workmen, all these provisions abundantly show that once the Standing Orders are certified and come into operation, they become binding on the employer and all the workmen presently employed as also those employed thereafter in the establishment conducted by that employer. It cannot possibly be that such Standing Orders would bind only those who are employed after they come into force and not those who were employed previously but are still in employment when they come into force. The right of being heard given to the union or, where there is no union, to the representatives of the workmen, the right of appeal and the right to apply for modification given to workmen individually clearly indicate that they were provided for because the Standing Orders, as they emerge after certification, are intended to be binding on all workmen in the employment of the establishment at the date when they come into force and those employed thereafter. Surely, the union or, in its absence, the representatives of workmen, who are given the right to raise objections either to the Draft Standing Orders proposed by the employer or to the fairness and reasonableness of their provisions, could not have been intended to speak for workmen to be employed thereafter and not those whom they presently represent. Besides, if the Standing Orders were to bind only those who are subsequently employed, the result would be that there would be different conditions of employment for different classes of workmen, one set of conditions for those who are previously employed and another for those employed subsequently, and where they are modified, even several sets of conditions of service depending upon whether a workman was employed before the Standing Orders are certified or after, whether he was employed before or after a modification is made to any one of them and would bind only a few who are recruited after and not the bulk of them, who though in employment were recruited previously. Such a result could never have been intended by the Legislature, for, that would render the conditions of service of workmen as indefinite and diversified, as before the enactment of the Act. Why does section 3 (3) of the Act require the employer to give particulars of the workmen employed by him at the date of his submission of the Draft

Standing Orders unless the object of making him furnish the particulars was to have uniformity of conditions of service and to make the Standing Orders binding on all those presently employed. That is why the Act also insists among other things that after they are certified they must be made known to all workmen by posting them at or near the entrance through which they pass and in the language known to the majority of them.

In *Guest Keen Williams Private Ltd. v. P. J. Sterling*¹, a view apparently contrary to the one above stated was said to have been taken since it was held there that it was unfair in that particular case to fix the age of superannuation of previous employees by a subsequent Standing Order, which should apply in that matter to future entrants. In that view the Court fixed 60 years as the age of retirement for such previous employees although the Standing Order had provided 55 years as the age of superannuation. In *Salem Erode Electricity Distribution Company Ltd. v. Salem Erode Electricity Distribution Co. Ltd Employees Union*², this Court, however, took the same view which we have stated above and held that the provisions of the Act clearly indicated that matters specified in the Schedule to the Act should be covered by uniform Standing Orders applicable to all workmen employed in an industrial establishment and not merely to entrants employed after their certification. The question arose out of an application made by the employer for modification of the existing Standing Orders by providing different rules relating to holidays and leave for employees appointed before a certain date and those appointed after that date. Negating such a modification, the Court, after examining the relevant provisions of the Act, stated at pages 504 and 505 as follows :

"One has merely to examine these clauses one by one to be satisfied that there is no scope for having two separate Standing Orders in respect to any one of them. Take the case of classification of workmen. It is inconceivable that there can be two separate Standing Orders in respect of this matter. What we have said about classification is equally true about each one of the other said clauses ; and so, the conclusion appears to be irresistible that the object of the Act is to certify Standing Orders in respect of the matters covered by the Schedule; and having regard to these matters, Standing Orders so certified would be uniform and would apply to all workmen alike who are employed in any industrial establishment."

"On principle, it seems expedient and desirable that matters specified in the Schedule to the Act should be covered by uniform Standing Orders applicable to all workmen employed in an industrial establishment. It is not difficult to imagine how the application of two sets of Standing Orders in respect of the said matters is bound to lead to confusion in the working of the establishment and cause dissatisfaction amongst the employees. If Mr Setalvad is right in contending that the Standing Orders in relation to these matters can be changed from time to time, it may lead to the anomalous result that in course of 10 or 15 years there may come into existence 3 or 4 different sets of Standing Orders applicable to the employees in the same industrial establishment, the application of the Standing Orders depending upon the date of employment of the respective employees. That, we think, is not intended by the provisions of the Act."

At pages 509 to 510 the Court referred to the case of *Guest, Keen, Williams Private Ltd.*¹, relied on by the employer's counsel and explained why the Court had fixed 60 years as the age of superannuation for the employees appointed before the standing orders were certified although the Standing Orders had fixed 55 years as the age of superannuation stating that :

"that course was adopted under the special and unusual circumstances expressly stated in the course of the judgment."

This decision thus confirms the view taken by us that the object of the Act is to have uniform standing orders providing for the matters enumerated in the Schedule to the Act, that it was not intended that there should be different conditions of service for those who are employed before and those employed after the Standing Orders come into force, and finally, that once the Standing Orders come into force, they bind all those presently in the employment of the concerned establishment as well those who are appointed thereafter.

Counsel for the workmen, however, drew our attention to the award in Reference No. 91 of 1964 under section 4 (k) of the U. P. Industrial Disputes Act, 1947-

1. (1960) 1 S.C.R. 348 : (1960) S.C.J. 281 : A.I.R. 1959 S.C. 1279.

2. (1966) 2 S.C.J. 480 : (1966) 2 S.C.R. 498 : A.I.R. 1966 S.C. 808.

That reference, no doubt, was between the appellant-company and its workmen and the question decided there was whether the company was right in compulsorily retiring the six workmen there concerned under these very Standing Orders although they were employed before they were certified and came into force. The Labour Court, relying on *Workmen of Kettlewell Bullen & Co., Ltd v. Kettlewell Bullen & Co. Ltd*¹, which in turn had relied on *Guest, Keen, William's case*², held that Standing Order 32 of these Standing Orders could not be applied to those previously appointed and that, therefore the company's action in retiring those workmen was not justified.

We may mention that the case of *Kettlewell Bullen & Co.*¹, was not one concerned with Standing Orders but with rules made by the company and this Court, relying on the decision in *Guest, Keen, Williams Private Ltd.*² held that where the rules of retirement are framed by the company they would have no application to its prior employees unless such employees have accepted the new rules. It is clear that neither the case of *Kettlewell Bullen & Co.*¹ nor the case of *Guest, Keen, Williams Private Ltd.*² in the light of the explanation given in the case of *Salem Erode Electricity Distribution Co. Ltd.*³ was applicable and the Labour Court was, therefore, clearly in error in basing its award on the decision in the case of *Kettlewell Bullen & Co.*¹.

The argument, however, was that even if that award was erroneous, the company did not appeal against it, consequently it became final and the issue there decided being the same and between the same parties, principles analogous to the principle of *res judicata* would apply and therefore no relief should be granted in the present case to the company. It is true, as stated in *The Newspapers Ltd. v. The State Industrial Tribunal. U. P.*⁴, that an award binds not only the individuals present or represented but all workmen employed in the establishment and even future entrants. But that principle is founded on the essential condition for the raising of an industrial dispute itself. If an industrial dispute can be raised only by a group of workmen acting on their own or through their union, the conclusion must be that all those who sponsored the dispute are concerned in it and therefore bound by the decision on such dispute. See *M/s. New India Motors (P.) Ltd. v. K. T. Morris*⁵. Such a consideration, however, is not the same as the principle of *res judicata* or principles analogous to *res judicata*. In *Workmen v. Bahmer Lawrie & Co.*⁶, no doubt, a case of revision of wage scales, this Court cautioned against applying technical considerations of *res judicata* thereby hampering the discretion of industrial adjudication. (See also *Shahdra (Delhi) Saharanpur Light Railway Co. Ltd. v. Shahdara Saharanpur Railway Workers Union*⁷. How inexpedient it is to apply such a principle is evident from the fact that the award in Reference No. 91 of 1964 was based on the decision in *Kettlewell Bullen & Co., Ltd.*¹ which in turn had followed the case of *Guest, Keen, Williams Private Ltd.*² on the supposition (which, as aforesaid, was not correct) that Standing Orders are not binding on those who are employed prior to their certification and their coming into force. The company, presumably, did not challenge the correctness of that award because it was perhaps then thought that that was the law laid down in *Guest, Keen, Williams Private Ltd.*². The consequence of holding that the company is barred by principles analogous to *res judicata* would be that there would be two sets of conditions of service, one for those previously employed and the other for those employed after the Standing Orders were certified, a consequence wholly incompatible with the object and policy of the Act. The very basis of the award in Reference No. 91 of 1964, namely, the wrong understanding of the decision in *Guest, Keen, Williams Private Ltd.*² having gone, it becomes all the more difficult and undesirable to perpetuate the distinction made therein between those who were previously appointed and those appointed subsequently and to refuse on such an untenable distinction relief to the company. The award in Reference No.

1. (1964) 2 Lab L.J. 146

2. (1950) 1 S.C.R. 348 : (1960) S.C.J. 281 : A.I.R. 1959 S.C. 1279.

3. (1966) S.C.J. 480 : (1966) 2 S.C.R. 498 : A.I.R. 1966 S.C. 808

4. (1957) S.C.J. 566 : (1957) M.L.J. (Cal) 540 : (1957) S.C.R. 754 : at 761 : A.I.R. 1957

S.C. 532

5. (1961) 1 S.C.J. 107 : (1960) 3 S.C.R. 350-a : 357 : A.I.R. 1960 S.C. 875.

6. (1965) 1 S.C.J. 190 : (1964) 5 S.C.R. 344 : A.I.R. 1964 S.C. 728.

7. (1969) 1 Lab. L.J. 734.

91 of 1964 was made on 24th May, 1965, when it was believed that the decision in *Guest, Keen, Williams Co. Ltd.*¹ laid down the principle that standing orders would not bind workmen previously employed. That that was not so was clarified in the case of *Salem Erode Electricity Distribution Co. Ltd.*² the decision in which was pronounced on 3rd November, 1965, removing thereby any possible misapprehension. The present reference was made on 23rd June, 1966, long after the decision in *Salem Erode Electricity Distribution Co. Ltd.*² and the Labour Court gave the award impugned in this appeal on 24th July, 1968. Thus, both the Reference and the award were made in circumstances different from those which prevailed when Reference 91 of 1964 was made and disposed of, a factor making it doubtful the application of a principle such as *res judicata*.

The second question relates to the workman, Shameem Khan. The company appointed him under a letter of appointment dated 2nd December, 1965, to the post of a clearer as a probationer for 6 months with discretion to the resident engineer to extend that period. The letter also stated that during his probationary period his service would be liable to termination without any notice and without assigning any reason therefor and that he would not be deemed to have been confirmed, automatically in the post on the expiry of the probation period unless so advised in writing. The workmen worked as such probationer till 28th February, 1966, when he was served with a memorandum that his service was terminated as from the close of that day.

The workman's case was that the company had no right to terminate his service before the expiry of the 6 months period of probation which is the period prescribed by standing order 2 (c), that the stipulation in the letter of appointment that his service was liable to termination during the probation period was contrary, to that standing order, and that therefore, that stipulation was not valid, and lastly, that the said order, though apparently one of termination simpliciter, was not a *bona fide* order, was in truth punitive in nature, and therefore, could not be passed without an opportunity of being heard having been given to him in a properly held enquiry. The fact is that no such enquiry was held and no opportunity was given to the workman to explain any misconduct for which he could be removed or dismissed.

The evidence before the Labour Court was that the concerned workman had unauthorisedly used the motor-cycle belonging to one Sidhana, a shift engineer in the company and that that motor-cycle met with an accident while the workman was using it causing damage to it. Three days after that accident a report alleging that his work as a probationer was unsatisfactory was made by his superior officer. On this evidence the Tribunal came to the conclusion that the impugned order was not an order of termination simpliciter, that though couched in that language it was passed as a punishment for the workman having used that vehicle without the consent of its owner and was, therefore, an order of dismissal. The Tribunal was also of the opinion that the said report alleging unsatisfactory work by the workman was colourable and made at the instance of the shift engineer or at any rate was inspired by the said incident. In this view the Labour Court held that the exercise of power to terminate the service of the workman was not *bona fide* and consequently it set aside that order and directed his reinstatement.

Now, it is a well-settled principle of industrial adjudication that even if an impugned order is worded in the language of a simple termination of service, industrial tribunals can look into the facts and circumstances of the case to ascertain if it was passed in colourable exercise of the power of the management to terminate the service of an employee and find out whether it was in fact passed with a view to punish him. The letter of appointment clearly states that the workmen, Shameem Khan, was appointed, as a probationer for a period of 6 months with power to the resident engineer to extend the period of probation. Ordinarily, that would mean that at the end of the probation period the company would have to decide whether to confirm him to a permanent post or, if that is not possible, to terminate his service. Standing

1. (1960) 1 S.C.R. 348 : (1960) S.C.J. 281 : A.I.R. 1959 S.C. 1279.

2. (1966) 2 S.C.J. 480 : (1966) 2 S.C.R. 498 : A.I.R. 1966 S.C. 808.

order 2 (c) provides that a probationer is an employee who is provisionally employed to fill a permanent vacancy in a post and who has not completed the period of probation thereunder. It also lays down that the normal period of probation shall be six months but the resident engineer has the discretion to extend that period, the maximum period of probation being 12 months in all. Ordinarily, this would mean that a probationer's service cannot be terminated except for some misconduct until the expiry of the probation period. The letter of appointment, no doubt, contained a provision that the service of the workman was liable to termination even during the probationary period. That provision, however, must be read to mean that the appointment was subject to the management's power of termination as provided in the standing orders. Standing order 14 provides for such a power and lays down that the service of "any employee" (which expression includes a probationer as is clear from the classification of employees in standing order 2 can be terminated on grounds (a) to (j) therein set out. It is quite clear that the termination of service of the concerned workman cannot be attributed to any one of these grounds. Therefore, that order cannot be said to have been passed in conformity with the power to terminate his service under the standing orders.

But apart from this consideration, the Labour Court came to a finding on the evidence before it that the real reason for passing the impugned order was not the alleged unsatisfactory work on the part of the workman but his having unauthorisedly used the motor-cycle and causing damage to it, that the order was punitive and not a simple termination of service and was therefore in colourable exercise of the power of termination. This finding is clearly one of fact and meant that the Labour Court rejected the evidence led by the management that the work of the concerned workman was found unsatisfactory. It is impossible to say from the evidence before the Labour Court that that finding was perverse or such as could not be reasonably arrived at. In that view, it is impossible to interfere with the order of the Labour Court relating to workman, Shameen Khan.

In the result, the appeal is partly allowed. The order of the Labour Court in connection with the 3 workmen whom the company retired, is set aside but its order relating to workman, Shameem Khan, is confirmed. In accordance with the order passed by this Court on 24th January, 1969, while granting stay to the appellant-company, the company will pay to the workman, Shameem Khan, interest at 6 per cent per annum on the amount of the arrears of wages will due to him under the order of the Labour Court. As the appeal is partly allowed and partly dismissed, there will be no order as to costs.

K.G.S.

Appeal allowed in part.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.

Commissioner of Income-tax, West Bengal II, Calcutta

... *Appellant**

v.

Nalin Behari Lal Singha, Etc.

... *Respondents.*

Income-tax Act (XI of 1922), section 2 (6-A)—Dividend—Amount distributed by company out of capital gains arising on or after 1st April, 1948—Whether liable to tax.

In a proceeding for assessment to income-tax for the year, 1949-50 the respondents claimed that the dividend distributed by the Ukhra Estate Zamindaries Ltd. was exempt from tax because the fund out of which the dividend was distributed did not form part of the "accumulated profits" of the company. The Income-tax Officer rejected the contention and brought the dividend to tax in the hands of the respondents. The Appellate Assistant Commissioner held that

Rs. 1,12,500 out of a total amount of Rs. 2,24,000 distributed by the company represented capital gains arising to the company on or after 1st April, 1948, and not being dividend within the meaning of section 2 (6-A) of the Indian Income-tax Act, 1922, the share distributed to the shareholders out of that amount was exempt from income-tax. The order of the Appellate Assistant Commissioner was reversed in appeal by the Tribunal. The High Court answered the reference in favour of the respondents. On appeal to Supreme Court,

Held, that the proportionate share of the capital gains out of which the dividend was distributed to the shareholders of the company must be deemed exempt from liability to pay tax under section 12 as dividend income liable to tax.

The proviso to the *Explanation* of section 2 (6-A) clearly enacted that capital gains arising after 31st March, 1948, are not liable to be included within the expression "dividend". The definition is, it is true, an inclusive definition and a receipt by a shareholder which does not fall within the definition may possibly be regarded as dividend within the meaning of the Act unless the context negatives that view. But it is difficult on that account to hold that capital gains excluded from the definition of dividend by express enactment still fall within the charge of tax. According to the definition in section 2 (6-A) only the proportionate share of the member out of the accumulated profits (excluding capital gains arising in the excepted period) distributed by the company alone will be deemed the taxable component.

Appeals from the Judgment and Order dated the 2nd December, 1964, of the Calcutta High Court in Income-tax References Nos. 131 of 1961, etc.*

Jagdish Swarup, Solicitor-General of India (*T. A. Ramachandran, R. N. Sachthey and B. D. Sharma*, Advocates, with him), for Appellant (In all the Appeals).

P. Barman, Senior Advocate (*Rannajit Ghose and Sukumar Ghose*, Advocates, with him), for Respondents. (In all the Appeals).

The Judgment of the Court was delivered by

Shah, Ag. C.J.—In a proceeding for assessment to income-tax for the year 1949-50 the respondents in these appeals claimed that the dividend distributed by the Ukhra Estate Zamindaries Ltd. was exempt from tax, because the fund out of which the dividend was distributed did not form part of the "accumulated profits" of the company. The Income-tax Officer rejected the contention and brought the dividend to tax in the hands of the respondents. The Appellate Assistant Commissioner held that Rs. 1,12,500 out of a total amount of Rs. 2,24,000 distributed by the company, represented capital gains arising to the company on or after 1st April, 1948 and not being dividend within the meaning of section 2 (6-A) of the Income-tax Act, 1922, the share distributed to the shareholders out of that amount was exempt from income-tax. The order of the Appellate Assistant Commissioner was reversed in appeal by the Tribunal. In the view of the Tribunal the definition of "dividend" in section 2 (6-A) in force in the year of assessment was not exhaustive, and if the amount distributed was "dividend in ordinary parlance it became chargeable under the general charging section", and that clause 2 (6-A) "was concerned with deemed dividends, and exclusion of certain capital gains by the proviso had no bearing on the issue raised by the revenue."

The following question referred by the Tribunal to the High Court of Calcutta under section 66 (1) of the Indian Income-tax Act :

"Whether on the facts and in the circumstances of the case the amount of Rs. 28,125 was rightly included as dividend in the total income of the assessee for the assessment year 1949-50?"

was answered in the negative. The Commissioner has appealed to this Court with certificates granted by the High Court.

"Dividend" in its ordinary connotation means the sum paid to or received by a shareholder proportionate to his shareholding in a company out of the total sum

distributed. The relevant part of the definition contained in section 2 (6-A) of the Income-tax Act, 1922, in the year of assessment 1949-50 was as follows :—

“Dividend” includes—

(a) any distribution by a company of accumulated profits whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company ;

* * * *

Explanation.—The words ‘accumulated profits’ wherever they occur in the clause, shall not include : capital profit

Provided further that the expression ‘accumulated profits’ wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946 or after the 31st day of March, 1948.”

Dividend distributed by a company being a share of its profits declared as distributable among the shareholders, is not impressed with the character of the profits from which it reaches the hands of the shareholders. It would be therefore difficult to hold that the mere fact that a distribution has been made out of the capital gains, it has the attributes of capital gains in the hands of the shareholders. But that does not assist the case of the Revenue, for the Legislature has expressly excluded from the content of dividend, capital gains arising after 31st March, 1948.

The proviso to the Explanation clearly enacted that capital gains arising after 31st March, 1948 are not liable to be included within the expression “dividend”. The definition is, it is true, an inclusive definition and a receipt by a shareholder which does not fall within the definition may possibly be regarded as dividend within the meaning of the Act unless the context negatives that view. But it is difficult on that account to hold that capital gains excluded from the definition of dividend by express enactment still fall within the charge of tax. According to the definition in section 2 (6-A) of the Income-tax Act only the proportionate share of the member out of the accumulated profits (excluding capital gains arising in the excepted period) distributed by the company, alone will be deemed the taxable component.

There is no warrant for the view expressed by the Tribunal that the definition of “dividend” only includes deemed dividend. To hold that the capital gains within the excepted period are not part of the accumulated profits for the purpose of the definition under section 2 (6-A) and a distributive share thereof does not on that account fall within the definition of “dividend” and therefore of income chargeable to tax and still to regard them as a part of accumulated profits for the purpose of dividend in the popular connotation and to bring the share to tax in the hands of the shareholders is to nullify an express provision of the statute. We do not see any reason why such a strained construction should be adopted.

We agree with the High Court that the proportionate share of the capital gains out of which the dividend was distributed to the shareholders of the company must be deemed exempt from liability to pay tax under section 12 as dividend income liable to tax.

Counsel for the Revenue sought to argue that share of dividend which is not chargeable to tax by virtue of the exemption clause is still liable to tax as income other than dividend. But no such contention was raised before the Tribunal or the High Court and no question was raised in that behalf. We will not be justified in entering upon the question which was not raised or argued before the Tribunal and before the High Court.

The appeals fail and are dismissed with costs. One hearing fee.

T.K.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.
V. Jaganmohan Rao and others ... *Appellants**

v.

Commissioner of Income-tax and Excess Profits Tax, Hyderabad ... *Respondent*.

Income-tax Act (XI of 1922), section 34 (1) (b) and 10—Back assessment—Information—Judicial decisions—Part of assessable income—Failure to tax—Escapement—Purchase by assessee of properties from Hindu father—Character of property—Self-acquired in joint family property—Litigation between father and sons—Pendency of appeal at the time of purchase by assessee—Decision by Privy Council—Information—Payment by assessee to sons to get their interest released—Capital expenditure.

The assessee purchased a mill from a Hindu father on the basis that it was his self-acquired property. On the date of the purchase, the question whether the property was the self-acquired property of the father or the joint family property was the subject-matter of an appeal pending in the High Court. The High Court in the appeal held that the mill was the joint family property. The father appealed to the Privy Council. Pending that appeal, the assessee was submitting returns for the relevant assessment years. Before the assessments were taken up, the assessee entered into a compromise with the sons of the vendor and got a release of their interest in the property on payment of Rs. 1,15,000. The assessee as the Receiver appointed by the High Court was depositing the income from the property in the High Court. The Privy Council decided the appeal in favour of the father. On the basis of the decision of the Privy Council, the Income-tax Officer, commenced back assessment proceedings in respect of the lease income of the mills. The Tribunal upholding the orders of the Department held that the decision of the Privy Council constituted information for the back assessment and that the sum paid by the assessee for obtaining the sons' interest in the property released was a capital expenditure and hence not allowable.

The High Court in reference held that on the basis of the compromise between the assessee and the sons part of the amount was taken to be for acquisition of the capital asset and part towards the discharge of the claim towards the profits and hence the amount should be apportioned. The Revenue as well as the assessee appealed :

Held that the back assessment proceedings are validly taken as the decision of the Privy Council constituted the information. The payment of Rs. 1,15,000 is a capital expenditure made by the assessee to perfect his title to a capital asset and the assessee is not entitled to set-off any portion of the amount as attributable to the lease money.

Once an assessment is reopened by issuing a notice under the Act the previous under assessment is set aside and the whole assessment proceedings start afresh.

The word "information" in section 34 (1) (b) included information as to the true and correct state of the law and so would cover information as to relevant judicial decisions. Escapement under section 34 (1) (b) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. But even in a case where a return had been submitted an Income-tax Officer had erroneously failed to tax a part of the assessable income it was a case where that part of the income had escaped assessment.

Held on facts: the assessee deliberately suppressed the fact that there was a compromise between himself and sons under which he was entitled to the whole of the

income from the mill. The decision of the Privy Council would constitute information for the purposes of back assessment proceedings.

The contention that the Officer could have legitimately assessed a third share of the income which was due to the assessee according to the judgment of the High Court and there was escapement only to the extent of two-third share income is not of much avail to the assessee because once proceedings under section 34 are taken to be validly initiated with regard to the two-third share of the income, the jurisdiction of the Officer cannot be confined only to that portion of the income.

Also held: it is well established that where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be capital payment and not revenue payment. If the asset which is acquired is in its character a capital asset, then any sum paid to acquire it must surely be capital outlay. Money paid in consideration of the acquisition of a source of property or income is capital expenditure.

Held on facts: it cannot be said that the amount was paid partly for the acquisition of the capital asset and partly to discharge the claim towards profits. The fact that the High Court took into consideration the income from the mill in testing whether the offer made by the assessee for the release of the claim of the sons was a fair offer would not mean that the sons were given as a result of the compromise a share in the profits of the assessee. It was a lumpsum payment for acquisition of the capital asset and the claim of the sons for the lease money from the property was merely ancillary or incidental to the claim to the capital asset. The High Court was in error in holding that the amount should be apportioned between capital and income. The entire amount should be treated as capital payment and the assessee is not entitled to exclude from the income sought to be assessed in his hands any portion of that amount.

Appeals from the Judgment and Order dated the 7th December, 1962, of the Andhra Pradesh High Court in Case Referred No. 24 of 1956.

D. Narasaraju, Senior Advocate (*P. Ramarao*, *K. R. Chaudhuri* and *K. Rajendra Chaudhuri*, Advocates, with him), for Appellants (In C. As. Nos. 893 to 898 of 1966) and the Respondents (in C. As. Nos. 1381 to 1386 of 1966).

Jagdish Swarup, Solicitor-General of India (*S. K. Aiyar* and *R. N. Sachthey* Advocates, with him), for Respondent (In C. As. Nos. 893 to 898 of 1966) and the Appellants (in C. As. Nos. 1381 to 1386 of 1966).

The Judgment of the Court was delivered by

Ramaswami, J.—The assessee who is the kartha of a Hindu undivided family was assessed in that status for the relevant assessment years, 1944-45, 1945-46, 1946-47 not only to income-tax but also to excess profits tax. On 1st February, 1941, he purchased from Randhi Appalaswamy (hereinafter referred to as the vendor) a spinning mill known as Sri Satynarayana Spinning Mills, Rajahmundry, for a sum of Rs. 54,731. The purchase was made at a period when there was litigation between the sons of the vendor and the vendor in respect of the spinning mill and other properties. The sons had filed a suit against the father, the vendor, claiming the schedule properties including the mill as joint family properties and for partition of the same. The vendor claimed that the properties were his self-acquired properties. The District Judge, Rajahmundry, held that the properties were the self-acquired properties of the vendor and dismissed the suit of the plaintiff. Against the judgment of the District Judge an appeal was filed in the Madras High Court, being A.S. No. 175 of 1938. While the appeal was pending, on 1st February, 1941 the assessee purchased the mill from the vendor who purported to sell the same as the sole owner. In A.S. No. 175 of 1938 the Madras High Court held that the properties of the vendor were not his self-acquired properties but were joint family properties in which the plaintiffs had a two-thirds share. Against this judgment the vendor preferred an appeal to the Privy Council. While that appeal was pending the assessee had submitted returns for the relevant assessment years. However, before the assessments were taken up the assessee entered into a compromise with the plaintiffs on 7th September, 1945, by

virtue of which he got a release of the interest of the vendor's sons on payment of Rs. 1,15,000. While the appeal was pending before the Privy Council the plaintiffs had applied to the High Court for recovery of their share of the profits. The High Court appointed the assessee as the Receiver directing him to deposit the profits in the High Court. The assessee deposited a sum of Rs. 1,09,613 for the year 1944-45, Rs. 31,087 for the year 1945-46 and Rs. 4,775 for the year 1946-47. Under the compromise the assessee was entitled to withdraw these amounts on payment of Rs. 1,15,000. The Privy Council decided the appeal on 2nd July, 1947, reversing the order of the High Court and restoring that of the District Judge holding that Appalaswamy was the absolute owner of the mill and the sons had no right, title or interest therein. On receipt of the Privy Council's decision which finally determined the rights of the parties and the ownership of the assessee in the mill, the Income-tax Officer issued on 2nd March, 1948 a notice under section 34 of the Income-tax Act in respect of Rs. 1,09,613 received by the assessee as lease income of the mill. It was contended for the assessee (1) that the proceedings initiated under section 34 of the Act for the year 1944-45 assessment were invalid in law as there was no new information leading to the discovery that income had escaped assessment, (2) that in any event the assessee was entitled to set off the sum of Rs. 1,15,000 paid to the sons of Appalaswamy under the compromise approved by the High Court for releasing their rights, if any, in the mill against the assessee's income from the mill. The Income-tax Officer rejected these contentions and treated the whole amount of Rs. 1,15,000 as paid toward capital expenditure in acquiring an asset. The Appellate Assistant Commissioner rejected the appeal of the assessee. The Tribunal affirmed the order of the Appellate Assistant Commissioner. It held in the first place that the assessee had not disclosed the impugned source of income from the mill in his original assessment, that the matter as to the assessee's ownership of the mill was *sub-judice* and that the decision of the Privy Council constituted information not only of law but also as to the factum of the ownership of the mill and the income therefrom. The Tribunal expressed the view that the sum of Rs. 1,15,000 could not be allowed to be set off against the assessee's income from the mill as it was an *ex gratia* payment to the sons of Appalaswamy who had no right, title or interest in the mill and it was paid in order to perfect a supposed defective title and as such was of capital nature. Thereafter the Income-tax Appellate Tribunal stated a case to the High Court under section 66 (2) of the Indian Income-tax Act, 1922 on the following questions of law:

“ R.A. No. 779 which relates to the assessment year 1944-45 :

(1) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1944-45, the assessment made on the assessee in the status of a Hindu undivided family in respect of income received by him as Receiver could be justified notwithstanding the provisions of section 41 of the Act?

(2) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 1,09,613 in the hands of the assessee is valid in the face of the compromise memo. dated 7th September, 1945 approved by the Court ?

(3) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs. 1,15,000 being the amount paid to the minors for releasing their rights in the property from out of the amount received from the mill ?

R.A. No. 780 which relates to assessment year 1945-46 :

(1) Whether, on the facts and in the circumstances of the case, the assessment made under section 34 of the Act is valid in law ?

(2) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1945-46, the assessment on the assessee in the status of a Hindu undivided family in respect of the income received by him as Receiver could be justified notwithstanding the provisions of section 41 of the Act ?

(3) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 31,037 in the hands of the assessee is valid in the face of the compromise memo dated 7th September, 1945 approved by the Court ?

(4) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs. 1,15,000 being the amount paid to the minors for releasing their rights in the property from out of the amount received from the mill ?

R.A. No. 781 which relates to assessment year 1946-47 :

(1) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1946-47 the assessment on the assessee in the status of a Hindu undivided family in respect of income received by him as Receiver could be justified, notwithstanding the provisions of section 41 of the Act?

(2) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 4,775 in the hands of the assessee is valid in the face of the compromise memo. dated 7th September, 1945 approved by the Court?

(3) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs. 1,15,000 being the amount paid to the minors for releasing their right in the property from out of the amount received from the mill?"

The Appellate Tribunal pointed out in the statement of the case that question No. 1 in R.A. No. 780 for the assessment year 1945-46 pertained to the earlier assessment year 1944-45 in R.A. No. 779 and also that question No. 2 in R.A. No. 780 and R.A. No. 779 for the assessment year 1945-46 and the corresponding excess profits tax assessment did not arise in that year but pertained to the earlier assessment year 1944-45 in R.A. No. 779 and the corresponding excess profits tax assessment in R.A. No. 782.

The High Court answered question Nos. 1 and 2 in R.A. No. 779 and question No. 1 in R.A. No. 780 in the affirmative. The High Court held that re-assessment proceedings have been validly initiated under section 34 of the Act. The High Court found that the assessment on the assessee in the status of Hindu undivided family in respect of income received by him as Receiver was proper. The High Court thought that the basis of the compromise in the Madras High Court entered into between the assessee and the minor sons of the vendor Appalaswamy wherein the assessee paid Rs. 1,15,000 to the minor sons cannot be ignored. The High Court negated the contention of the Income-tax Department that the sum of Rs. 1,15,000 was paid to cure a supposed defect in the title and that it was a capital payment. Upon the interpretation of the terms of the compromise the High Court took the view that the amount of Rs. 1,15,000 was paid partly towards acquisition of capital asset and partly towards the discharge of the claim towards profits and hence it should be apportioned towards capital and income in the proportion of 90/85. C.As. Nos. 1331 to 1386 of 1966 are brought by certificate from the judgment of the High Court on behalf of the Commissioner of Income-tax and C.A. Nos. 893 to 898 of 1966 were brought by special leave from the same judgment to this Court on behalf of the assessee.

After the Amending Act of 1939 and before the Amending Act of 1948 section 34 stood as follows :

"(1) If in consequence of definite information which has come into his possession the Income-tax Officer, discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income profits or gains or in the case of a company on the principal officer thereof a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profit or gains, and the provisions of this Act, shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) No order of assessment under section 23 or of assessment or re-assessment under sub-section (1) of this section shall be made after the expiry, in any case to which clause (c) of sub-section (1) of section 23 applies, of eight years, and in any other case, of four years from the end of the year, in which the income, profits or gains were first assessable.

The first question arising in this case is whether the proceeding under section 34 is legally valid. It was contended by Mr. Narasaraaju that the decision of the Privy Council could not be said to be definite information within the meaning of the section. It was said that the Income-tax Officer was fully aware of the circumstances of the case and the assessee had placed all the relevant facts before him, namely, that under

the High Court's judgment the vendor was only entitled to one-third share of the income pending the decision of the appeal before the Privy Council. In our opinion there is no justification for this argument. It is not true to say that the assessee brought all the relevant facts before the Income-tax Officer. On the contrary he deliberately suppressed the fact that there was a compromise between himself and the plaintiffs under which he was entitled to the whole of the income from the mill. At any rate the Privy Council's decision which determined the rights of the parties irrespective of the compromise did constitute definite information within the meaning of section 34 of the Income-tax Act. This view is borne out by the decision of this Court in *Maharaja Kumar Kamal Singh v. Commissioner of Income-tax*¹. In that case the Income-tax Officer had, following the decision of the High Court in *Kamakhyia Narain Singh's case*², omitted to bring to assessment for the year 1945-46 the sum of Rs. 93,604 representing interest on arrears of rent due to the assessee in respect of agricultural land on the ground that the amount was agricultural income. Subsequently the Privy Council, on appeal from that decision held that interest on arrears of rent payable in respect of agricultural land was not agricultural income. As a result of this decision the Income-tax Officer initiated re-assessment proceedings under section 34 (1) (b) of the Income-tax Act and brought the amount of Rs. 93,604 to tax. In these circumstances it was held by this Court firstly that the word "information" in section 34 (1)(b) included information as to the true and correct state of the law, and so would cover information as to relevant judicial decisions, secondly, that "escape" in section 34 (1) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. But even in a case where a return had been submitted, if the Income-tax Officer had erroneously failed to tax a part of the assessable income, it was a case where that part of the income had escaped assessment. The decision of the Privy Council, therefore, was held to be information within the meaning of section 34 (1) (b) and the proceedings for re-assessment were validly initiated. In our opinion the principle of this decision governs the present case and it must be held that the proceedings initiated under section 34 for the assessment year 1944-45 were legally valid. It was stated on behalf of the appellant that in any case the Income-tax Officer could have legitimately assessed one-third share of the income which was due to the assessee according to the judgment of the Madras High Court and there was escape only to the extent of two-third share of the income. This argument is not of much avail to the appellant because once proceedings under section 34 are taken to be validly initiated with regard to two-third share of the income, the jurisdiction of the Income-tax Officer cannot be confined only to that portion of the income. Section 34 in terms states that once the Income-tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under section 22 (2) and may proceed to assess or re-assess such income, profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section (2) of section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under section 34 (1) (b) the Income-tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year.

The second question involved in this case is whether the High Court was right in holding that any portion of the amount of Rs. 1,15,000 was liable to be treated as business expenditure. It is well established that where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be capital payment and not revenue payment. What is essential to be seen is whether the amount of Rs. 1,15,000 was paid for bringing into existence a right or asset of an enduring nature. In other words if the asset which is acquired is in its character a capital asset, then any sum paid to acquire it must surely be capital

1. (1959) 35 I.T.R. 1 : (1959) 1 M.L.J. (S.C.) 257.
92 : (1959) 1 A.W.R. (S.C.) 92 : (1959) 1 S.C.R. (Supp.) 10 : (1959) S.C.J. 230 : A.I.R. 1959 S.C.

2. (1946) 14 I.T.R. 673 : A.I.R. 1947 Pat. 115.

outlay. Money paid in consideration or the acquisition of a source of profit of income is capital expenditure both on principle and authority. In *Atherton v. British Insulated and Helsby Cables Ltd.*¹ Viscount Cave said :

"But where an expenditure is made, not only once for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as property attributable not to revenue but to capital."

In *Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd.*², Lord Radcliffe observed at p. 960 :

"Courts have stressed the importance of observing a demarcation between the cost of creating, acquiring or enlarging the permanent (which does not mean perpetual) structure of which the income is to be the produce or fruit and the cost of earning that income itself or performing the income-earning operations. Probably this is as illuminating a line of distinction as the law by itself is likely to achieve"

It is, however, contended on behalf of the assessee that the amount of Rs. 1,15,000 was paid partly for the acquisition of capital asset and partly to discharge the claim towards profits and hence there should be an apportionment of the amount. It is not possible to accept this contention. It appears from the order of the High Court that the value of the mill was fixed at Rs. 1,15,000 after taking into consideration the fact that the mill was built on a leasehold premises. The value of the machinery was fixed at Rs. 1,36,000 and the leasehold interest was fixed at Rs. 14,000. On this basis the share of the minors was taken to be Rs. 90,000. In respect of the profits the claim of the plaintiffs was taken to be Rs. 85,000. The total claim was therefore Rs. 1,75,000 so that the offer of Rs. 1,15,000 for the release of the claim of the plaintiffs in the mill was held to be fair. The High Court, therefore, certified the compromise to be for the benefit of the minor plaintiffs. In the course of its order dated 7th September, 1945 the High Court observed :

"There are, however, numerous risks which the continuance of the litigation would necessarily involve. The Privy Council might hold that the mill was the self-acquired property of the father, in which case the plaintiffs would get nothing and would incur a liability for costs. It might also be held that, though the property was the family property, the father was entitled as the natural guardian to sell the interests of minor sons in discharging of a binding family obligation. There is the further possibility that by the time the litigation ends the property will have deteriorated and its value will have been materially reduced by the termination of the lease of the land."

Taking all these contingencies into consideration we are of opinion that the offer made by the purchaser of Rs. 1,15,000 for the release of the claim, if any, of the two sons in the mill sold to him by their father is a fair offer, the acceptance of which would be beneficial to the minor second plaintiff."

It is true that the High Court took into consideration the income from the mill in testing whether the offer made by the purchaser of Rs. 1,15,000 for the release of the claim of the plaintiffs was a fair offer. But that does not mean that the sons of Appalaswamy were given as a result of the compromise a share in the profits of the assessee. It is clear from the circumstances of this case that the payment of Rs. 1,15,000 was made by the assessee in order to perfect his title to capital asset and the assessee is not entitled to set off any portion of the amount as attributable to the lease money. It was a lump sum payment for acquisition of a capital asset and the claim of the plaintiffs for the lease money from the property was merely ancillary or incidental to the claim to the capital asset. In our opinion the High Court was in error in holding that the amount should be apportioned between capital and income. In the result so far as questions 3 and 4 in R.A. No. 779, questions 1 and 2 in R.A. No. 780 and questions 2 and 3 in R.A. No. 781 are concerned the answer is that the entire amount of Rs. 1,15,000 should be treated as capital payment and the assessee is not entitled to exclude from the income sought to be assessed in his hands any portion of that amount.

We accordingly allow C.A. Nos. 1381 to 1386 of 1966 to the extent indicated above. C.A. Nos. 893 to 898 of 1966 are dismissed. There will be no order as to costs in either of two sets of appeals.

V.S.

Ordered accordingly.

-1. (1926) A.C. 205, 213 : 10 T.C. 155 : 95 L.J. K. B. 336 : 42 T.L.R. 187.

2. (1964) A.C. 948 : (1964) 2 W.L.R. 339 (1964) 1 All E.R. 208.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.

Star Company Ltd.

... Appellant*

v.

Commissioner of Income-tax (Central) Calcutta

... Respondent.

Income-tax Act (XI of 1922), section 10—Business loss—Assessee, dealer in shares—Purchase and sale of shares—Part of a scheme to assist another company to acquire managing agency—Purchase at a higher rate than the market rate—Sale to the same company—Purchase on the overdraft account—If a transaction done in the ordinary course of business—If an allowable loss.

Income-tax Act (XI of 1922), section 66—Reference—Question arising out of the order of Tribunal—Loss—Disallowance by department—Tribunal sustaining disallowance for certain reasons—High Court upholding decision on the basis of reasons rejected by the Tribunal—No necessity on department to apply for and obtain reference—No reference on a question arising from the reasons given by the Tribunal.

Under an agreement dated 21st May, 1952, the managing agents of a jute company agreed to sell to M their entire holdings of the shares of the managed company consisting of preference shares at the rate of Rs. 196 per preference share and also to tender their resignation of agency with effect from 1st July, 1952. At the time of the agreement the market price of the preference share was Rs. 119 to Rs. 122. M company transferred the shares to three companies one of which is the assessee. M was appointed the managing agent of the jute company for a period of 10 years. Out of the total shares of 1,670 purchased by the assessee from M, one lot of 1,620 shares was purchased on 22nd May, 1952 at Rs. 186 per share and the second lot of 50 shares was purchased at Rs. 184 on 27th May, 1952. The assessee had to overdraw their bank account to purchase these. On 23rd December, 1952, the assessee sold back to M 1,575 shares at Rs. 115 per share and claimed the loss as one arising in the ordinary course of its business. The Department rejected the claim on the ground that the shares were purchased as contribution to scheme of acquisition of the managing agency of the jute company by M, that the loss therefore did not arise in the course of assessee's normal business of dealing in shares. The Tribunal however held that the assessee was not a pawn in the scheme of acquisition of the managing agency. But it held that the shares had not been acquired in the course of its share dealing business on the ground of the treatment of the loss given by the assessee in its own profit and loss account and held that the shares were acquired by the assessee as a measure of investment and not as stock-in-trade of the assessee's share dealing business. The High Court, on the proved and admitted facts inferred that the assessee as an associate of M company had entered into the transaction at the bidding of M company and hence the loss was not incurred in the ordinary course of its business. The assessee appealed :

Held, that the loss is not allowable as the shares were not bought and sold in the ordinary course of business of the assessee as a dealer in shares.

The question which was referred was couched in general terms and was not limited to or circumscribed by the reasons which had been given by the Tribunal against the assessee. The question of law on which reference can be made must arise out of the order of the Tribunal. The order which was made was in favour of the Department and against the assessee. It is true that certain reasons which had appealed to the Officer and the Appellate Commissioner were not accepted by the Tribunal. But it had come to the conclusion that the loss was not a loss that arose in the course of the assessee's business in share dealing. The question which was referred framed in the light of the final conclusion and it was not

necessary for the Department to apply for and obtain a reference on a question arising from the reasons given by the Tribunal in support of its conclusion in favour of the Department.

On the admitted and proved facts there can be no doubt that the assessee did not acquire the preference shares in the ordinary course of business. These facts are : the market rate of the preference share was lower on the relevant days. On the very next day to the agreement between *M* and the then managing agent company shares were acquired by the assessee at a higher rate. Most of these shares were sold back to the same company at a lower rate.

The profit and loss account for the assessment year 1954-55 showed that the dealings in other shares were of comparatively much lesser value than the shares in question. The profit and loss which had been made and incurred on account of the other shares were also comparatively of minimal nature to the shares which were purchased by the assessee by obtaining an overdraft from a bank.

Appeal from the Judgment and Order, dated the 7th May, 1965, of the Calcutta High Court in Income-tax Reference No. 205 of 1961.

S. Ray, R. K. Choudhury and Mrs. B. P. Maheshwari, Advocates, for Appellant.
Jagdish Swarup, Solicitor General of India and *S.C. Manchunda* Senior Advocate (*R. N. Sachthey and B. D. Sharma*, Advocates, with them), for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by certificate from a judgment of the Calcutta High Court answering the following question referred to it in the negative and against the assessee :

“Whether on the facts and in the circumstances of the case, the loss of Rs. 1,11,816 suffered by the assessee on the sale of shares of Fort William Jute Company Ltd., was a loss that arose in its share dealing business?”

The assessee is a public limited company. It carries on, *inter alia*, business of dealing in shares and securities. The profits and losses arising from transactions in shares in the ordinary course of the assessee's business have always been treated as profits or losses of the share dealing business. During the assessment year 1954-55, relevant accounting period being the financial year 1953-54 the assessee suffered a loss of Rs. 1,11,816 on the sale of 1,575 preference shares of Fort William Jute Company Ltd. These shares were purchased on 22nd May, 1952 at the rate of Rs. 186 per share from *Mugneeram Bangur and Co.*, and were sold on 23rd December, 1953 at the rate of Rs. 115 per share to the same company.

The background in which these transactions took place may be noticed: *Kettlewell Bullen and Co.*, were the managing agents of *Fort William Jute Co., Ltd.*, On 21st May, 1952, an agreement was entered into between *Kettlewell Bullen and Co.* and *Mugneeram Bangur and Co.*, according to which the entire holding of *Kettlewell Bullen and Co.*, in the managed company (*Fort William Jute Co., Ltd.*), consisting of 6,920 tax-free cumulative preference shares and 600 ordinary shares were to be sold to *Mugneeram Bangur and Co.*, or their nominees at the agreed price of Rs. 185 per preference share and Rs. 400 per ordinary share. Pursuant to this agreement *Kettlewell Bullen and Co.*, issued a circular letter to all shareholders of *Fort William Jute Co., Ltd.*, informing them of the terms of the agreement and pointing out that *Kettlewell Bullen and Co.*, would tender resignation from the office of the managing agents with effect from 1st July, 1952. It was stated in this letter “the purchase price of each ordinary share was Rs. 400 and of each preference share Rs. 185. It was further condition of the agreement that *M/s. Mugneeram Bangur and Co.*, would offer to all shareholders of the company (ordinary and preference) to purchase their shares at the same price on the terms hereinafter referred to.” It was intended that *M/s. Bangur Brothers Ltd.*, would be appointed managing agents.

At the time of the agreement, namely, 21st May, 1952, the market price of the preference shares ranged between Rs. 119 and Rs. 122 per share but the shares were purchased by the assessee on 22nd May, 1952, at the rate of Rs. 186 per share. A

large part of the preference shares of Fort William Jute Co., Ltd., were transferred to three companies by Mugneeram Bangur and Co., who had to take over 8,617 preference shares in terms of the agreement. The companies to which these shares were transferred were (1) Marwar Textile Agency Ltd. (2) Union Co. Ltd. and (3) Star Co., Ltd., the assessee. M/s. Bangur Bros., were appointed as the managing agents of Fort William Jute Company for a period of ten years with effect from 1st July, 1952. The total number of preference shares of Fort William Jute Company Ltd., which were acquired by the assessee from Mugneeram Bangur and Co., was 1,670. One lot of 1,620 shares was purchased on 22nd May, 1952 of Rs. 186 per share and the second lot of 50 shares was purchased at Rs. 154 on 27th May, 1952. For the acquisition of these shares the assessee had to overdraw on its bank account. On 23rd December, 1953, 1,575 shares were sold to Mugneeram Bangur and Co., at Rs.115 per share resulting in a loss of Rs. 1,11,816 which was included in the loss of Rs. 1,30,152 debited to the profit and loss account under the head "loss on sale of investment." The assessee claimed this as a loss arising in the ordinary course of its business.

The Income-tax Officer and the Appellate Assistant Commissioner rejected the assessee's claim on the ground that the shares were purchased as a contribution to the scheme of acquisition of the managing agency of the Fort William Jute Co., Ltd., by Mugneeram Bangur and Co., or its nominee. The loss, therefore, did not arise in the course of the assessee's normal business of dealing in shares. The Appellate Tribunal found that there was no evidence that the assessee had been made a pawn in the scheme of acquisition of the managing agency of Fort William Jute Co., Ltd., by Mugneeram Bangur and Co., or that the shares were acquired by the assessee to relieve the latter of the load of their shares in pursuance of that scheme. The Tribunal was further of the view that even if Mugneeram Bangur and Co., had a controlling interest in the assessee-firm by having a majority of the shares in it no such inference could necessarily be raised that the assessee did not purchase the shares of Fort William Jute Co., Ltd., as a measure of its own activity as a dealer in shares. The Tribunal, however, held that the shares were not acquired in the course of the assessee's share dealing business for the reason that in the profit and loss account for the year ending 31st March, 1954, the assessee had made a distinction between its transactions as a dealer and as an investor in shares. The Tribunal found that while the profit on sale of shares out of its stock-in-trade had been shown and described as such in the profit and loss account, the loss on sale of investment had been shown in the profit and loss account as a loss in investment. From the treatment of the loss given by the assessee in its own profit and loss account the Tribunal came to the conclusion that the shares of Fort William Jute Co., Ltd., were acquired by the assessee as a measure of investment and not as stock-in-trade of the assessee's share dealing business.

The High Court, while dealing with the question which had been referred at the instance of the assessee, was of the opinion that the Tribunal had not properly considered the primary facts which had been found by the Income-tax Officer and the Appellate Assistant Commissioner. It proceeded to refer to some of the proved and admitted facts which were :

(1) The profit and loss account relating to the sale of shares showed that the transactions in Fort William Jute Co., shares stood apart from the other transactions. While the other transactions were of a few thousand rupees only rising to nearly 30,000 in one case the transaction in Fort William Jute Co., shares involved the payment of nearly Rs. 3,00,000.

(2) These shares were acquired in one lot from Mugneeram Bangur and Co., and sold back to the same concern in one lot which was altogether unusual.

(3) The shares in question were purchased by the assessee one day after the agreement was entered into between Kettlewell Bullen and Co., and Mugneeram Bangur and Co.

(4) The preference shares of the face value of Rs. 100 were purchased at Rs. 186 per share on 22nd May, 1952, when on the previous day the quotation in the

market was Rs. 119 per share only. Taking the over-all picture the High Court felt that there could be only one inference that the assessee—an associate of Mugneeram Bangur and Co.—had entered into the transaction relating to preference share at the bidding of the Bangurs *B* for the purpose of helping them. It was observed that the Tribunal was wrong in holding that there was no evidence that these associates had been made pawns in the transaction. The conclusion of the High Court was “on the facts and circumstances of the case it is impossible to hold that the assessee bought shares in the ordinary course of business or would have bought them but to help Mugneeram Bangur and Co., in their scheme of acquisition of the managing agency rights.” It appears that the High Court was not impressed with the view of the Tribunal that on the basis of entries in the profit and loss account it could be held that the share transactions in question related to the capital account, the shares having been acquired as a measure of investment.

The first contention raised on behalf of the assessee, which is the appellant before us, is that the High Court was not entitled to reverse the findings of fact of the Appellate Tribunal since the department had not challenged the same by means of appropriate proceedings for reference of a question challenging those findings. It is pointed that the Tribunal had come to the conclusion that there was no evidence to show that the assessee had been made a pawn in the scheme of acquisition of the managing agency of Fort William Jute Co., by Mugneeram Bangur and Co., or that the preference shares had been acquired by the assessee pursuant to that scheme. It is submitted that the Tribunal had thus reversed the view which had commended itself to the Income-tax Officer and the Appellate Assistant Commissioner and to that extent the Tribunal's decision was in favour of the assessee and could not be reversed or set aside by the High Court in the absence of any reference at the instance of the department. It is noteworthy that the question which was referred is couched in general terms and was not limited to or circumscribed by the reasons which had been given by the Tribunal against the assessee. The question of law on which reference can be made must arise out of the order of the Tribunal. The order which was made in the present case was in favour of the department and against the assessee. It is true that certain reasons which had appealed to the Income-tax Officer and the Appellate Assistant Commissioner were not accepted by the Appellate Tribunal but it had come to the following conclusions which was material for the disposal of the appeal :

“We accordingly uphold the view taken by the authorities below that the loss of Rs. 1,11,816 incurred on the sale of 1,575 preference shares of Fort William Jute Co., Ltd., was not a loss that arose in course of the appellant's business in share dealing though for different reasons.”

The question which was referred was framed in the light of the final conclusion and in our judgment it was not necessary for the department to apply for and obtain a reference on a question arising from the reasons given by the Tribunal in support of its conclusion in favour of the department.

It has next been contended on behalf of the appellant that where a question is one of mixed facts and law the facts as found by the Tribunal must be accepted as correct. The Tribunal had negatived the finding of the Income-tax Officer and the Appellate Assistant Commissioner that the preference shares had been acquired by the assessee as a pawn in the scheme of transfer of the managing agency of Fort William Jute Co. Ltd. It was, therefore, not open to the High Court to come to the same conclusion by not treating the finding of the Appellate Tribunal as final. Our attention has been invited to the observations in *Commissioner of Income-tax, Bombay City-I v. Greaves Cotton and Co. Ltd.*¹, that it is not open to the High Court in a reference under section 66 (1) of the Income-tax Act, 1922 to embark upon a re-appraisal of the evidence and to arrive at findings of fact contrary to those of the Tribunal. The finding of fact will be defective in law if there is no evidence to support it or if the finding is unreasonable or perverse, but it is not open to a party to challenge such a finding unless reference has been made of a specific question concerning that finding. In *Oriental Investment Co. (P.) Ltd. v. Commissioner of Income-tax*², it has been reite-

1. (1968) 68 I.T.R. 200.

(1969) 1 S.C.J. 666 : A.I.R. 1969 S.C. 460.

2. (1969) 72 I.T.R. 408 : (1969) 1 I.T.J. 491 :

rated that in dealing with findings on questions of mixed law and fact, the High Court must accept the findings of the Tribunal on the primary question of fact as final although it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly. It is argued that the High Court has not characterised the aforesaid finding of the Appellate Tribunal as perverse or arbitrary and once that finding is accepted there would be no justification for holding that the assessee had been made a pawn in the matter of the scheme of transfer of the managing agency of Fort William Jute Co., Ltd. by Mugneeram Bangur and Co. or Bangur Brothers Ltd. In any case there were several facts which showed that the assessee was not privy or party to the aforesaid scheme. It did not acquire any interest in the managing agency nor was it a subsidiary or associate of Mugneeram Bangur group of concerns. The assessee was connected with the Bangurs only to the extent that out of its four directors two of the directors were Bangurs.

In our opinion even if the conclusion of the High Court on the point mentioned above is not taken into consideration the question which was referred had to be answered against the assessee. On admitted and proved facts there can be no manner of doubt that the assessee did not acquire the preference shares in the ordinary course of business. These facts may be restated as follows :

(1) The market rate of the preference shares remained constant at the figure of Rs. 119 between 16th April, 1952, and 21st May, 1952.

(2) On 12th May, 1952, the agreement between Mugneeram Bangur and Kettlewell Bullen & Co. was entered into for purchasing the entire holding of the managing agency company in the managed company.

(3) On 22nd May, 1952, 1,620 shares were acquired by the assessee from Mugneeram Bangur and Co. at the rate of Rs. 186 per share. 50 more shares were acquired on 27th May, 1952, at Rs. 184 per share. The shares were obviously acquired at a price which was very much higher than the market price which prevailed only a day before they were purchased by the assessee.

(4) Out of 1,670 shares taken over by the assessee from Mugneeram Bangur and Co., 1,575 were sold back to the same company at the rate of Rs. 115 per share.

(5) The profit and loss account for the assessment year 1954-55 showed that the dealings in other shares were of comparatively much lesser value than the shares in question. The profits and losses which had been made and incurred on account of the other shares were also comparatively of minimal nature.

(6) The shares of Fort William Jute Co. Ltd., were purchased by the assessee by obtaining an overdraft from a bank.

All the above facts and circumstances which have some extraordinary features lead to the irresistible conclusion that whatever the motives which entered into the acquisition of the shares, they were certainly not bought and sold in the ordinary course of business of the assessee as a dealer in shares. The answer to the question must, therefore, be in the negative and against the assessee and it was rightly so returned by the High Court.

The appeal fails and it is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.
 Satyanarayan S. Mody ... *Appellant* *

v.

Controller of Estate Duty, Delhi and Rajasthan, New

Delhi

... *Respondent*.

Estate Duty Act (XXXIV of 1953), section 10—Property deemed to pass on death—Gift of fixed deposit receipts taken in joint names of donor and donee—Renewals after gift in joint names—Donor whether entirely excluded—Liability to estate duty.

On 16th August, 1953, the deceased executed a deed of gift in favour of her minor grandson in respect of three fixed deposit receipts which were taken in the joint names of the deceased and her grandson and the gift was accepted on behalf of the minor by his father and natural guardian. On 17th August, 1953, the deceased sent a copy of the declaration of gift to the bank and intimated that her grandson was the sole owner of the amounts and till he attained the age of majority the fixed deposit receipts should remain in the joint names as they then stood. From time to time, the deceased presented the fixed deposit receipts for renewal when they matured and obtained fresh receipts in the joint names of herself and her grandson. On the death of the deceased, the Assistant Controller of Estate Duty held that possession and enjoyment of the gifted property was not assumed by the donee to the entire exclusion of the donor and on that account the amounts of the fixed deposit receipts and interest thereon formed part of the estate of the deceased and was liable to estate duty. In appeal the Central Board of Revenue confirmed the order. The High Court, on a reference held that the amounts were liable to estate duty. On appeal to the Supreme Court,

Held, that the amounts were liable to be included in the estate of the deceased as property deemed to pass on death under section 10 of the Estate Duty Act, 1953.

Section 10 clearly means that if in respect of any property which is gifted, *bona fide* possession and enjoyment is not immediately assumed by the donee and thenceforward retained by him to the entire exclusion of the donor or of any benefit to him therein the property gifted shall not be excluded from the estate subject to estate duty.

Held on facts : the conduct of the deceased clearly indicates that she had no intention to part with control over the property; the fixed deposit receipts were obtained in joint names, and the deceased had authority to withdraw the amount from the bank, without consulting the guardian of her grandson. The fixed deposit receipts were renewed on several occasions even after the execution of the deed of gift in the joint names of the deceased and her grandson. The deceased alone presented the fixed deposit receipts for renewal. She could under the terms of the receipts receive the moneys to the entire exclusion of her grandson. In the circumstances, it cannot be held that *bona fide* possession and enjoyment of the property gifted was immediately assumed by the grandson and thenceforward retained by him to the entire exclusion of the deceased. The right retained by the deceased to have the receipts made out in her name jointly with her grandson and the power to recover the amount from the bank without the concurrence of her grandson clearly indicate that she was not excluded, but she had retained important benefits in herself in the fixed deposit receipts.

Appeal from the Judgment and Order dated the 11th April, 1966, of the Rajasthan High Court in D. B. Civil Reference (Estate Duty Act) 16 of 1963.*

* (C. A. No. 438 of 1967).

*(1966) 2 I.T.J. 307: (1967) 65 I.T.R. 84.

31st July, 1969.

M. C. Chagla, Senior Advocate (*D. B. Sharma* and *M. D. Bhargava*, Advocates, with him), for Appellant.

Jagdish Swarup, Solicitor-General of India (*T. A. Ramachandran*, *R. N. Sachthey* and *B. D. Sharma*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, Acting C.J.—Purnabai widow of Sagarmal Mody held on 1st April, 1953, three deposit receipts of the aggregate face value of Rs. 6,26,724-14-0 with the State Bank of Bikaner. By her letter dated 22nd July, 1953, Purnabai informed the bank that she intended to make a gift of the amounts of two out of the three receipts to Suryakant, son of her adopted son Satyanarayana, and requested that the receipts be renewed for three months in the joint names of

“Purnabai Sagarmal Mody and/or Surya Kant S. Mody—payable to either or survivor.”

and that the renewed fixed deposit receipts be sent to Satyanarayana at Bombay. Pursuant to this letter two fresh receipts were issued on 3rd August, 1953 for Rs. 5,00,000 and Rs. 45,793-4-0. It appears that a receipt for Rs. 80,931-10-0 was previously obtained in the joint names of Purnabai and Suryakant on 4th July, 1953.

On 16th August, 1953. Purnabai executed a deed of gift in favour of Suryakant in respect of the three receipts containing the following recitals :

“Out of natural love and affection I have towards the said Suryakant son of Satyanarayana I hand over to the said Satyanarayana as the father and natural guardian of the said Suryakant Fixed Deposit Receipts total for Rs. 6,26,724-14-0 * * * F. D. R. No. 222/8293. dated 3rd August, 1953 for Rs. 45,793-4-0 F.D. R. No. 221/8292, dated 3rd August, 1953 for Rs. 5,00,000 of the Bank of Bikaner Ltd., Jaipur and F. D. R. No. 11446, dated 4th July, 1953 for Rs. 80,931-10-0 of Bank of Bikaner Ltd., Jhunjhunu in the name of Purnabai Sagarmal and Suryakant Satyanarayana Mody payable to either or survivor as and by way of gift to the said Suryakant on the 15th of August, 1953 and that the said Satyanarayana for and on behalf of and as the natural guardian of the said Suryakant accepted the said gift of Rs. 6,26,724-14-0 * * * * gifted by me as aforesaid.”

The gift deed contained a confirmation by Satyanarayana that he had accepted the gift for and on behalf of and as natural guardian of Suryakant, “to the intent and effect that the said Suryakant shall be the absolute owner of the sum gifted.”

On 17th August, 1953, Purnabai addressed a letter to the manager of the bank enclosing a copy of the declaration of gift and intimated that her grandson Suryakant was the sole owner of the amount of the two fixed deposit receipts and till Suryakant S. Mody attained the age of majority the receipts should remain in the joint names as they then stood.

From time to time, Purnabai presented the receipts for renewal when they matured and obtained fresh receipts in the joint names of herself and Suryakant. On 25th August, 1955 the receipt for Rs. 80,931-10-0 was encashed and out of the amount of Rs. 86,732 realized, Rs. 5,000 were invested in the name of Suryakant in National Savings Certificates. The balance was also deposited alone with a firm in Bombay also in the name of Suryakant alone. The other two receipts were renewed in the joint names of Purnabai and Suryakant.

After the death of Purnabai on 15th February, 1956, the two receipts were encashed by Suryakant. The Assistant Controller of Estate duty in proceedings for assessment of estate duty held *inter alia* that possession and enjoyment of the gifted property was not assumed by the donee to the entire exclusion of the donor, and on that account the amount of the two receipts and interest thereon formed part of the estate of Purnabai and was liable to estate duty. Regarding the third receipt for Rs. 80,931-10-0 the Assistant Controller observed that even though the earlier receipt was discharged on 25th August, 1955 i.e. within two years of the death of Purnabai and the amount was invested in the name of Suryakant, by virtue of the Estate Duty Act the amount held in the name of Suryakant alone, was for assessment of estate duty liable to be included in the estate of Purnabai.

In appeal the Central Board of Revenue confirmed the order. The Board held that at all material times during the currency of the fixed deposit Purnabai had the

right to receive the money from the bank by giving discharge for the same and that whenever the fixed deposit receipts matured during the lifetime of Purnabai, the receipts were, in fact, discharged by her alone and in the circumstances it could not be said that the property was held by the donee to the entire exclusion of the donor.

The Board of Revenue referred the following question to the High Court of Rajasthan for opinion :

“ Whether on the facts and in the circumstances of the case the sum of Rs. 6,85,193 was correctly included in the estate of the deceased as property deemed to pass on her death under section 10 of the Estate Duty Act, 1953? ”

The High Court of Rajasthan answered the question in the affirmative, With certificate granted by the High Court this appeal has been preferred.

The deposit receipts were renewed from time to time after 16th August, 1953, in the joint names of Purnabai and Suryakant. Till 25th August, 1955, under their terms the receipts could be encashed by either or the survivor. Even after Purnabai made a gift of the amount represented by the three receipts, she continued to obtain the receipts in the joint names, presumably with the object of not parting with control over those receipts.

Counsel for the appellant however contended that the fixed deposit receipts were held by Purnabai in her name as *benamidar* for Suryakant. Counsel placed strong reliance upon the letters dated 22nd July, 1953, 17th August, 1953 and the terms of the deed of gift dated 16th August, 1953. By the letter dated 22nd July, 1953 the manager of the bank was informed that in respect of two out of the three receipts Purnabai intended to make a gift and the manager was requested that the receipts be made in the joint names of Purnabai and Suryakant. It was expressly recited in the letter :

“ I intend to gift the entire amount of the receipts to my grandson Mr. Suryakant S. Mody hence you are requested to prepare the receipts in joint names as under :

Purnabai Sagarmall Mody and/or Suryakant S. Mody payable to either or survivor.”

The deed of gift also recites that Purnabai had made a gift of the amount of Rs. 6,26,724-14-0 represented by the previous receipts in favour of Suryakant, and that the gift was accepted by Satyanarayana on behalf of Suryakant. The letter 17th August, 1953, recites that a copy of the deed of declaration of gift was sent to the bank for record and information and proceeds to state :

“ Further I would like to state that now Suryakant S. Mody is the sole owner of the above fixed deposit receipts in question till Suryakant S. Mody attains majority the receipts should remain in joint names as it stands now.”

It is clear that Purnabai desired to make a gift of the amount represented by the previous deposit receipts and did in fact execute a deed of gift. The bank had notice of the gift deed. Counsel for the appellant contends that Purnabai did everything possible to divert herself of her interest in the money held by her, in deposit with the bank, and retained no interest therein and that in obtaining renewal of the receipts in the joint names of herself and of Suryakant, she was merely a *benamidar* and in any event was acting on behalf of Suryakant. Counsel further contends that the bank having notice of the gift could not have parted with the money except only for the benefit of the minor and by obtaining renewal of the receipt in favour of the minor Suryakant and Purnabai, the latter retained no possession or enjoyment of the money represented by the receipts. Counsel invited our attention to a decision of the Madras High Court in *Imperial Bank of India, Madras v. S. Krishnamurthi and another*¹, in which Beasley, C. J. speaking for the Court observed that when a bank having notice that the administrators of the estate of the depositor intended to commit a breach of trust by seeking to invest monies contrary to express directions of the will paid out the money, the bank was liable to make good to the beneficiary the money deposited by the testator. In that case one Naidu had deposited a sum of money with the Imperial Bank of India in fixed deposit. Naidu died having bequeathed by his will the amount deposited to his son Krishnamurthi who was

then a minor. Naidu had appointed by his will two persons to be guardians of Krishnamurthi with authority to receive the amount in fixed deposit with the Imperial Bank and to apply the same for the maintenance and education of Krishnamurthi. The guardians obtained from the High Court of Madras grant of letters of administration with copy of the will annexed. After the death of one of the guardians the surviving guardian withdrew the money from the bank on the pretext that he wanted to invest it on more advantageous terms in house property or some other form of investment and misappropriated it. On attaining the age of majority Krishnamurthi sued the bank. It was held by the High Court that the bank knowing of the trust created by the will had parted with and delivered the amount deposited to the administrator who intended to commit a breach of the trust. The learned Chief Justice quoted a passage from Hart's Laws of Banking (End. 3) at page 159 that "A banker who receives into his possession moneys of which his customer to his knowledge became the owner in a fiduciary character. contracts the duty and to part with them at the mandate of his customer for purposes which are inconsistent with the customer's fiduciary character and duty," and upheld the claim of Krishnamurthi.

It is unnecessary to consider whether in the present case the investment was made by renewal of fixed deposit receipts after 16th August, 1953, for a purpose which the bank knew was inconsistent with Purnabai's fiduciary character and duty. We are not concerned in this case to decide whether the bank could have refused to pay the amount of the renewed deposit receipts if demanded by Purnabai. Whether the amount of deposit receipts was liable to estate duty must be determined on the true effect of section 10 of the Estate Duty Act 34 of 1953. Section 10 of that Act provides :

"Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that *bona fide* possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise :

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if by means of the surrender of the reserved benefit or otherwise, it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death. Provided....."

The phraseology of the section is somewhat involved. The purport of the section is however, clear. The section clearly means that if in respect of any property which is gifted, *bona fide* possession and enjoyment is not immediately assumed by the donee and thenceforward retained by him to the entire exclusion of the donor or of any benefit to him therein the property gifted shall not be excluded from the estate subject to estate duty.

The question which must be determined therefore is whether in the present case the donee did under the deed of gift immediately assume *bona fide* possession and enjoyment of the fixed deposit receipts gifted to him, and thenceforward retained the same to the entire exclusion of Purnabai or of any benefit arising to her by contract or otherwise. The conduct of Purnabai clearly indicates that she had no intention to part with control over the property ; the deposit receipts were obtained in joint names, and Purnabai had authority to withdraw the amount from the bank, without consulting the guardian of Suryakant. The deposit receipts were renewed on several occasions even after the execution of the deed of gift in the joint names of Purnabai and Suryakant. Purnabai alone presented the fixed deposit receipts for renewal. She could under the terms of the receipts receive the moneys to the entire exclusion of Suryakant. We are unable to hold, in the circumstances, that *bona fide* possession and enjoyment of the property gifted was immediately assumed by Suryakant and thenceforward retained by him to the entire exclusion of Purnabai. The right retained by Purnabai to have the receipts made out in her name jointly with Suryakant and the power to recover the amount from the bank without the concurrence of Suryakant clearly indicate that she was not excluded, but she had retained important benefits in herself in the fixed deposit receipts.

It is true that the third receipt was encashed during the life time of Purnabai and the amount was invested in the name of Suryakant alone. But the encashment and

reinvestment were within two years of the death of Purnabai and the amounts so reinvested were liable to be included in the estate of Purnabai.

The argument that fixed deposit receipts had remained exclusively in the possession of Satyanarayana as guardian of Suryakant and they were obtained by him from Purnabai for the purpose of renewal is not supported by any evidence. There is also no evidence that in obtaining the receipts in the joint names Purnabai acted as a guardian of Suryakant nor that she was a *benamidar* of Suryakant. We are of the view that the High Court was right in answering the question against the appellant.

The appeal fails and is dismissed with costs.

T. K. K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH AND G. K. MITTER, JJ.

Income-tax Officer Special Investigation Circle-B, Meerut

... *Appellant**

v.

M/s. Seth Brothers and Others etc.

... *Respondents.*

Income-tax Act (XLIII of 1961), section 132 (as amended in 1965)—Search and seizure—Scope of powers—Warrant of authorisation—Whether should specify particulars of documents and books of account—Large number of documents seized—Some documents found not relevant—Whether vitiates search and seizure—Books of account and other documents in respect of other business carried on by partners of assessee-firm—Whether relevant—Whether can be seized—Failure to place identification marks on documents—Effect of—Presence of police officers during search—Effect of.

Constitution of India (1950), Article 226—Writ Jurisdiction—Search and seizure under Income-tax Act—Scope of power of High Court.

On 14th March, 1963, the Income-tax Officer, Meerut, issued a notice under section 148 of the Income-tax Act, 1961, intimating the respondents that there was reason to believe that their income chargeable to tax had escaped assessment and it was proposed to reassess this income for the assessment year 1954-55. In response to the notice a return was filed under protest. In the meantime information was received by the Income-tax Commissioner, U.P., that the respondents were maintaining "duplicate records" and were evading assessment of their true income and that it was necessary to seize the records which may be found in the premises in which the respondents carried on the business. The Commissioner issued an order authorising two Income-tax Officers to search the premises and seize books and documents which would be relevant or useful for purposes of reassessment proceedings. The Income-tax Officers conducted the search and seized a number of books and documents. The respondents filed a petition in the High Court to quash the proceedings and the High Court held that the action of the Commissioner and the Income-tax Officers who purported to act in pursuance of the letters of authorisation was *mala fide* and quashed the proceedings. On appeal to the Supreme Court,

Held, that the decision of the High Court cannot be accepted as correct.

Since by the exercise of the power under section 132 of the Income-tax, Act, 1961 a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorises it to be exercised. If the action of the officer issuing the authorization, or of the designated officer is challenged the officer concerned must satisfy the Court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral

purpose, it is liable to be struck down by the Court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed. But where power is exercised *bona fide*, and in furtherance of the statutory duties of the tax officers any error of judgment on the part of the officer will not vitiate the exercise of the power.

Where the Commissioner entertains the requisite belief and for reasons recorded by him authorises a designated officer to enter and search premises for books of account and documents relevant to or useful for any proceeding under the Act, the Court in a petition by an aggrieved person cannot be asked to substitute its own opinion whether an order authorising search should have been issued. Again, any irregularity in the course of entry, search and seizure committed by the officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken, provided the officer has in executing the authorisation acted *bona fide*.

The Act and the Rules do not require that the warrant of authorisation should specify the particulars of documents and books of account : a general authorisation to search for and seize documents and books of account relevant to or useful for any proceeding complies with the requirements of the Act and the Rules. It is for the officer making the search to exercise his judgment and seize or not to seize any documents or books of account. An error committed by the officer in seizing documents which may ultimately be found not to be useful for or relevant to the proceeding under the Act will not be itself vitiate the search, nor will it entitle the aggrieved person to an omnibus order releasing all documents seized.

The aggrieved party may move a competent Court for an order releasing the documents seized. In such a proceeding the officer who has made the search will be called upon to prove how the documents seized are likely to be useful for or relevant to a proceeding under the Act. If he is unable to do so, the Court may order that those documents be released.

The circumstance that a large number of documents have been seized is not a ground for holding that all documents seized are irrelevant or the action of the officer is *mala fide*.

Section 132 of the Income-tax Act does not require specific mention by description of each particular documents which has to be discovered on search : it is for the officer who is conducting the search to decide whether a particular document found on search is relevant for the purpose or not.

The mere fact that it may ultimately be found that some document seized was not directly relevant to any proceeding under the Act or that another officer with more information at his disposal may have come to a different conclusion will not be a ground for setting aside the order and the proceeding for search and seizure.

The books of account and other documents in respect of other business carried on by the partners of the firm of the assessee would certainly be relevant because they would tend to show inter-relation between the dealing and supply materials having a bearing on the case of evasion of income-tax by the firm. The fact that the Income-tax Officers made a search for and seized the books of account and documents in relation to business carried on in the names of other firms and companies will not make the search and seizure illegal.

In the absence of any thing to show that the documents were either replaced or tampered with, failure to place identification marks will not by itself supply a ground for holding that the search was *mala fide*. A delay of two months in issuing a notice calling for explanation is also not a ground for holding that the action was taken for a collateral purpose.

By the express terms of the Act and the Rules the Income tax Officer may obtain the assistance of a police officer. By sub-section (13) of section 132 the provisions of the Code of Criminal Procedure, 1898, relating to searches apply, so far as may be, to searches under section 132. Thereby it is only intended that the officer concerned shall issue the necessary warrant, keep present respectable persons of

the locality to witness the search, and generally carry out the search in the manner provided by the Code of Criminal Procedure. But sub-section (2) of section 132 does not imply that the limitations prescribed by section 165 of the Code of Criminal Procedure are also incorporated therein.

In appropriate cases a writ-petition may lie challenging the validity of the action on the ground of absence of power or on a plea that proceedings were taken maliciously or for a collateral purpose. But normally the High Court in such a case does not proceed to determine merely on affidavits important issues of fact especially where serious allegations of improper conduct are made against public servants.

Held on facts :—It cannot be held on the evidence that in keeping police officers present at the time of the search in the house of influential businessmen to ensure the protection of the officers and the record, excessive force was used.

Appeals by Special Leave from the Judgment and Order dated the 27th March, 1964, of the Allahabad High Court in Civil Misc. Writs Nos. 3302, 3380, 3381 and 3382 of 1963.*

Sukumar Mitra, Senior Advocate (*S. K. Aiyar*, *R. H. Dhebar* and *B. D. Sharma* Advocates, with him) for Appellant (In all the Appeals).

M. C. Chagla and *S. C. Manchanda*, Senior Advocates (*P. N. Pachauri*, *P. N. Duda* and *D. N. Mukherjee*, Advocates, with them) for Respondent No. 1 (In C.A. No. 700 of 1965).

S. C. Manchanda, Senior Advocate (*P. N. Pachauri*, *P. N. Duda* and *D. N. Mukherjee*, Advocates, with him) for Respondent No. 1 (In C.A. No. 701 of 1965).

S. C. Manchanda (*P. N. Pachauri*, *S. M. Jain* and *B. P. Maheshwari*, Advocates, with him) for Respondent No. 1 (In C. As. Nos. 702 and 703 of 1965).

The Judgment of the Court was delivered by

Shah, J.—M/s. Seth Brothers run a flour mill in the name and style of "Imperial Flour Mills." From 1st April, 1953 to March, 1956 the business was carried on by M/s. Seth Brothers, of which the partners were Baikunth Nath and Vishwa Nath. Between March 1956 and 31st March, 1957 the business was carried on by Baikunth Nath, Vishwa Nath, Dr. Manmohan Nath, Mrs. Rama Rahi and Mrs. Sushila Devi. On 7th April, 1957 Mrs. Prem Lata was admitted as a partner. The partners were engaged in carrying on other businesses in the names of Seth Brothers (Private) Ltd., Nath Brothers (Private) Ltd., and Meerut Cold Storage and General Mills.

The owners of the business were, year after year, assessed to income-tax in respect of the income arising in the course of the business. On 14th March, 1963 the Income-tax Officer, Meerut, issued a notice under section 148 of the Income-tax Act, 1961, intimating M/s. Seth Brothers that there was reason to believe that their income chargeable to tax had escaped assessment and it was proposed to re-assess this income for the assessment year 1954-55. In response to the notice Baikunth Nath and Vishwa Nath filed a return under protest. In the meantime information was received by the Income-tax Commissioner, U.P., that M/s. Seth Brothers were maintaining "duplicate records" and were evading assessment of their true income and that it was necessary to seize the records which may be found at "Shanti Niketan", Meerut in which M/s. Seth Brothers carried on the business of Imperial Flour Mill and other businesses. The Commissioner of Income-tax, U.P., on 29th May, 1963 drew up a memorandum that on a report of the Income-tax Officer, D-Ward, Meerut, requesting for authorisation under section 132 of the Income-tax Act, 1961, to enter and search the premises of M/s Seth Brothers, he was satisfied about the need for the issue of the authorisation. The Commissioner also issued an order in Form 45 prescribed under Rule 112 of the Income-tax Rules, 1962, authorising two Income-tax

Officers—R. R. Agarwal and R. Kapoor—to enter the premises known as “Shanti Niketan”, at Meerut and to search for and seize such books and documents as may be considered relevant or useful for the purpose of the proceeding of reassessment, and to place identification marks thereon and to convey them to the Income-tax Office.

On the 7 and 8 of June, 1963 the premises described in the order were searched and account books and certain documents found therein were seized and were carried to the Income-tax Office. M/s. Seth Brothers then moved a petition in the High Court of Allahabad for an order quashing the proceedings of the Income-tax Authorities. Petitions were also filed by Nath Brothers (Private) Ltd., Seth Brothers (Private) Ltd., and Seth Brothers, Meerut, for the same relief. By these petitions they claimed writs of *certiorari* quashing the letters authorising search of the premises at Shanti Niketan, and writs of *mandamus* directing the Income-tax Officer to return all the books, papers and articles seized during the search and for writs of *prohibition* restraining the Income-tax Department from using any information gathered as a result of the search. It was submitted by the petitioners that K. L. Ananda, Income-tax Officer, and Satya Prakash an “ex-employee” of M/s. Seth Brothers had given false information to the Deputy Director of Inspection with a view to blackmail the partners of M/s. Seth Brothers, and that the order of search was made by the Commissioner of Income-tax at the direction of the Deputy Directors of Inspection, that the action of the Income-tax Officer in searching the premises and in seizing the books of account was malicious and that in any event section 132 of the Income-tax Act 1961, and the rules framed thereunder, were violative of the fundamental freedoms, guaranteed by Arts. 14, 19 (1) (f) and (g) and 31 of the Constitution.

Affidavits were filed on behalf of M/s. Seth Brothers. It was affirmed that “the so-called duplicate records” seized by the Income-tax Officer were copies of the books of account and that action had been taken by the Commissioner of Income-tax, not on his own initiative but at the behest of the Directorate of Inspection. In reply to the contentions raised by the assessee several affidavits sworn by Officers of the Income-tax Department were filed. The Commissioner of Income-tax stated in his affidavit that before issuing letters of authorisation and the warrant of search he was satisfied that it was necessary to take action under section 132 of the Indian Income-tax Act, 1961, and that the letters of authorisation were not issued at the direction of the Directorate of Inspection. The Income-tax Officers stated that in consequence of the search a large number of “duplicate account books and records” maintained by M/s. Seth Brothers were recovered that the search was carried out according to law and in the presence of two of the partners of the firm and their advocates, that all the documents seized were relevant for the purpose of reassessment, that there was close connection between the different business activities of the partners of M/s. Seth Brothers and that all the documents which were seized were in relation to those activities. The Deputy Director of Inspection in his affidavit stated that he did not give any direction to the Commissioner to issue authorisation for search and seizure.

The High Court of Allahabad held on a consideration of the averments made in the affidavits filed on behalf of M/s. Seth Brothers and the Revenue that “there was reason to believe” that instructions were issued by the Directorate of Inspection for a general raid and seizure of all account books and papers which may be found at the premises of the firm; that some out of the documents seized by the Income-tax Officers were irrelevant for the purpose of any proceeding under the Act; that besides the documents belonging to M/s. Seth Brothers the Income-tax Officers seized documents relating to the transactions of the allied concerns; that marks of identification were not placed on certain documents at the time they were seized; that the documents seized were detained by the Income-tax Officer for more than two months; and that the police force employed during the raid was excessive. The High Court concluded :—

“It is true that there was no ill-will between the * * * (partners of Seth Brothers) on one side and respondent Nos 1, 3 and 4 (Commissioners of Income-tax, U. P.

and Punjab and Income-tax Officer, Special Investigation Circle-A, Meerut) on the other side. But the extent of the seizure was far beyond the limits of section 132 of the Act. The action was *mala fide* in the sense that, there was abuse of power conferred on Income-tax Officers by section 132 of the Act. The act being *mala fide*, the proceedings should be quashed by this Court by issuing a writ of *mandamus*."

The Income-tax Officers, S. I. Circle, has appealed to this Court with Special Leave.

Section 132 as originally enacted by Act 43 of 1961 was substituted by a modified provision by the Finance Act of 1964 which in its turn was replaced by section 1 of the Income-tax (Amendment) Act, 1965. By section 8 of that Act it was provided *inter alia*, that any search of a building or place by an.....Income-tax Officer purported to have been made in pursuance of sub-section (1) of section 132 of the principal Act shall be deemed to have been made in accordance with the provisions of that sub-section as amended by the Act of 1965 as if those provisions were in force on the day the search was made.....The relevant part of section 132 as substituted by the Income-tax (Amendment) Act, 1965 may, therefore, be set out :

"132. *Search and seizure*.—(1) Where the Director of Inspection or the Commissioner, in consequence of information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (XI of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (XI of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed for the purposes of the Indian Income-tax Act, 1922 (XI of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),

he may authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income-tax Officer (hereinafter referred to as the authorised officer) to—

(i) enter and search any building or place where he has reason to suspect that such book of account, other documents, money, bullion, jewelery or other valuable article or thing are kept ;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available ;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search ;

(iv) place marks of identification on any books of account or other documents, or make or cause to be made extracts or copies therefrom ;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing.

(2) The authorised officer may requisition the services of any police officer or of any officer of the Central Government or of both, to assist him for all or any of the purposes specified in sub-section (1) and it shall be the duty of every such officer to comply with such requisition.

(3) The authorised officer may, where it is not practicable to seize any such books of account, other document, money, bullion, jewellery or other valuable article or thing, serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

* * * *

(8) The books of account or other documents seized under sub-section (1) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Commissioner for such retention is obtained:

Provided *

(13) The provisions of the Code of Criminal Procedure, 1898 (V of 1898), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1)."

The Central Board of Direct Taxes has, in exercise of the power conferred by section 295 (1) of the Act, framed, rule 112 prescribing the procedure to be followed by the Commissioner and the authorised officers.

The Commissioner or the Director of Inspection may after recording reasons order a search of premises, if he has reason to believe that one or more of the conditions in section 132 (1) exist. The order is in the form of an authorization in favour of a subordinate departmental officer authorising him to enter and search any building or place specified in the order, and to exercise the powers and perform the functions mentioned in section 132 (1). The officer so authorised may enter any building or place and make a search where he has reason to believe that any books of account or other documents which in his opinion will be useful for, or relevant to, any proceeding under the Act, may be found. The officer making a search may seize any books of account or other documents and place marks of identification on any such books of account or other documents, make or cause to be made extracts or copies therefrom and may make an inventory of any articles or things found in the course of any search which in his opinion will be useful for, or relevant to any proceeding under the Act and remove them to the Income-tax Office or prohibit the person in possession from removing them. He may also examine on oath any person in possession of or control of any books of account or documents or assets.

The section does not confer any arbitrary authority upon the Revenue Officers. The Commissioner or the Director of Inspection must have, in consequence of information, reason to believe that the statutory conditions for the exercise of the power to order search exist. He must record reasons for the belief and he must issue an authorization in favour of a designated officer to search the premises and exercise the power set out therein. The condition for entry into and making search of any building or place is the reason to believe that any books of account or other documents which will be useful for, or relevant to, any proceeding under the Act may be found. If the officer has reason to believe that any books of account or other documents would be useful for, or relevant to, any proceedings under the Act he is authorised by law to seize those books of account or other documents and to place marks of identification therein, to make extracts or copies therefrom and also to make a note or an inventory of any articles or other things found in the course of the search. Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the officer issuing the authorization, or of the designated officer is challenged the officer concerned must satisfy the Court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed. But where power is exercised *bona fide* and in furtherance of the statutory duties of the tax officers any error of judgment on the part of the officers will not vitiate the exercise of the power. Where the Commissioner entertains the requisite belief and for reasons recorded by him authorises a designated officer to enter and search premises for books of account and documents relevant to or useful for any proceeding under the Act, the Court in a petition by an aggrieved person cannot be asked to substitute its own opinion whether an order authorising search should have been issued. Again, any irregularity in the course of entry, search and seizure committed by the officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken, provided the officer has in executing the authorisation acted *bona fide*.

The Act and the Rules do not require that the warrant of authorisation should specify the particulars of documents and books of account: A general authorisation to search for and seize documents and books of account relevant to or useful for any proceeding complies with the requirements of the Act and the Rules. It is for the

officer making the search to exercise his judgment and seize or not to seize any documents or books of account. An error committed by the officer in seizing documents which may ultimately be found not to be useful for or relevant to the proceeding under the Act will not by itself vitiate the search, nor will it entitle the aggrieved person to an omnibus order releasing all documents seized.

The aggrieved party may undoubtedly move a competent Court for an order releasing the documents seized. In such a proceeding the officer who has made the search will be called upon to prove how the documents seized are likely to be useful for or relevant to a proceeding under the Act. If he is unable to do so, the Court may order that those documents be released. But the circumstance that a large number of documents have been seized is not a ground for holding that all documents seized are irrelevant or the action of the officer is *mala fide*. By the express terms of the Act and the Rules the Income-tax Officer may obtain the assistance of a police officer. By sub-section (13) of section 132 the provisions of the Code of Criminal Procedure, 1898, relating to searches apply, so far as may be, to searches under section 132. Thereby it is only intended that the officer concerned shall issue the necessary warrant, keep present respectable persons of the locality to witness the search, and generally carry out the search in the manner provided by the Code of Criminal Procedure. But sub-section (2) of section 132 does not imply that the limitations prescribed by section 165 of the Code of Criminal Procedure are also incorporated therein.

In *Income-tax Officer, A-Ward, Agra, and others v. Firm Madan Mohan Damma Mal and another*¹, it was observed that the issue of a search warrant by the Commissioner is not a judicial or a quasi-judicial act and even if the Commissioner is enjoined to issue a warrant only when in fact there is information in his possession in consequence of which he may form the necessary belief, the matter is not thereby subject to scrutiny by the Court. Section 132 of the Income-tax Act does not require specific mention by description of each particular document which has to be discovered on search; it is for the officer who is conducting the search to decide whether a particular document found on search is relevant for the purpose or not. That statement of the law, in our judgment, accurately states the true of effect section 132. The mere fact that it may ultimately be found that some document seized was not directly relevant to any proceeding under the Act or that another officer with more information at his disposal may have come to a different conclusion will not be a ground for setting aside the order and the proceeding for search and seizure.

The authorisation issued by the Commissioner was, in the view of the High Court, open to challenge on the ground that the Commissioner did not apply his mind to the existence of circumstances which justified the exercise of the power to issue authorisation. The action of the Income-tax Officers who searched the premises was quashed on the ground that they seized some documents which were irrelevant to the process of re-assessment. In our judgment, in reaching their conclusion that the Commissioner acted at the behest of the Director of Inspection, the High Court ignored important evidence on the record. It was averred in the petition of M/s. Seth Brothers that :—

(56) "It appears that the Deputy Director of Inspection at the instigation of Shri K L Nanca and Sri Satya Prakash, without making any enquiries or having any material, ordered a raid for search and seizure of all the account books and papers, which could be found."

(57) "That, according to such directions of the Directorate, the Commissioner of Income-tax, UP Lucknow, was made to issue authorisations under section 132 of the Act of 1961 in favour of opposite Parties Nos 3 and 4 to search out the premises of 'Shanti Niketan', Civil Lines, Meerut, and to seize the account books, documents and papers, which could be recovered therefrom."

The High Court observed that even though a number of affidavits were filed by the Income-tax Authorities, no reference to paragraph 56 of the writ petition was made and the "only affidavit filed by Shri A. L. Jha, Commissioner of Income-tax

was vague in the extreme". The allegation in paragraphs 56 and 57 of the writ petition made on definite allegation that the Commissioner of Income-tax acted at the behest of the Deputy Director of Inspection and not on his own satisfaction reached in consequence of information in his possession. In the verification clause Baikunth Nath stated that the contents of paragraph 57 were true on information received from the Deputy Director of Inspection (Investigation) Income-tax, Central Revenue Buildings, New Delhi, but said nothing about the contents of paragraph 56. The affidavits filed on behalf of the Income-tax Department specifically denied the allegations made in paragraphs, 56 and 57. R. R. Agarwal (one of the Income-tax Officer authorised to conduct the search) in his affidavit affirmed that the letter of authorisation was issued to him by the Commissioner of Income-tax, U. P., Lucknow, after the Commissioner had been satisfied on the report submitted by the deponent.

The Commissioner of Income-tax, Mr. A. L. Jha, by his affidavit denied that letters of authorisation were issued under the directions of the Deputy Director of Inspection or anybody connected with Directorate. He also stated that in respect of the case of M/s. Seth Brothers some information was brought to him by the Directorate and that information corroborated the report made to him by Mr. R. R. Agarwal and that after taking into consideration all those materials he was satisfied that a search of the premises of M/s. Seth Brothers "was called for" and that he issued the impugned letters of authorisation.

Mr. R. V. Ramaswamy, Deputy Director of Inspection (Investigation), in paragraph 6 of his affidavit denied that the raid or search of the premises of M/s. Seth Brothers was ordered by him.

The affidavit of R. Kapur, Income-tax Officer, Special Investigation Circle, who was authorised by the Commissioner of Income-tax to make the search is also relevant. Mr. Kapur averred that some information was received by Mr. R. R. Agarwal from which it appeared that the firm of M/s. Seth Brothers and its partners were "evading tax by maintaining duplicate a sets of accounts" and by suppressing relevant documents and papers from the Department; that Mr. R. R. Agarwal made written request to the Commissioner of Income-tax for letters of authorisation in order to carry out the search of the assessee's premises and in pursuance thereof on 29th May, 1963 the Commissioner of Income-tax issued three authorisation letters, two in favour of Mr. R. R. Agarwal and one in favour of the deponent authorising them to carry out the search in accordance with the terms of the authorisation letters.

In this state of the record we are unable to agree with the High Court that the letters of authorisation were issued by the Commissioner of Income-tax at the direction of the Director of Inspection (Investigation). The attention of the Court was presumably not invited to the relevant paragraphs of the affidavits of the Officers concerned.

It is true that a large number of documents were seized from the premises of M/s. Seth Brothers but that has by itself no direct bearing on the question whether the Income-tax Officer acted *mala fide*. If the Income-tax Officer in making a search had reason to believe that any books of account or other documents useful for, or relevant to, any proceeding under the Act may be found, he may make a search for and seize those books of account and other documents. Some books, maps of the cold storage, assessment returns and doctor's prescriptions were seized by the Income-tax Officer. It appears, however, from the inventory that a large number of documents which related to the business of the assessee and their allied concerns were also seized. It would be impossible merely from the circumstance that some of the documents may be shown to have no clear or direct relevance to any proceeding under the Act, that the entire search and seizure was made not in *bona fide* discharge of official duty but for a collateral purpose. The suggestion that the books of account and other documents which could be taken possession of should only be those which directly related to the business carried on in the name of M/s. Seth Brothers has, in our judgment, no substance. The books of account and other documents in respect of other business carried on by the partners of the firm of the

assessee would certainly be relevant because they would tend to show interrelation between the dealings and supply materials having a bearing on the case of evasion of income-tax by the firm. We are unable to hold that because the Income-tax Officer made a search for and seized the books of account and documents in relation to business carried on in the names of other firms and companies, the search and seizure were illegal.

It is also said that marks of identification were not placed on several documents. Assuming that this allegation is true, in the absence of anything to show that the documents were either replaced or tampered with, that irregularity will not by itself supply a ground for holding that the search was *mala fide*. A delay of two months in issuing a notice calling for explanation is also not a ground for holding that the action was taken for a collateral purpose.

It is not disputed that assistance of the police may be obtained in the course of a search. The High Court has, however, found that the police force employed was excessive. But we are unable to hold that on the evidence, in keeping police officers present at the time of the search in the house of influential businessmen to ensure the protection of the officers and the record, excessive force was used.

We accordingly see no good grounds to accept the finding recorded by the High Court that the manner in which the search and seizure were conducted "left no room for doubt that the Income-tax Officer did not apply his mind and formed no opinion regarding the relevancy or usefulness of the account books and documents for any proceedings under the Income-tax Act". The High Court accepted that the correctness of the opinion actually formed by the Income-tax Officer was not open to scrutiny in a writ petition, but in their view no opinion was in fact formed by the Officer and the search and seizure of documents, and books of account must on that account be held as made in excess of the powers conferred upon the Income-tax Officer and *mala fide*. For these observations we find no warrant. The Income-tax Officers concerned have sworn by their affidavits that they did in fact form the requisite opinion under section 132 of the Act and the other evidence and the circumstances do not justify us in discarding that assertion.

These proceedings were brought before the High Court by way of a writ petition under Article 226 of the Constitution before any investigation was made by the Income-tax Officer pursuant to the action taken by them. In appropriate cases a writ petition may lie challenging the validity of the action on the ground of absence of power or on a plea that proceedings were taken maliciously or for a collateral purpose. But normally the High Court in such a case does not proceed to determine merely on affidavit important issues of fact especially where serious allegations of improper conduct are made against public servants. The Income-tax Officers who conducted the search asserted that they acted in good faith in discharge of official duties and not for any collateral purpose. The Commissioner of Income-tax also denied that he acted at the direction of the Deputy Director of Inspection and that case was supported by the Deputy Director of Inspection. If the learned Judges of the High Court were of the view that the question was one in respect of which an investigation should be made in a petition for the issue of a writ, they should have directed evidence to be taken *viva voce*. The High Court could not, on the assertions by the partners of the firm which were denied by the Income-tax Officer, infer that the premises of M/s. Seth Brothers were searched and documents were seized for a collateral purpose, merely from the fact that many documents were seized or that some of the documents seized marks of identification were not put or that the documents belonging to the "sister concerns" of the "Imperial Flour Mills" were seized.

In our view the decision of the High Court that the action of the Commissioner of Income-tax, U.P. and the Income-tax Officers who purported to act in pursuance of the letters of authorisation was *mala fide*, cannot be accepted as correct.

Counsel for M/s. Seth Brothers contended that opportunity may be given to the assessee to lead evidence *viva voce* to prove that the revenue officers acted for a collateral purpose. We do not entertain this request since we propose to remand the

case to the High Court to decide questions which have not been decided. The applicants, if so advised, may move the High Court for leave to lead evidence. It is for the High Court to decide whether at this stage after nearly six years leave to examine witnesses should be granted.

The order passed by the High Court is set aside and the proceeding is remanded to the High Court. The High Court will deal with and dispose of the proceeding according to law. We may observe that Counsel for the Income-tax Officer did not invite us to decide the question of the *vires* of section 132 of the Income-tax Act on which the High Court has expressed no opinion. M/s. Seth Brothers and the other petitioners in the High Court will pay the costs of these appeals in this Court. There will be one hearing fee. Costs in the High Court will be costs in the petitions.

T.K.K.

Order set aside ; case remanded.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.

Juggilal Kamlapat, Kanpur

... *Appellant**

v.

Commissioner of Income-tax, U. P.

... *Respondent.*

Income-tax Act (XI of 1922)—Adventure in the nature of trade—Shares—Purchase and sale by assessee—Dealer or investor—Mixed question of law and fact.

The departmental authorities, the Tribunal in appeal and the High Court in reference held that the surplus realised by the assessee by the sale of certain shares was revenue income liable to tax under the Act. The department rejected the contentions put forward by the assessee that the purchase of certain shares of a company was with a view to secure its managing agency and had thereafter distributed the shares to the various associates of the assessee, that in regard to other shares the assessee purchased them when a new issue of the shares was not taken over by the public and that the shares were sold on account of "financial embarrassment" and not with the object of earning income. With Special Leave the assessee appealed.

Held, that the surplus is assessable as revenue income.

Whether a transaction is or is not an adventure in the nature of trade is a question of mixed law and fact ; in each case the legal effect of the facts found by the Tribunal on which the taxpayer could be treated as a dealer or an investor in shares, has to be determined.

Held on facts: the transaction in relation to certain shares, since the inception appears to be impressed with the character of a commercial transaction, entered into with a view to earn profit. Large block of shares was purchased at the ruling rates with borrowed money, and soon thereafter the shares were disposed of at a profit in small lots. Some of the shares were sold through brokers to strangers. The story of the assessee that some or all the shares were merely distributed to its associates is not proved. The interest which the firm had to pay for the amount borrowed for purchasing the shares were debited in the revenue account and was not claimed as a revenue allowance. In regard to certain other shares it was claimed that the shares were taken over because the public did not accept those shares. It was one of the objects of the assessee to finance its allied concerns and in taking over shares which the public did not subscribe the assessee was acting in the course of its business. The assessee commenced selling the shares soon after they were purchased. The story that the shares had to be sold on account of financial embarrassment is plainly belied by the circumstances that the assessee went on

purchasing and the selling the same shares. The transactions were all stamped with the character of commercial transactions entered into with a profit motive and were not transactions in the nature of capital investment.

Appeal by Special Leave from the Judgment and Order dated the 17th September, 1962 of the Allahabad High Court in Misc. I.T. Application No. 167 of 1955.*

A. K. Sen, Senior Advocate (*G. L. Sanghi*, Advocate, and *B. R. Agarwal*, Advocate of *M/s. Gagrath & Co.*, with him), for Appellant.

Jagdish Swarup, Solicitor-General of India (*S. K. Iyer*, *R. N. Sachthey* and *B. D. Sharma*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, Ag. C. J.—In proceedings for assessment to income-tax for the year 1946-47, the appellant-firm was assessed to tax in respect of an amount of Rs. 3,99,587 received by it as profit on sale of shares. The plea of the firm that the amount was "capital gain" and was on that account not taxable was rejected. In the view of the Income-tax Officer the profit arose from "a well planned business activity in which the assessee had fully utilised its resources". The Appellate Assistant Commissioner affirmed the decision of the Income-tax Officer. The Income-tax Appellate Tribunal dismissed the appeal filed by the firm.

The Tribunal amongst others referred the following question to the High Court of Allahabad for opinion :

"Whether the surplus realised by the sale of the shares of Aluminium Corporation of India Ltd., J.K. Investment Trust and Raymond Woollen Mills amounting in aggregate to Rs. 3,99,587 or any part thereof was the revenue income of the assessee liable to tax under the Income-tax Act, 1922?"

The High Court answered the question in the affirmative. The firm has appealed to this Court with Special Leave.

In 1944 the firm purchased 50,000 ordinary shares of Raymond Woollen Mills Ltd., (hereinafter called "Raymond") for Rs. 69,75,255. The firm paid Rs. 7,00,000 on 4th November, 1944 and the balance on 6th December, 1944. The transaction was financed with the aid of a loan of Rs. 70 lakhs borrowed from the Hindustan Commercial Bank Ltd. The firm sold those shares through brokers between 23rd November, 1944 and 2nd April, 1946 and realised Rs. 72,42,200, the transaction resulting in a net profit of Rs. 2,66,945. Between 26th January, 1945 and 5th April, 1946 the firm also purchased 67 debentures, 5,582 preference shares and 18,576 ordinary shares of the Aluminium Corporation Ltd. (hereinafter called "Aluminium") for Rs. 8,57,480. Except 2,118 preference shares, the entire lot of shares with the debentures was sold for Rs. 7,05,957 between 1st February, 1945 and 13th August, 1945. Adjusting the cost of shares left on hand the firm realised a net profit of Rs. 60,278 in that transaction. The firm also purchased 290 "A" Class shares of J. K. Investment Trust Ltd., (hereinafter called "J. K. Trust") on 4th February, 1945 for Rs. 1,45,000 and sold the same on 22nd August, 1945 for Rs. 2,17,264, the transaction resulting in a net profit of Rs. 72,364.

Before the departmental authorities the firm claimed that it had taken over the entire share capital issued by Raymond with a view to secure its managing agency and had thereafter distributed the shares of Raymond to the various associates of the firm, and the transaction being one to facilitate acquisition of a capital asset being a capital investment, the profit realised by sale of the shares was not liable to be assessed to income-tax. The firm also claimed that when a part of the new issue of capital of Aluminium was not taken over by the public, the firm as financiers of the J. K. Group of Industries took over the shares and the debentures not subscribed within the time allowed. This transaction, it was contended, was also of the nature of capital investment. It was explained that the shares were sold on account of "financial embarrassment" and not with the object of earning income,

and the profit realised by the sale did not attract tax. Similar contentions were also raised in respect of the shares of J. K. Trust. The departmental authorities rejected the contentions. The Tribunal agreed with them.

From the facts found by the Tribunal it is clear that for purchasing the Raymond shares, the firm paid Rs. 7,00,000 on 4th November, 1944, and the balance on 6th December, 1944, and commenced selling the shares on 23rd November, 1944. The contention that the shares were only distributed to the "allied concerns" is contrary to the findings of the Tribunal. Some of the shares were sold through brokers to outsiders. It is a significant circumstance that the firm parted with all the Raymond shares by 2nd April, 1946 and did not retain a single share after that date. It is true that some of the shares were held by J. K. Industries Ltd., and other J. K. concerns. But the transfer even to the J. K. concerns was in all cases for a profit. Within a few days after purchasing the Raymond shares, the "firm started unloading them", and the shares were never sold without making profit. The interest paid for the loan borrowed from the Hindustan Commercial Bank Ltd., for financing the purchase of Raymond shares was debited in the accounts as a revenue expenditure, and it was claimed as a permissible allowance. The firm used to promote companies. One of its activities was to finance "sister concerns" known as J. K. Industries. The case of the firm that the shares had to be sold on account of "financial embarrassment" was plainly untrue. The Tribunal was, in our judgment, right in inferring that the "purchase and sale of shares was a business activity which was continuous" and since the firm "had entered upon a well-planned scheme for earning profit and that in furtherance and execution of that profit making scheme they sold the shares at the opportune time" and that "the sale of the shares was not merely on account of pecuniary embarrassment" as claimed, the profit realised by the firm by the sales of shares could not be characterised as a casual receipt, nor could it be treated as accretion to a capital asset.

Strong reliance was, however, placed on a somewhat obscure statement in the order of the Appellate Assistant Commissioner :

"In the case of Raymond Woollen Mills shares it is clear beyond doubt that the purchase of the shares was a first rate business deal and that it was motivated by the desire and intention to acquire the managing agency of the Mills. If this is not an operation in the scheme of profit-making, it is not known what will constitute such a transaction."

Apparently there is a typographical error in the second clause of the first sentence, and the word "not" has by inadvertence been omitted otherwise in the context in which it occurs the clause has no meaning whatever. In any event as rightly pointed out by the High Court the reasons given by the Tribunal and the conclusion recorded by it are inconsistent with the finding that the shares were purchased with the sole object of acquiring the managing agency of the Raymond Woollen Mills and not with a view to make profits.

Counsel for the firm invited our attention to the decision of this Court in *Ramnarin Sons (P.) Ltd. v. Commissioner of Income-tax, Bombay*¹, in support of his contention that a transaction for purchasing shares with the object of acquiring the managing agency of a company will be regarded as capital investment and not a business in share. In *Ramnarin Sons case*¹, the appellant-company was a dealer in shares and securities and also carried on business as managing agents of other companies. With a view to acquire the managing agency of a company, the appellant-company purchased from the managing agents a large block of shares at a rate approximately 50 per cent above the ruling market rate. Two months later the appellant-company sold a small lot out of those shares at a loss and claimed the loss as a trading loss. It was found in that case by the Tribunal that the intention of purchasing the shares was not to acquire them as part of the stock-in-trade of taxpayer's business in shares but to facilitate the acquisition of the managing agency of the company which was in fact acquired, and on that account loss incurred by

1. (1961) 41 I.T.R. 534 : (1961) 2 An. W.R. (S.C.) 29 : (1961) 2 M.L.J. (S.C.) 29 : (1961) 2 S.C.J. 159 : (1961) 2 S.C.R. 904 : A.I.R. 1961 S.C. 1141.

the sale of a small lot could be regarded only as a loss of capital nature. The Court observed in that case that the circumstance that the taxpayer had borrowed loans at interest to purchase the shares or that it was a dealer in shares and was authorised by its memorandum of association to deal in shares was of no effect. On a review of the evidence the Tribunal held that the shares were purchased with the object of acquiring the managing agency and with that view the High Court agreed.

Whether a transaction is or is not an adventure in the nature of trade is question of mixed law and fact ; in each case the legal effect of the facts found by the Tribunal on which the taxpayer could be treated as a dealer or an investor in shares, has to be determined. In the present case the transaction since the inception appears to be impressed with the character of a commercial transaction entered with a view to earn profit. Large block of shares was purchased at the ruling rates with borrowed money, and soon thereafter the shares were disposed of at a profit in small lots. Some of the shares were sold through brokers to strangers. The story of the firm that some or all the shares were merely "distributed" to its associates is not proved. The interest which the firm had to pay for the amount borrowed for purchasing the shares was debited in the revenue account and was claimed as a revenue allowance.

It was not the case of the firm that Aluminium and J. K. Trust shares were purchased for acquiring the managing agency. It was claimed that the shares were taken over because the public did not accept those shares. It was one of the objects of the firm to finance its allied concerns and in taking over shares which the public did not subscribe the firm was acting in the course of its business. The firm commenced selling the shares soon after they were purchased. Aluminium shares were purchased between 26th January, 1945 and 5th April, 1946 (except a few which were retained) and sold at profit. Whereas the first lot was purchased on 26th January, 1945, the first sale was made on 1st February, 1945. It could not be said that this was an investment in shares independent of the trading activity of the firm. The story that the shares had to be sold on account of financial difficulties is plainly belied by the circumstance that the firm went on purchasing and selling the Aluminium shares. J. K. Trust shares were purchased on 14th February, 1945 and were sold on 22nd August, 1945. Aluminium shares as well as J. K. Trust shares were sold at a profit and through brokers. These transactions were also stamped with the character of commercial transactions entered into with a profit motive and were not transactions in the nature of capital investments. The answer recorded by the High Court is therefore correct.

The appeal fails and is dismissed with costs.

V. S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. Hidayatullah, *Chief Justice* AND G. K. MITTER, J.

Collector of Customs, Calcutta and others

.. Appellants*

v.

Soorajmull Nagarmull and another

... Respondents.

Income-tax Act (XI of 1922), section 46 (5-A)—Tax recovery—Garnishee notice—Payment out of Court—Certificate of payment by Court—Assessee-firm—Excess customs duty paid by assessee—Decree against Union of India—Garnishee notice by Income-tax Officer to Collector of Customs—Requiring payment of decree amount towards arrears of income-tax and penalty due by assessee—Payment by Collector—Amount adjusted towards super-tax due by assessee—Application by Collector to Court for certifying payment under the Code of Civil Procedure.

Civil Procedure Code (V of 1908), Order 21, rule 2.

The assessee-firm obtained decrees against the Union of India for refund of the excess customs duty paid by it. In pursuance of a garnishee notice issued under section 46 (5-A) of the Income-tax Act, the Collector of Customs paid the amounts to the Income-tax Department and the sums were adjusted towards the super-tax payable by the assessee. The Collector applied under Order 21, rule 2, of the Code of Civil Procedure, for certifying the payment made out of Court. The High Court refused to certify the payment on the grounds that the decrees were against the Union of India and not the Collector of Customs, that the sums were held by the Collector on behalf of the Union of India and not on behalf of the assessee, that the notice was defective inasmuch as it asked for payment towards income-tax and towards penalty, while the receipts which were granted to the assessee, stated that the amount was for super-tax. The Collector of Customs appealed.

Held that, in the case of a garnishee payment or one made under section 46 (5-A) of the Income-tax Act, if the payment has been legally made out of Court, there is no reason why the judgment-debtor cannot move the Court for getting the adjustment or payment certified as required under Order 21, rule 2, of the Code.

Order 21, rule 2, of the Code merely contemplates payment out of Court and says nothing about voluntary payment. A garnishee order can never by its nature lead to a voluntary payment and it is not to be thought that a garnishee order does not lead to the adjustment of the decree sufficient for being certified by the Court.

Held on facts : the Union of India operates through different Departments and a notice to the Collector of Customs was a proper notice to issue because it was the Collector of Customs who had in the first instance recovered the money and held it from the assessee, and under the decrees of the Court the Union of India was liable to refund it to the assessee. Since super-tax is also a kind of income-tax, the notice was not defective.

Appeals by Special Leave from the Judgments and Orders, dated the 22nd January, 1964, of the Calcutta High Court in Appeals Nos. 199 and 200 of 1962 from Original Order.

B. Sen, Senior Advocate (S.P. Nayar, Advocate, with him) for Appellants (In both the Appeals).

A.N. Sinha and D.N. Gupta, Advocates, for Respondent No. 1 (In both the Appeals).

The Judgment of the Court was delivered by

Hidayatullah, C. J.—This is an appeal against the judgment and decree of the High Court of Calcutta refusing to enter satisfaction of two decrees under Order 21,

* C. As. Nos. 429 and 430 of 1966.

rule 2, of the Code of Civil Procedure, obtained by the respondents against the Union of India in the following circumstances.

The respondents, M/s. Soorajmull Nagarmull, imported spindle oil from Philadelphia. The firm was required to pay customs duty under Item 27 (3) of the First Schedule to the Tariff Act, 1934 at 27 per cent. *ad valorem*. The firm filed two suits asking for refund of excess duty claiming that the oil was dutiable only under Item 27 (8) at 2 as. 6 ps. per imperial gallon. The suits were filed against the Collector of Customs, the Assistant Collector of Customs for Appraisalment and the Union of India. The suits were successful and decrees were passed against the Union of India for refund of the amount charged in excess. In one suit the decree was for payment of Rs. 43,723 with interest at 6 per cent per annum from 1st day of April, 1952, until realisation. In the second suit the decree was for Rs. 75,925 with similar interest.

Since the firm had not paid a sum of Rs. 18,08,667.72 as tax, the Income-tax Officer, Circle II, Calcutta, issued a notice under section 46 (5-A) of the Indian Income-tax Act, 1922, calling upon the Collector of Customs to pay the amount of the decree to him and stating that his receipt would constitute a good and sufficient discharge of the liability for refund to the firms. The Collector of Customs paid the amount into the Reserve Bank and the Reserve Bank issued receipts crediting the amount against super-tax due from the firm. The Collector of Customs then applied to the High Court of Calcutta under Order 21, rule 2, of the Code of Civil Procedure, for the adjustment of the decrees by this payment. This was refused by a learned single Judge who gave no reasons while dismissing the petition. On appeal to the Division Bench it was held by the Division Bench on 22nd January, 1964, that the adjustment of the decrees could not be granted. It is against the last order that the present appeals have been filed by Special Leave of this Court.

The High Court, in reaching the conclusion observed that the decrees were against the Union of India and not the Collector of Customs. Further the sums were held by the Collector of Customs on behalf of the Union of India and not on behalf of the firm. The High Court found the notice to be defective inasmuch as it asked for payment towards income-tax and towards penalty, while the receipts, which were granted to the firm, stated that the amount was for super-tax. On these three grounds, the High Court held that the learned single Judge was right in dismissing the application of the Collector of Customs for the adjustment of the decrees.

Order 21, rule 2, of the Code of Civil Procedure, takes note of payments out of Court to decree-holders and provides that where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. It is also provided that the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified.

The contention of the respondents in these appeals is that the decrees were not passed against the Collector of Customs but against the Union of India and that payment by the Collector of Customs was not a payment by the judgment-debtor. In our judgment this plea is highly technical. The amount was recovered by the Collector of Customs from the firm and was being held by the Union of India through the Collector of Customs. The Collector of Customs paid the money not on behalf of himself but on behalf of the Union of India and it must be treated as a proper payment of the amount to the firm. The objection of the respondent that it amounts to a payment by one Department of the Government to another, does not, in our opinion, hold much substance. It is also extremely technical. The Union of India operates through different Departments and a notice to the Collector of Customs in the circumstances was a proper notice to issue because it was the Collector of Customs who had in the first instance recovered this money and held it from the firm.

It is next contended that the notice is defective inasmuch as it shows that the money was lying with the Collector of Customs whereas it was, in fact, lying with the Union of India and that it was not money held by the Collector of Customs on behalf of the firm. Section 46 (5-A) of the Income-tax Act reads as follows :

“46. *Mode and time of recovery.*—.....

(5-A) The Income-tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income-tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income-tax Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the taxpayer in respect of arrears of income-tax and penalty or the whole of the money when it is equal to or less than that amount.....

Any person making any payment in compliance with a notice under this sub-section shall be deemed to have made the payment under the authority of the assessee and the receipt of the Income-tax Officer shall constitute a good and sufficient discharge of the liability of such person to the assessee to the extent of the amount referred to in the receipt.

Any person discharging any liability to the assessee after receipt of the notice referred to in this sub-section shall be personally liable to the Income-tax Officer to the extent of the liability discharged or to the extent of the liability of the assessee for tax and penalties, whichever is less.

If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income-tax Officer, further proceedings may be taken by and before the Collector on the footing that the Income-tax Officer's notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to sub-section (2) of section 46.....”

Such notices of the Income-tax Officer are no more than a kind of a garnishee order issued to the person holding money which money is due to an assessee. The Collector of Customs had recovered this money and under the decrees of the Court the Union of India was liable to refund it to the firm. A garnishee order is issued to a debtor not to pay to his own creditor but to some third party who has obtained a final judgment against the creditor. By a parity of reasoning this amount, which was with the Collector of Customs, could be asked to be deposited with the Income-tax Authorities under section 46 (5-A). The argument is extremely technical for that the firm is entitled to get a double benefit of the decree, first by having the decretal amount paid to the benefit of the firm and then to recover it again from the Union of India.

It is contended lastly that the notice of the Income-tax Officer spoke of income-tax and/or penalty whereas the amount was taken towards payment of super-tax due from the firm. It is, however, conceded in the face of authorities cited at the Bar that the super-tax is also a kind of income-tax and, therefore, the notice could issue in the form it did. The leading case on the subject is in *In re Reckitt*¹, and learned Counsel for the respondents did not controvert the proposition laid down there. It is, however, argued on the authority of *Bidhoo Beebee v. Keshub Chunder Baboo and others*² *Mahiganj Loan Office, Ltd. v. Behari Lal Chaki*³ *A.P. Bagchi v. Mrs. F. Morgan*⁴ and *Thomas Skinner v. Ram Rachpal*⁵ that the payment which can be adjusted under Order 21, rule 2, is a voluntary payment by the judgment-debtor to the decree-holder and that this is not a case of voluntary payment at all. The rulings which have been cited do not, in our opinion, apply here. This point was not considered in the High Court and seems to have been thought of here. Order 21, rule 2, merely contemplates payment out of Court and says nothing about voluntary payment. A garnishee order can never by its nature lead to a voluntary payment and it is not to be thought that a garnishee order does not lead to the adjustment of the decree sufficient for being certified by the Court. Payment by virtue of section 46 (5-A), as we have stated before, is in the nature of a garnishee payment and must, therefore, be subject to the same rule.

1. (1933) 1 I.T.R. 1: 101 L.J. Ch. 333.

2. (1868) 9 W.R. 462.

3. I.L.R. (1937) 1 Cal. 781 : 41 Cal.W.N. 406 : 65 Cal.L.J. 361 : A.I.R. 1937 Cal. 211.

4. (1935) All.L.J. 543 : A.I.R. 1935 All. 513..

5. (1938) All.I.J. 59 : I.L.R. (1938) All. 294 : A.I.R. 1938 All. 141.

The rulings themselves do not control the present matter. In *Bidhoo Beebee v. Keshub Chumder Baboo case*¹, the payment was not under a garnishee order but under the process of the Court issued in execution by arrest of the judgment-debtor. Contrasting what had happened in the case with the words of the second rule of Order 21 (then section 206 of the Code of 1859) the learned Judges observed that section 206 covers cases of voluntary payment. The debtor was protected by treating the payment as being made through the Court. The exact point we are dealing with was not before the Court. In *Mahiganj Loan Office Ltd. v. Behari Lal Chaki's case*², there was a scheme framed by the depositors of a banking company for return of their deposits in spite of opposition from decree-holder depositor of the company. The scheme was sanctioned by the Court. The scheme was binding on the decree-holder but it was not treated as an adjustment within Order 21, rule 2, of the Code of Civil Procedure. The reason given was that the adjustment must be to the satisfaction of the decree-holder and must be with the consent of both the decree-holder and the judgment-debtor and not one which is made binding by operation of law. It is to be noticed that that was a payment to which the judgment-debtor had objected although it was binding on him. We see no reason for making a distinction between a voluntary payment out of Court and a payment out of Court which the law regards as valid. No reasons are given in the judgment why such a distinction should be made. In *Thomas Skinner v. Ram Rachpal's case*³, the payment was made in Court and not outside Court. This is the nearest case to the present one and but for his difference, it is reasonable to think that the learned Judges would have taken the same view of the matter as we have taken. The reason given by the learned Judges brings out the real object of the rule:

"Where a judgment-debtor makes payment outside the Court, the Court knows nothing about the payment and therefore rule 2, Order 21, ordains that the parties should inform the Court about the payment."

This object in our opinion is fully achieved when there is payment under a garnishee order outside the Court. In the case cited the Court knew of the payment and could give protection in other ways. In *A.P. Bagchi v. Mrs. P. Morgan's case*⁴, the payment was again without the consent of the judgment-debtor either in fact or in law. Too much emphasis appears to have been placed upon mutual understanding and too little on payment out of Court which is the essence of the rule. The case turned on whether there was any understanding between the parties that sums spent by the judgment-debtor on repairs would be set off against the decretal amount and therefore Order 21, rule 2, of the Code of Civil Procedure, was held inapplicable.

In none of the cases the point of a garnishee order was considered. In our opinion, a case of a garnishee payment or one made under section 46 (5-A) of the Income-tax Act of 1922 stands on a different footing and if the payment has been legally made out of Court in full and final discharge of the liability under a decree, there is no reason why the judgment-debtor cannot move the Court for getting the adjustment or payment certified. The payment was required to be certified under Order 21, rule 2, of the Code of Civil Procedure, and the order that it be so certified.

The appeals are accordingly allowed with costs here and in the High Court.

V.S.

Appeals allowed.

1. (1868) 9 W.R. 462.

2. 1 L.R. (1937) 1 Cal. 781; A.I.R. 1937 Cal. 211.

3. I.L.R. (1938) All. 294; A.I.R. 1938 All. 141.

4. A.I.R. 1935 All. 513; (1935) All.I.J. 543.

IN THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—M. Hidayatullah, *Chief Justice*, J. C. Shah, V. Ramaswami, G. K. Mitter and A. N. Grover, JJ.

Mohd. Faruk

... *Petitioner.**

v.

The State of Madhya Pradesh and others

... *Respondents.*

Madhya Pradesh Municipal Corporation Act (XXIII of 1956), section 430 (3)—Scope—Cancellation of the confirmation of the bye-laws made by Municipal Committee for inspection and regulation of slaughter—Houses if infringes fundamental right under Article 19 (1) (g) of the Constitution.

Constitution of India (1950), Article 19 (1)—Interpretation—entrustment of power to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion—Prohibition of fundamental right Article 19 (1)—Law, if ex facie violates Article 19 (1)—Burden of proof.

Constitution of India (1950), Article 19 (1) (g)—Interpretation—Fundamental right to carry on business—Prohibition of—Prohibition not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people, if justified.

The bye-laws of the Jabalpur Municipality permitted slaughter of bulls and bullocks. A licence had to be obtained for that purpose. Slaughter of animals in places outside the premises fixed by the Municipality was prohibited by section 257 (3) of the M. P. Municipal Corporation Act, and sale of meat within the area of the Municipality of the animals not slaughtered in the premises fixed by the Municipality was also prohibited. Under the notification by which the bye-laws were issued in 1948, bulls and bullocks could be slaughtered in premises fixed for that purpose. But by the notification dated 12th January, 1967, confirmation of the bye-laws insofar as they related to bulls and bullocks was cancelled. The effect of that notification was to prohibit the slaughter of bulls and bullocks within the Municipality of Jabalpur. This cancellation of the confirmation of Bye-laws imposed a direct restriction upon the fundamental right of the petitioner under Article 19 (1) (g) of the Constitution.

When the validity of a law placing restriction upon the exercise of fundamental rights in Article 19 (1) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State. A law requiring that an act which is inherently dangerous, noxious or injurious to public interest, health or safety or is likely to prove a nuisance to the community, shall be done under a permit or licence of an executive authority, it is not *per se* unreasonable and no person may claim a licence or permit to do that act as of right. Where the law providing for grant of a licence or a permit confers a discretion upon an administrative authority regulated by the rules of principles expressed or implied, and exercisable in consonance with rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion, the law *ex facie* infringes the fundamental right under Article 19 (1). Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition, but when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest lies heavily upon the State.

The impugned notification, though within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Article 19 (1) (g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interests of the general public and a less drastic

restriction will not ensure the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens effected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency national or local or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved.

The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable. If it is imposed, not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people whose way of life, belief or thought is not the same as that of the claimant.

The notification issued by the State Government must, therefore, be declared *ultra vires* as infringing Article 19 (1) (g) of the Constitution.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

Frank Anthony and *B. Datta*, Advocates, and *J. B. Dadachanji*, Advocate of M/s. *J. B. Dadachanji and Co.*, for Petitioner.

I. N. Shroff, Advocate, for Respondents.

The Judgment of the Court was delivered by

Shah, J.—The petitioner Mohd. Faruk who carries on the vocation of slaughtering bulls and bullocks at the Madar Tekdi Slaughter-House at Jabalpur claims a declaration that the notification dated 12th January, 1967, issued by the Governor of Madhya Pradesh in exercise of the powers conferred under sub-section (3) of section 430 of the Madhya Pradesh Municipal Corporation Act (XXIII of 1956), "cancelling confirmation of the bye-laws" made by the Jabalpur Municipal Committee for inspection and regulation of slaughter-houses "in so far as the bye-laws relate to slaughter of bulls and bullocks" infringes the fundamental freedoms guaranteed under Articles 14 and 19 of the Constitution.

Section 5(37) of the Madhya Pradesh Municipal Corporation Act (XXIII of 1956) defines "municipal slaughter-house". By section 66 (m) it is made obligatory upon the Corporation to make adequate provision for the construction, maintenance and regulation of a slaughter-house. By sub-section (1) of section 257 of the Act the Corporation may and when required by the Government shall fix places for the slaughter of animals for sale, and may with the like approval grant and withdraw licences for the use of such premises. By sub-section (3) it is enacted that when premises have been fixed under sub-section (1) no person shall slaughter any such animal for sale within the city at any other place. By sub-section (4) bringing into the city for sale, flesh of any animal intended for human consumption, which has been slaughtered at any slaughter-house or place not maintained or licensed under the Act, without the written permission of the Commissioner, is prohibited. Section 427 authorises the Corporation, with the sanction of the Government, to make bye-laws consistent with the provisions of the Act and the rules made thereunder for carrying out "the provisions and intentions" of the Act. The bye-laws may, *inter alia*, relate to the management of municipal markets and the supervision of the manufacture, storage and sale of food, and for that purpose may regulate the

sanitary conditions in municipal slaughter-houses. By section 430 it is provided that no bye-law made by the Corporation under the Act shall have any validity until it is confirmed by the Government. Power is conferred upon the Government by section 432 to modify or repeal either wholly or in part any bye-laws in consultation with the Corporation.

In exercise of the power conferred by section 178 (3) of the C. P. and Berar Municipalities Act II of 1922, bye-laws were made by the Jabalpur Municipality in January 1948. Those bye-laws continued to remain in force under the Madhya Pradesh Municipal Corporation Act (XXIII of 1956). The bye-laws controlled and regulated the conditions under which animals may be slaughtered in the premises fixed for that purpose and provided for inspection and for ensuring adequate precaution in respect of sanitation and for slaughter of animals certified by competent authorities as fit for slaughtering. By the notification issued by the Jabalpur Municipality a slaughter-house at a place called "Madar Tekdi" was fixed as premises for slaughtering animals. Under that notification bulls and bullocks were permitted to be slaughtered along with other animals like buffaloes, sheep, goats and pigs. But on 12th January, 1967, the State Government issued a notification "cancelling the confirmation of the bye-laws" insofar as they related to slaughter of bulls and bullocks at Madar Tekdi Slaughter-House. That notification places restrictions upon the right of the petitioner to carry on his hereditary vocation.

The question of permitting slaughter of cows, bulls and bullocks has, for a long time, generated violent sentimental differences between sections of the people in our country. After the enactment of the Constitution the controversy relating to the limits within which restrictions may be placed upon the slaughter of cows, bulls and bullocks was agitated before this Court in *Mohd. Hanif Quareshi and Others v. The State of Bihar*¹. In that case the validity of provisions made in three State Acts which imposed a total ban upon slaughter of all categories of "animals of the species of bovine cattle" was challenged. These Acts were the Bihar Preservation and Improvement of Animals Act, 1955, the U. P. Prevention of Cow Slaughter Act, 1955, and the C. P. and Berar Animals Preservation Act, 1949. The petitioners who followed the occupation of butchers and of dealings in the by-products of slaughter-houses challenged the validity of the three Acts on the plea that the Acts, infringed their fundamental rights under Articles 14, 19 (1) (g) and 25 of the Constitution. This Court held—(i) that a total ban on the slaughter of cows of all ages and calves of cows and of she-buffaloes, male and female, was reasonable and valid ; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes), so long as they were capable of being used as milch or draught cattle, was also reasonable and valid ; and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they ceased to be capable of yielding milk or of breeding or working as draught animals was not in the interests of the general public and was invalid.

Attempts were made from time to time to circumvent the judgment of this Court in *Mohd. Hanif Quareshi's case*¹. After that judgment, Legislatures of the State of Bihar, U.P. and Madhya Pradesh enacted the minimum age of animals to be slaughtered. The Bihar Act prohibited slaughter of a bull, bullock or she-buffalo unless the animal was over 25 years of age and had become useless. Under the U.P. Act slaughter of a bull or bullock was permitted only if it was over 20 years of age and was permanently unfit. Under the Madhya Pradesh Act slaughter of a bull, bullock or buffalo, except upon a certificate issued by the competent authority, was prohibited. The certificate could not be issued unless the animal was over 20 years of age and was unfit for work or breeding. This Court held in *Abdul Hakim Quaraishi and others v. The State of Bihar*², that the ban on the slaughter of bulls, bullocks and she-buffaloes below the age of 20 or 25 years was not a reasonable restriction in the interests of the general public and was void. The Court observed that a bull, bullock or buffalo did not remain useful after it was 15 years old, and whatever little

1. (1958) S.C.J. 975 : (1958) M.L.J. (Cri.) 727 : (1959) S.C.R. 629.

2. (1961) 2 S.C.R. 610 : (1962) 2 S.C.J. 523.

use it may then have been greatly offset by the economic disadvantages of feeding and maintaining unseviceable cattle. This Court also held that the additional condition that the animal must, apart from being above 20 or 25 years of age, be unfit was a further unreasonable restriction. On that ground the relevant provisions in the Bihar, U.P. and Madhya Pradesh Acts were declared invalid.

The present case is apparently another attempt, though on a restricted scale, to circumvent the judgment of this Court in *Mohd. Hanif Quareshi's case*¹. The bye-laws of the Jabalpur Municipality permitted slaughter of bulls and bullocks. A licence had to be obtained for that purpose. Slaughter of animals in places outside the premises fixed by the Municipality was prohibited by section 257 (3) of the Act, and sale of meat within the area of the Municipality of the animals not slaughtered in the premises fixed by the Municipality was also prohibited. Under the notification by which the bye-laws were issued in 1948, bulls and bullocks could be slaughtered in premises fixed for that purpose. But by the notification dated 12th January, 1967, confirmation of the bye-laws insofar as they related to bulls and bullocks was cancelled. The effect of that notification was to prohibit the slaughter of bulls and bullocks within the Municipality of Jabalpur. This cancellation of the confirmation of Bye-laws imposed a direct restriction upon the fundamental right of the petitioner under Article 19 (1) (g) of the Constitution.

In the affidavit filed on behalf of the State of Madhya Pradesh two principal contentions were raised :—(1) the power to rescind confirmation of the bye-laws cannot be challenged by reference to Article 14 or Article 19 of the Constitution, because the power vested in the Government to confirm the bye-laws carries with it the power to rescind such confirmation ; and (2) that since every person desiring to use a slaughter-house had to apply for and obtain a licence, which may be refused and if given was liable to be withdrawn, no person may insist that he shall be given a licence to slaughter animals in a slaughter-house.

The power to issue bye-laws indisputably includes the power to cancel or withdraw the bye-laws but the validity of the exercise of the power to issue and to cancel or withdraw the bye-laws must be adjudged in the light of its impact upon the fundamental rights of persons affected thereby. When the validity of a law placing restriction upon the exercise of fundamental rights in Article 19 (1) is challenged the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State. A law requiring that an act which is inherently dangerous, noxious or injurious to public interest, health or safety or is likely to prove a nuisance to the community, shall be done under a permit or licence of an executive authority, it is not *per se* unreasonable and no person may claim a licence or permit to do that act as of right. Where the law providing for grant of a licence or a permit confers a discretion upon an administrative authority regulated by rules or principles expressed or implied, and exercisable in consonance with rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion, the law *ex facie* infringes the fundamental right under Article 19 (1). Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition, but when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest lies heavily upon the State.

This Court in *Narendra Kumar and others v. The Union of India and others*², held that the word "restriction" in Articles 19 (5) and 19 (6) of the Constitution includes cases of "prohibition" also ; that where a restriction reaches the stage of total restraint of rights special care has to be taken by the Court to see that the test of reasonableness is satisfied by considering the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the harm caused to individual citizens by the proposed remedy, the beneficial effect reasonably expected

1. (1958) S.C.J. 975 : (1958) M.L.J. (Cri.) 727.

2. (1960) 2 S.C.R. 375 : (1960) S.C.J. 214.

to result to the general public, and whether the restraint caused by the law was more than what was necessary in the interests of the general public.

The impugned notification, though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Article 19 (1) (g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interests of the general public and a less drastic restriction will not ensure the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency—national or local—or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved.

The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if it is imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people whose way of life, belief or thought is not the same as that of the claimant.

The notification issued by the State Government must, therefore, be declared *ultra vires* as infringing Article 19 (1) (g) of the Constitution.

It is unnecessary to consider the validity of section 430 of the Act which was sought to be challenged in the petition or to consider whether there has been any infringement of the guarantee of the equality clause of the Constitution.

The petitioner will be entitled to his costs in this Court.

V.M.K.

Petition allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND K. S. HEGDE, JJ.

A. K. Jain and others

... *Appellants**

v.

... *Respondents.*

Union of India and others

Essential Commodities Act (X of 1955), sections 2 and 3—Scope—Control of the price of sugarcane, if comes within the ambit of the Act.

Constitution of India (1950), Article 372 and Entry 33 of List III—Scope—Pre-Constitution Act Bihar Sugar Factories Control Act, 1937, if stands altered by sub-rule (3) of rule 3 of Sugar Cane (Control) Order, 1955.

From the scheme of clauses (b) and (c) of section 2 and section 3 of the Essential Commodities Act, 1955, it is clear that the Parliament intended to bring under control the cultivation and sale of food-crops. In view of these provisions it is idle to contend that sugarcane does not come within the ambit of the Act. The provisions of sections 2 and 3 would certainly bring within the scope of this Act the regulation of the production of sugarcane as also the controlling of the price at which sugarcane may be bought or sold.

* CrI. A. No. 189 of 1966.

Held also that, Sub-rule (3) of rule 3 of Sugar Cane (Control) Order, 1955 specifically provides that unless there is an agreement in writing to the contrary between the parties the purchaser shall pay to the seller the price of the sugarcane purchased within 14 days from the date of the delivery of the sugarcane. This is a specific mandate. If the Bihar Sugar Factories Control Act, 1937 provides anything to the contrary the same must be held to have been altered in view of Article 372 of the Constitution which provides that all laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. The Parliament which altered or amended the Bihar Act, a pre-Constitution Act, under Entry 33 of List III of the Constitution is a competent authority.

Appeal by Special Leave from the Judgment and Order dated the 4th July, 1966 of the Patna High Court in Criminal W.J.C. No. 11 of 1966.

B. R. L. Iyengar, Senior Advocate (*U. P. Singh*, Advocate, with him), for Appellants.

V. A. Seyid Muhammad, Senior Advocate *S. P. Nayar*, Advocate with him, for Respondent No. 1.

The Judgment of the Court was delivered by

Hegde, J.—This appeal against the decision of the High Court of Patna in Criminal W.J.C. No. 11 of 1966 was brought after obtaining Special Leave from this Court. The principal question raised herein is whether the investigation which is being carried on against the appellants under sub-rule (3) of rule 3 of Sugar Cane (Control) Order, 1955 (to be hereinafter referred to as the Order) read with section 7 of the Essential Commodities Act, 1955 (to be hereinafter referred to as the Act) is in accordance with law.

The appellants are office bearers of M/s. S. K. G. Sugar Ltd. (Lauriya). A complaint has been registered against them under sub-rule (3) of rule 3 of the Order read with section 7 of the Act on the ground that they have failed to pay to the sellers the price of the sugar cane purchased by them, within the time prescribed. The said complaint is being investigated. The appellants are objecting to that investigation on various grounds. They unsuccessfully sought the intervention of the High Court of Patna under Article 226 of the Constitution in Criminal W. J. C. No. 11 of 1966. Hence this appeal.

Mr. B. R. L. Iyengar appearing for the appellants challenged the validity of the investigation in question on various grounds. We shall now proceed to deal with each one of those grounds.

The first contention of Mr. Iyengar was that sub-rule (3) of rule 3 could not have been validly issued under section 3 of the Act. According to him the said section 3 cannot be used for controlling the payment of the price of food crops ; it can only deal with food stuffs ; food-crops are outside its scope. This contention has been negatived by the High Court. We agree with the High Court that there is no merit in this contention. Section 2 (a) of the Act defines "essential commodity." Sub-clause (v) of that clause brings food-stuffs within the definition of essential commodity. Clause (b) of section 2 provides that food-crops include sugarcane. The next important provisions in the Act are clauses (b) and (c) of section 3 (1). Section 3 (1) provide: that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) of that section says that without prejudice to the generality of the powers conferred by sub-section (1) and order made thereunder may provide.....

"(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of food-crops generally or

of specified food-crops, and for otherwise maintaining or increasing the cultivation of food-crops generally, or of specified food-crops;”

Clause (c) provides for controlling the price at which any essential commodity may be bought or sold. From the scheme of clauses (b) and (c) of section 2 and section 3 of the Act, it is clear that the Parliament intended to bring under control the cultivation and sale of food-crops. In view of these provisions it is idle to contend that sugarcane does not come within the ambit of the Act. The question whether the cultivation and sale of sugarcane can be regulated under section 3 of the Act came up for the consideration of this Court in *Ch. Tika Ramji and others, etc. v. The State of U.P. and others*¹. At pages 432 and 433 of the report it is observed :

“Act X of 1955 included within the definition of essential commodity food stuffs which we have seen above would include sugar as well as sugarcane. This Act was enacted by Parliament in exercise of the concurrent legislative power under Entry 33 of List III as amended by the Constitution Third Amendment Act, 1954. Food-crops were there defined as including crops of sugarcane and section 3 (1) gave the Central Government powers to control the production, supply and distribution of essential commodities and trade and commerce therein for maintaining or increasing the supplies thereof or for securing their equitable distribution and availability at fair prices. Section 3 (2) (b) empowered the Central Government to provide *inter alia* for bringing under cultivation any waste or arable land whether appurtenant to a building or not for growing thereon of food-crops generally or specified food-crops and section 3 (2) (c) gave the Central Government power for controlling the price at which any essential commodity may be bought or sold. These provisions would certainly bring within the scope of Central legislation the regulation of the production of sugarcane as also the controlling of the price at which sugarcane may be bought or sold, and in addition to the Sugar Control Order, 1955 which was issued by the Central Government on 27th August, 1955, it also issued the Sugar Cane Control Order, 1955, on the same date investing it with the power to fix the price of sugarcane and direct payment thereof as also the power to regulate the movement of sugarcane.

Parliament was well within its powers in legislating in regard to sugarcane and the Central Government was also well within its powers in issuing the Sugar-Cane Control Order, 1955, in the manner it did because all this was in exercise of the concurrent power of legislation under Entry 33 of List III.”

It is needless to say anything more on this question.

It was next contended by Mr. Iyengar that the regulation of price of sugarcane is expressly dealt with by the Bihar Sugar Factories Control Act, 1937 and therefore we should not impliedly spell out the same power from the provisions of the Order and the Act. Mr. Iyengar is not right in contending that the power that is sought to be exercised in the instant case is an implied one. Sub-rule (3) of rule 3 specifically provides that unless there is an agreement in writing to the contrary between the parties the purchaser shall pay to the seller the price of the sugarcane purchased within 14 days from the date of the delivery of the sugarcane. This is a specific mandate. If the Bihar Act provides anything to the contrary the same must be held to have been altered in view of Article 372 of the Constitution which provides that all laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended to a competent legislature or other competent authority. Quite clearly the Bihar Act is a pre-Constitution Act and it could have continued to be in force only till it was altered, repealed or amended by a competent legislature or other competent authority. We shall presently see that the authority that altered or amended that law is a competent one.

The next contention of the learned Counsel for the appellants was that the Parliament had no competence to enact any law relating to the control of sugarcane as that subject is within the exclusive legislative jurisdiction of the State, the same being

1. (1956) S.C.J. 625 : (1956) S.C.R. 393 at p. 432 and 433.

a part of agriculture. This contention is again unsustainable in view of Entry 33 of List III of the Constitution which empowers the Parliament to legislate in respect of production, supply and distribution of foodstuffs. It is not disputed that the Parliament had declared by law that it is expedient in public interest that it should exercise control over food stuffs. That being so it was well within the competence of Parliament to enact the Act and hence the power conferred on the Government under section 3 of the Act cannot be challenged as invalid.

There is no substance in the contention that the impugned order contravenes the fundamental right guaranteed to the citizens under Article 19 (1). No fundamental right is conferred on a buyer not to pay the price of the goods purchased by him or to pay the same whenever he pleases.

The contention that in view of section 11 of the Act, no cognizance could have been taken of the offence alleged is premature. This question does not arise in this case. No Court has yet taken cognizance of the case. That stage has still to come.

There is no substance in the contention that the complaint made before the police does not disclose a cognizable offence and as such the police could not have taken up the investigation of that complaint. The offence complained of is punishable with three years' imprisonment and as such it falls within the 2nd Schedule of the Criminal Procedure Code, and consequently the same is a cognizable offence as defined in section 4 (1) (f) of the Criminal Procedure Code. Hence it was open to the police to investigate the same.

For the reasons mentioned above we are unable to accept any of the contentions advanced on behalf of the appellants. In the result this appeal fails and the same is dismissed.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND K. S. HEGDE, JJ.

Dhian Singh

... *Appellant**

v.

Municipal Board, Saharanpur and Another

... *Respondents.*

Prevention of Food Adulteration Act (XXXVII of 1954), section 20—Scope—Prosecution for an offence under the Act—Requirement of written consent of the Government or local authority—Complaint by the Food Inspector—Accused not questioning the maintainability of the complaint during the trial as well as in appeal—Accused if could be permitted to raise the contention after the disposal of the appeal.

Section 20 of the Prevention of Food Adulteration Act, 1954 prescribes that no prosecution for an offence under that Act should be instituted except by or with the written consent of, the Central Government or the State Government or a local authority or a person authorised in this behalf, by general or special order, by the Central Government or the State Government or a local authority. There is no dispute that the Municipal Board is a local authority. Hence it was competent to file a complaint or authorise some one else to file complaint on its behalf. In the present case, the question whether the Food Inspector was authorised by the Municipal Board to file the complaint was never put into issue. Both the parties to the complaint proceeded on the basis that it was a validly instituted complaint. It was never the case of the accused that the complaint was invalid. If the complaint had been filed by the Food Inspector on the authority of the local board, the complaint must be held to have been instituted by the local board itself. The question whether he had authority to file the complaint on behalf of the local board is a question of fact. Official acts must be deemed to have been done according to law. If the accused had challenged the authority of the Food Inspector to file the complaint, the trial Court would have gone into that question. The accused cannot

be permitted to take up that contention for the first time after the disposal of the appeal.

Held also that, under section 20 of the Act, no question of applying one's mind to the facts of the case before the institution of the complaint arises as the authority to be conferred under that provision can be conferred long before a particular offence has taken place.

Appeal by Special Leave from the Judgment and Order dated the 18th April, 1966 of the Allahabad High Court in Criminal Appeal No. 1642 of 1964.

R. K. Garg and S. C. Agarwal Advocates of *M/s. Ramamurthi & Co.*, and *Sumitra Chakravarty and Uma Dutt* Advocates, for Appellant.

O. P. Rana, Advocate, for Respondent. No. 2.

The Judgment of the Court was delivered by

Hegde J.—Two contentions advanced in this appeal by Special Leave are (1) that the appeal filed by the Municipal Board, Saharanpur before the High Court of Allahabad under section 417 (3) of the Criminal Procedure Code was not maintainable in law and (2) the accused could not have been convicted on the strength of the certificate of the Public Analyst annexed to the complaint. The High Court rejected both these contentions.

The material facts relating to this appeal are these : The accused in this case is the proprietor of Khalsa Tea Stall situated in Court Road, Saharanpur. Among other things he was selling coloured sweets. On suspicion that the sweets sold by him were adulterated, the Food Inspector, Municipal Board, Saharanpur purchased from the accused for examination some coloured sweets under a *Yaddasht* on 31st May, 1963, and sent a portion of the same to the Public Analyst of the Government of U.P. for examination. The Public Analyst submitted his report on 24th June, 1963. It reads :

“ See Rule 7 (3)

REPORT BY THE PUBLIC ANALYST.

Report No. 11652.

I hereby certify that I, Dr. R.S. Srivastava, Public Analyst for Uttar Pradesh, duly appointed under the provisions of the Prevention of Food Adulteration Act, 1954, received on the 4th day of June, 1963, from the Food Inspector C/o Medical Officer of Health, Municipal Board, Saharanpur a sample of coloured sweets (*Patisa*) prepared in Vanaspati No. 264 for analysis, properly sealed and fastened and that I found the seal intact and unbroken.

I further certify that I have caused to be analysed the aforementioned sample and declare the result of the analysis to be as follows :—

Test for the presence of coal-tar dye: Positive.

Coal-tar dye identified :—Metanil yellow. (Colour Index No. 138).

ANALYTICAL DATA IN RESPECT OF FAT OR OIL USED IN THE PREPARATION OF THE SAMPLE

1. Bityro—refractometer reading at 40 C :—50.5.

2. Melting point :—33.8 C.

3. Baudouin's test for the presence of Til oil :—Positive.

4. Tintometer reading on Lovibond Scale 4.0 Red Units plus 0.1 yellow unit coloured with a coal-tar dye namely, Metanil Yellow (Colour Index No. 138) which is not one of the coal-tar dyes permitted for use in foodstuffs under rule No. 28 of the Prevention of Food Adulteration Rules, 1955.

No change had taken place in the constituents of the sample which would have interfered with analysis.

Signed this 24th day of June, 1963.

The sample belongs to:—

S. DHIAN SINGH S/O JIWAN SINGH.

R. S. Srivastava,

M.Sc. L.L.B. Ph.D. (Lond.), P.R.L.C.,
Public Analyst to Government of U.P.
Public Analyst, Uttar Pradesh, Lucknow.

Sender's address :

The Food Inspector, C/o Medical Officer of Health, Municipal Board, Saharanpur."

On the basis of that certificate, a complaint was filed in the Court of City Magistrate, Saharanpur under section 7 read with section 16 of the Prevention of Food Adulteration Act, 1954. It is purported to have been filed by the Municipal Board, Saharanpur but it was signed by its Food Inspector. The accused pleaded not guilty. Various contentions were taken by the accused in support of his defence. The trial Court acquitted him taking the view that as the report of the analyst did not contain any data, no conviction could be founded on its basis and as the *Yaddashit* relating to the sale had not been attested as required by law, the seizure in question must be held to be invalid. As against that decision, the Municipal Board of Saharanpur went up in appeal to the High Court under section 417 (3), Criminal Procedure Code. The High Court allowed the appeal disagreeing with the trial Court on both the questions of law referred to earlier. It came to the conclusion that the analyst had given the necessary data and hence his report afforded sufficient basis for conviction. It further opined that the fact that the *Yaddashit* had not been attested by the witnesses of the locality, did not vitiate the seizure made. At the hearing of the appeal, no objection about the maintainability of the appeal was taken. The judgment of the High Court was rendered on 18th April, 1966. The High Court convicted the appellant and sentenced him to undergo rigorous imprisonment for two months and to pay a fine of Rs. 100, in default to undergo further imprisonment for a period of one month. On 28th April, 1966, the accused filed an application for certificate under Article 134 of the Constitution. On 4th May, 1966, when the application filed under Article 134 of the Constitution for certificate was still pending, the accused moved the High Court under section 561-A, Criminal Procedure Code, for reviewing its judgment of dated 18th April, 1966, principally on the ground that the appeal filed by the Municipal Board was not maintainable under section 417 (3), Criminal Procedure Code as the complaint had been instituted by the Food Inspector and not by the Municipal Board. The application under section 561 (A) was dismissed by the High Court as per its order of 16th March, 1967 repelling the contention of the accused that the complaint had not been instituted by the Municipal Board. It further came to the conclusion that it had no power to review its own judgment. The certificate prayed for under Article 134 of the Constitution was also refused by a separate order of the same date. Thereafter this appeal was brought after obtaining Special Leave.

Mr. Garg, learned Counsel for the appellant strenuously contended that the appeal filed by the Municipal Board of Saharanpur before the High Court under section 417(3), Criminal Procedure Code, was not maintainable as the complaint from which that appeal had arisen had been instituted by the Food Inspector. Section 417(3) of the Criminal Procedure Code, provides that if an order of acquittal is passed in any case instituted upon complaint, the High Court may grant to the complainant Special Leave to appeal against the order of acquittal. It is clear from that section that Special Leave under that provision can only be granted to the complainant and to no one else. It may be noted that in this case no appeal against acquittal had been filed by the State. Hence the essential question for consideration is whether the complainant before the Magistrate was the Municipal Board of Saharanpur? The complainant shown in the complaint is the Municipal Board of Saharanpur but the

complaint was signed by the Food Inspector. Section 20 of the Prevention of Food Adulteration Act, 1954 prescribes that no prosecution for an offence under that Act should be instituted except by, or with the written consent of, the Central Government or the State Government or a local authority or a person authorised in this behalf, by general or special order, by the Central Government or the State Government or a local authority. There is no dispute that the Municipal Board is a local authority. Hence it was competent to file a complaint. It was also competent for that board to authorise someone else to file complaints under the Prevention of Food Adulteration Act on its behalf. As seen earlier, the complaint purports to have been filed by the Municipal Board. That board could have authorised its Food Inspector to file the complaint on its behalf. Neither in the trial Court, nor in the High Court at the stage of hearing of the appeal, any objection was taken by the accused as to the maintainability either of the complaint or of the appeal. Both these Courts and the parties before it proceeded on the basis that the Municipal Board, Saharanpur was the complainant and its Food Inspector had filed the complaint on its behalf. It is only after the disposal of the appeal, the accused for the first time took up the contention that the Municipal Board was not the real complainant.

It is true that the complaint was signed by the Food Inspector. As seen earlier it was competent for the Municipal Board to authorise him to file the complaint. The question whether he was authorised by the Municipal Board to file the complaint was never put into issue. Both the parties to the complaint proceeded on the basis that it was a validly instituted complaint. If the Municipal Board had not authorised him to file the complaint then the complaint itself was not maintainable. If that is so, no question of the invalidity of the appeal arises for consideration. It was never the case of the accused that the complaint was invalid. In *K.C. Aggarwal v. Delhi Administration*¹, this Court has held that a complaint filed by one of the officers of a local authority at the instance of that authority is in law a complaint instituted by that local authority. Therefore if the complaint with which we are concerned in this case had been filed by the Food Inspector on the authority of local board, the complaint must be held to have been instituted by the local board itself. The question whether the Food Inspector had authority to file the complaint on behalf of the local board is a question of fact. Official acts must be deemed to have been done according to law. If the accused had challenged the authority of the Food Inspector to file the complaint, the trial Court would have gone into that question. The accused cannot be permitted to take up that contention for the first time after the disposal of the appeal. This Court refused to entertain for the first time an objection as regards the validity of a sanction granted in *Mangaldas Raghavji and another v. State of Maharashtra and another*². Mr. Garg, learned Counsel for the accused urged that a permission under section 20 of the Prevention of Food Adulteration Act, 1954 to file a complaint is a condition precedent for validly instituting a complaint under the provisions of that Act. The fulfilment of that condition must be satisfactorily proved by the complainant before a Court can entertain the complaint. Without such a proof, the Court will have no jurisdiction to try the case. In support of that contention of his he sought to take assistance from the decision of the Judicial Committee in *Gokulchand Dwarkadas Morarka v. The King*³ and *Madan Mohan Singh v. The State of U.P.*⁴. Both those decisions deal with the question of the validity of sanctions given for the institution of certain criminal proceedings. The provisions under which sanction was sought in those cases required the sanctioning authority to apply its mind and find out whether there was any justification for instituting the prosecutions. The Judicial Committee as well as this Court has laid down that in such cases, the Court must be satisfied either from the order of sanction or from the other evidence that all the relevant facts had been placed before the sanctioning authority and that authority had granted the sanction after applying its mind to those facts. The ratio of those decisions has no bearing on the facts of this case. Under section 20 of the Prevention of Food Adulteration Act, 1954, no question of applying one's mind to

1. CrI. A. No. 100 of 1966 decided on 27th May, 1969.
 2. (1966) 2 S.C.J. 87 : (1966) M.L.J. (CrI.) 506 :
 3. (1948) 1 M.L.J. 243 : (1935) 75 I.A. 30.
 4. A.I.R. 1954 S.C. 637.

(1965) 2 S.C.R. 894.

the facts of the case before the institution of the complaint arises as the authority to be conferred under that provision can be conferred long before a particular offence has taken place. It is a conferment of an authority to institute a particular case or even a class of cases. That section merely prescribed that person or authorities designated in that section are alone competent to file complaints under the statute in question.

For the reasons mentioned above, we are unable to accept the contention of the accused that the Municipal Board of Saharanpur was not competent to file the appeal.

The only other question canvassed before us is that the report of the analyst could not have afforded a valid basis for founding the conviction as the data on the basis of which the analyst had reached his conclusion is not found in that report or otherwise made available to the Court. We are unable to accept this contention as well. It is not correct to say that the report does not contain the data on the basis of which the analyst came to his conclusion. The relevant data is given in the report. A report somewhat similar to the one before us was held by this Court to contain sufficient data in *Mangaldas's case*¹ referred to earlier. The correct view of the law on the subject is as stated in the decision of the Allahabad High Court in *Nagar Mahapalika of Kanpur v. Sri Ram*², wherein it is observed :

"That the report of the public analyst under section 13 of the Prevention of Food Adulteration Act, 1954, need not contain the mode or particulars of analysis nor the test applied but should contain the result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated as defined in section 2 (1) of the Act."

In the result the appeal fails and the same is dismissed. The appellant is on bail. He should surrender to his bail and serve the sentence imposed on him.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—M. HIDAYATULLAH, *Chief Justice*, J. M. SHELAT, V. BHARGAVA, K. S. HEGDE AND A. N. GROVER, JJ.

Kumari Chitra Ghosh and another

.. *Appellants**

v.

Union of India and others

.. *Respondents.*

Constitution of India (1950), Article 14—Scope—Legislation—Reasonable Classification—Test—Classification to be founded on intelligible differentia and differentia to have a rational relation to the object sought to be achieved.

Constitution of India (1950), Article 14—Scope—Admission to medical college—Reservation of seats to sons and daughters of Union territories other than Delhi, Central Government servants posted in Indian Missions abroad and cultural, Colombo Plan and Thailand scholars—Classification, if satisfies the test of reasonableness.

The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union territories other than Delhi. These areas are well known to be comparatively backward and the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility for doing so. As regards the sons and daughters of Central Government servants posted in Indian Missions abroad it is equally well known that due to exigencies of their service these persons are faced with lot of difficulties in the matter of education. Apart from the problems of language, it is not easy or always possible to get admission into institution imparting medical education

1. (1966) 2 S.C.J. 87 : (1966) M.L.J. (Cri) 506 : (1965) 2 S.C.R. 894.

2. (1963) All. L.J. 765.

* C.A. No. 452 of 1969.

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A STUDY OF ' ERROR OF LAW APPARENT ON THE FACE OF THE RECORD '.

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A superior Court can review the decision of a tribunal if there is an error of law apparent on the face of the record. A tribunal may commit an error of fact or an error of law within its jurisdiction. A superior Court cannot however correct the errors because if the superior Court interferes then the case could be decided *de novo*; the superior Court cannot assume functions of an Appellate Court. The superior Court can interfere only if the error is patent on record and no arguments are required to establish it. The error of law apparent on the face of the record is always self evident and demonstrable. It means that the supervising Court cannot weigh the evidence or cannot interfere with the findings of fact of the inferior tribunal. "An error in the decision or determination itself may also be amenable to a writ of *certiorari* but it must be a manifest error apparent on the face of the proceedings e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is only a patent error which can be corrected by *certiorari*, but not a mere wrong". A wrong decision cannot be reviewed by the Superior Court and the reason is that if a tribunal has jurisdiction to decide then it includes jurisdiction to decide rightly as well as wrongly. If the tribunal has given a wrong decision then it can be corrected by way of appeal, if provided in the statute. A wrong finding of fact cannot be interfered with by reviewing Court unless the fact is a jurisdictional fact. If the reviewing Court interferes with the erroneous finding of fact then the reviewing Court would convert itself into a Court of appeal which is not permissible by the law. "The Court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or tribunal even if they be erroneous."²

1. Per Mukherjea, J. in *T.C. Basappa v. T. Nagappa*, (1954) S.C.I. 695 : (1955) 1 S.C.R. 250: A.I.R. 1954 S.C. 440 at page 444.

Similar views were expressed by Morris, L.J. in *R. v. Northumberland Compensation Appeal Tribunal Exp. Shaw*, L.R. (1952) 1 K.B. 338 at page 357. The Lord Justice said, 'It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the face of an order or decision or irregularity or absence of or excess of jurisdiction when shown.'

Gajendragadkar, J. in *Sri Ambika Mills Co. v. S.B. Bhatt*, (1961) 1 M.L.J. (S.C.) 198: (1961) 1 An. W.R. (S.C.) 198: (1961) 1 S.C.J. 643: A.I.R. 1961 S.C. 970 at 973., observed, 'There is no doubt that it is only errors of law which are apparent on the face of the record that can be corrected, and errors of fact though they may be apparent on the face of the record cannot be corrected.'

See also *Nagendra Nath Bora v. Commissioner of Hills Division*, (1958) S.C.R. 1240 : (1958) S.C.J. 798 : A.I.R. 1958 S.C. 398.

2. *Hari Vishnu Kamath v. Syed Ahmad Ishaque*, (1955) S.C.J. 267: (1955) 1 M.L.J. (S.C.) 157 : (1955) 1 S.C.R. 1104 at p. 1121 : A.I.R. 1955 S.C. 233.

What is error of law apparent on the face of the record.

Now it is evident that the Superior Courts would interfere if there is an error of law apparent on the face of the record. But what is error of law apparent on the face of the record? No error could be said to be apparent on the face of the record if it was not self evident and if it required an examination or argument to establish it³. The same view was also expressed by Gajendragadkar, J., as difficulty however, arises when it is attempted to lay down tests for determining when an error of law can be said to be an error apparent on the face of the record. Sometimes it is said that it is only errors which are self evident, that is to say, which are evident without any elaborate examination of the merits that can be corrected and not those which can be discovered only after the elaborate argument⁴. But an error of law may be self-evident to a particular judge and not to another because judicial opinions may differ⁵. In such situations it is very difficult to define what is an error apparent on the face of the record. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the facts of each case⁶. Similarly, a finding based on no evidence is an error of law apparent on the face of the record. But errors in appreciation of documentary evidence or errors in drawing inferences are not errors of law and can be corrected only by way of appeal⁷. If a statutory provision is capable reasonably of two constructions and one construction has been adopted by the inferior Court then it cannot be said that the construction so made constitutes an error of law apparent on the record⁸. When an error of law apparent on the face of the record is found and a writ of *certiorari* is issued the usual course to adopt is to correct the error and send the case back to the inferior Court or tribunal for its decision in accordance with law. In such cases the reviewing Court cannot consider the evidence itself and reach its own conclusions in the dispute involved therein⁹. In *Champsay Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.*¹⁰, Lord Dunedin said that an error on the face of an award means that the Court must find whether there is any legal proposition which is the basis of such an award. His Lordship also observed that where an

3. Chagla, C.J. in *Batuk K. Vyas v. Surat Municipality*, A.I.R. 1953 Bom.133;..... it is well established that the High Court cannot in exercise of its power under that section (section 107 of the Government of India Act, 1915) assume appellate powers to correct every mistake of law.' Per A.K. Sarkar J. in *Satyanarayan v. Mallikarjun*, (1960) S.C.J. 1065 : (1960) S.C.R. 890 : A.I.R. 1960 S.C. 137 at page 142.

4. *Shri Ambica Mills Co. v. S.B. Bhatt*, (1961) 1 S.C.J. 643 : (1961) 1 M.L.J. (S.C.) 198 : (1961) 1 An. W.R. (S.C.) 198 : A.I.R. 1961 S.C. 970 at page 973.

5. Venkatarama Ayyar, J. in *Hari Vishnu Kamath v. S.A. Isaque*, (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) 1 S.C.R. 1104 at page 1123 said 'There must be cases even this test might, break down because judicial opinions also differ, and an error that may be considered by one judge as self evident might not be so considered by another.'

6. (1955) 1 S.C.R. 1104 at page 1124 : (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157.

7. *Kaushalya Devi and others v. Bachittar Singh and others*, A.I.R. 1960 S.C. 1168.

8. Gajendragadkar, J. in *Syed Yakub v. K.S. Radhakrishnan and others*, (1964) 5 S.C.R. 64 : A.I.R. 1964 S.C. 477,480; 'An error which has to be established by a long drawn process of reasoning on a point where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. *Satya Narayan v. Mallikarjun*, (1960) S.C.J. 1065 : (1960) S.C.R. 890 : A.I.R. 1960 S.C. 137 at page 141-142.

9. Gajendragadkar, J. in *T. Prem Sagar v. M/s. Standard Vacuum Oil Corp.*, (1964) 5 S.C.R. 1030 : A.I.R. 1965 S.C. 111 at page 118.

10. L.R. (1923) A.C. 480 : 44 M.L.J. 706 : L.R. 50 I.A. 324 : A.I.R. 1923 P.C. 66.

award is challenged upon such a ground it is not possible to read words into it or to draw inferences and the award or the order must be taken as it stands¹¹. Two learned English writers, Griffith and Street, have observed. 'There may be an error of law on the face of the record either because the facts, being fully stated on the record, are plainly inconsistent in law with the decision reached or because a wrong proposition of law has been relied on in the record'¹². But the formula given by the learned writers is not always applicable and does not cover all the cases of error of law apparent on the face of the record. It appears that it is impossible to define error of law apparent on the face of the record. Whether or not an impugned error is an error of law which is apparent on the face of the record must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision alleged to have been misconstrued or contravened.¹³

In England, the first case where a writ of *certiorari* was issued against a decision of an Administrative Tribunal, on the ground of error apparent on the face of the record, was *R. v. Northumberland Compensation Appeal Tribunal Exp. Shaw*¹⁴. In that case, due to the National Health Service Act, 1946, the applicant lost his service, in a Hospital Board. Some Compensation was awarded by the Compensation Authority to him according to the provisions of the Act, Aggrieved by the amount awarded he took the matter to the tribunal. The Tribunal calculated the duration of the applicant's services without taking into account the service of the applicant with the local Government Board. The Tribunal rejected the appeal of the applicant. The applicant applied to the Divisional Court for an order of *certiorari* to quash the order of the Tribunal. Before the divisional Court, it was admitted by the counsel for the Tribunal that there was an error on the face of the order made by the Tribunal but contended that no *certiorari* could be issued against a statutory tribunal on the ground of error of law on the face of the record. But the Divisional Court granted the order for *certiorari*. The Tribunal appealed. The Court of Appeal dismissed the appeal and held that there was an error of law on the face of the record. The Tribunal gave a "speaking order" where the Tribunal considered the services of the applicant to the Hospital Board only and did not consider the service of the applicant with the Local Government Board. Morris L. J., said 'it is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity or absence of or excess of jurisdiction where shown.'

11. This dictum was followed in *M/s. Bharat Barrel and Drum Mfg. Co. v. L.K. Bose and others*, (1967) 1 S.C.R. 739 : (1968) 1 S.C.J. 199 : A.I.R. 1967 S.C. 361.

12. 'Principles of Administrative Law' (1959) at page 218, 219. This idea of Griffith and Street is reflected in the decision of Gajendragadkar in *Syed Yakob v. K.S. Radhakrishnan*, (1964) 5 S.C.R. 64 : A.I.R. 1964 S.C. 477 at page 480. as 'Thus where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on a statutory provision, or sometimes in ignorance of it, or may be even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of *certiorari*. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty, is experienced by the High Court in holding on the face of the record.'

13. Per Gajendragadkar, J. in *Syed Yakob v. K.S. Radhakrishnan*, (1964) 5 S.C.R. 64 : A.I.R. 1964 S.C. 477, 480.

14. L.R. (1952) 1 Q.B. 338.

The first Indian case where a writ of *certiorari* was issued against the decision of administrative tribunal on the ground of error of law apparent on the face of record was *Hari Vishnu Kamath v. Syed Ahmed Ishaque*¹⁵. Writ of *certiorari* was issued on the ground of the error of law apparent on the face of the record when votes were counted¹⁶ against the provisions of rule 47 (c) of the rules made under the Representation of the People Act, 1951 ; when a person was dismissed¹⁷ from service on the charge of having political leaning but not as having had any objectionable activity amounting to misconduct. *Certiorari* was not issued on the ground of erroneous finding of facts because whether petitioner had a workshop or not at terminus of a route was a pure question of fact¹⁸ and the High Court had no jurisdiction to interfere with the finding recorded by the appellate Tribunal and the High Court cannot seek to correct it by issuing a writ of *certiorari*.

What is Record.

A record comprises the document in which determinations of a decision are recorded. It also comprises the document which initiates the proceedings, the pleadings if any and the adjudication¹⁹. A statement of reasons given²⁰ by the Tribunal is deemed to be part of the record. If the record is incomplete the Superior Court can ask the inferior Court or tribunal to complete it. Error of law will, not usually be disclosed unless the Tribunal has given reasons for its decision. But an error of law may sometimes be held to be apparent on the face of the record even though the Tribunal has not set out or has not fully set out its process of legal reasoning²¹.

Speaking Order.

A speaking order is an order where reasons for the decision are set out. If in the decision reasons are not given then it would be very difficult for the reviewing Court to issue a writ of *certiorari*. It seems that it would be correct to say that where the impugned decision does not give any reasons whatsoever, so that evidence has to be taken in order to discover the erroneous reasons, the Court will not do so, in the exercise of its power to issue *certiorari*; if the impugned order is a 'speaking order' i.e., the reasons for the decision are set out therein, the Court will issue *certiorari*.

The word speaking order can be traced from *Walsall Overseers v. London and North Western Ry. Co.*²², where, Lord Carns said: All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it an unspeaking or unintelligible order, but should in some way, state upon the face of the order the elements which had led to the decision of the Court of Quarter Sessions, stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated ; then the order became upon the face of it a speaking order ; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might

15. (1955) 1 S.C.R. 1104 : (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157.

16. *Ibid.*

17. *Dakshinamurthi v. State of Madras and others*, I.L.R. (1964) 1 Mad. 861 : (1964) M.L.J. (Cri.) 671 : (1964) 2 M.L.J. 535 : A.I.R. 1967 Mad. 392.

18. *Syed Yakoob v. K.S. Radhakrishnan and others*, (1964) 5 S.C.R. 64 : A.I.R. 1964 S.C. 477.

19. Per Denning L.J. in *Shaw's case*, L.R. (1952) 1 K.B. 338 at 352.

20. See section 12 of the Tribunals and Inquiries Act, 1958.

21. De Smith-Judicial Control of Administrative Action-page 303.

22. (1878) L.R. 4 App. Cas. 30.

go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and when so removed to pass judgment upon it, whether it should or should not be quashed²³. In this case Lord Cairns distinguished an 'unspeaking order' from a 'speaking order.' Later this dictum of Lord Cairns was followed in *R. v. Northumberland Compensation Appeal Tribunal, Exp Shaw*²⁴, where Lord Goddard said 'Similarly anything that is stated in the order which an inferior Court has made and which has been brought up into this Court can be examined by the Court, if it be a speaking order, that is to say, an order which sets out the grounds of the decision²⁵. The *Northumberland case*²⁴ was followed in *Hari Vishnu Kamath v. Syed Ahmed Ishaque*¹.

When an administrative authority is inflicting punishment upon a person, the order of punishment must contain reasons for the decision because the authority acts in a quasi-judicial manner in inflicting the punishment. So where punishing administrative authority passed an order without assigning any reason for the removal of an employee for his unsatisfactory conduct, it was held that the omission to give reasons made the order of removal illegal². Hence the order of the Tribunal must *ex facie* disclose the reasons³, which persuaded the Tribunals to give such decision. The statement of reasons in a decision of lower Court or authority is not only relevant in case of judicial review but it is also relevant in case of an appeal because in the absence of reasons it is impossible for the Courts exercising appellate powers, or powers of superintendence, to see whether or not the authority was influenced by any extraneous considerations⁴. The Supreme Court of India has very recently said⁵ that an order of an administrative authority should contain reasons for it. Hidayatullah, J., observed. The next question is whether government was justified in making the order of 26th April, 1955? That order gives no reasons at all. The Act lays upon the Government a duty which obviously must be performed in a judicial manner. The appellants do not seem to have been heard at all. The Act bars a suit and there is all the more reason that Government must deal with such cases in a quasi judicial manner giving an opportunity to the claimants to state their case in the light of the report of the Deputy Commissioner. The appellants were also entitled to know their reason why their claim for the grant of money or a pension was rejected by Government and how they were considered as not falling within the class of persons who it was clearly intended by the Act, it to be compensated in this manner⁶. This statement clearly shows as to what should be done by an administrative authority while pronouncing a decision. It is clear now on these discussed authorities that an administrative authority should pronounce its decisions with reasons.

23. (1878) L.R. 4 A.C. 30 at page 40.

24. L.R. (1951) 1 K.B. 711.

25. L.R. (1951) 1 K.B. 711 at page 718.

1. (1955) 1 S.C.R. 1104: (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157.

2. *P.J. Joseph v. Superintendent of Post Offices*, A.I.R. 1961 Ker. 197.

3. *M. Ramayya v. State of Andhra*, A.I.R. 1956 Andh. 217.

4. *Jagannath Kashinath Kavalakar v. Union of India and others*, A.I.R. 1967 Delhi 121, 124.

5. *Sardar Govindrao v. State of M.P.*, (1966) 1 S.C.J. 480 : (1965) 1 S.C.R. 678 : A.I.R. 1965 S.C. 1222.

6. A.I.R. 1965 S.C. 1222 at page 1226 : (1966) 1 S.C.J. 480 : (1965) 1 S.C.R. 678.

OMBUDSMEN IN DEVELOPING COUNTRIES

By

JOSEPH MINATTUR*

Ombudsman is defined as "a legislative commissioner for the investigation of citizens' complaints of bureaucratic abuse."¹

In an attempt at describing him and his office, the Thirty-second American Assembly stated that he is

"an independent, high-level officer who receives complaints, who pursues inquiries into matters involved, and who makes recommendations for suitable action. He may also investigate on his own motion. He makes periodic public reports. His remedial weapons are persuasion, criticism and publicity. He cannot as a matter of law reverse administrative action."²

It is common knowledge that the institution of Ombudsman originated in Sweden. Provision was made for it in the Swedish Constitution of 1809. Finland adopted the institution in 1919, and Denmark made provision for it in the Constitution of 1953. In 1962 Norway appointed an Ombudsman for Civil Affairs. The same year witnessed a country in the Commonwealth—New Zealand—adopting the institution.

From the time Professor Stephan Hurwitz, the Danish Ombudsman, who took office in 1955, began propagating the Ombudsman idea, enthusiasm was evinced for it in many parts of the world. We have seen that New Zealand adopted the institution in 1952. A few years later a Parliamentary Commissioner for Administration was appointed in the United Kingdom. Two provinces of Canada, Alberta and New Brunswick, as well as the State of Hawaii in the United States appointed their Ombudsmen. Northern Ireland may appoint one very soon. One hears in England talk of an Ombudsman for hospitals. A London borough council announced the appointment of an unofficial Ombudsman.³ An American University, it is reported, has appointed an Ombudsman to deal with student grievances; even department stores in the United States have not been slow to jump on the Ombudswaggon; one of them in San Francisco has appointed an Ombudsman to deal with customer's complaints.⁴

Two developing countries of the Commonwealth, Guyana and Mauritius, recently adopted the institution. India contemplates adopting it at two levels;

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1. S.V. Anderson, "Ombudsman", in *Encyclopaedia Britannica*, (1968) ed.)

2. Quoted in S.V. Anderson (ed) *Ombudsman for American Government* ? p. 3. If an additional definition is required here is one from Professor D.C. Rowat. He says that the Ombudsman "is an independent, politically neutral officer of the legislature, usually provided for in the constitution, who receives and investigates complaints from the public against administrative action, and who has the power to criticize and publicize, but not to reverse such action." ("The Spread of the Ombudsman Idea" in S.V. Anderson (ed) *Ombudsman for American Government* ? p. 36.

3. F.P. Ridley, "The Ombudswaggon", *Parliamentary affairs* Vol. XXI, p. 285.

4. F.P. Ridley, *op. cit.* p. 286 ; D C. Rowat, *The Ombudsman ; Citizen's Defender*, p. 15.

one Ombudsman for investigating complaints against ministers and secretaries to government, and a number of others to investigate administrative acts of other public authorities at the Centre and in the States. In Singapore, the Constitutional Commission recommended the adoption of constitutional provisions for an Ombudsman similar to those in Guyana and Mauritius.

When there is so much 'Ombudsmania' it may be worthwhile to look at the institution as adopted in two Commonwealth countries. Guyana and Mauritius have been selected for this purpose, in view of the fact that they may provide the necessary guidelines for other developing countries of the Commonwealth where the adoption of the institution is contemplated.

In Guyana

A separate part of Chapter V dealing with the Executive in the Constitution of Guyana is devoted to the office of the Ombudsman. This part deals with his appointment, his jurisdiction, his function on concluding an investigation and his annual report to the National Assembly.

The Ombudsman in Guyana is to be appointed by the Governor-General on the recommendation of the Prime Minister after consulting with the Leader of the Opposition.⁵ He is precluded from performing the functions of any other public office, and also from holding any other office of profit except with the approval of the Prime Minister in each particular case, and from engaging in any other occupation for reward.⁶ The appointment is for a term of four years. He may be removed for inability to discharge the functions of his office or for misbehaviour if a tribunal to which the question of removing him from office has been referred recommends such removal.⁷ The Governor-General appoints the tribunal on the advice of the Prime Minister and it will consist of a Chairman and at least two members selected by the Prime Minister, after consultation with the Judicial Service Commission.⁸

The Ombudsman may investigate any administrative action taken by any department of government or by any other authority or by Ministers⁹, officers or members of such department or authority on or after Independence day¹⁰

He may investigate any such action.

(i) if a complaint made made to him by any person alleging that the complainant has sustained injustice on account of a fault in administration.

(ii) if a Minister or a Member of the National Assembly requests the Ombudsman to conduct an investigation on the ground that some person has or may have sustained such injustice.

5. Constitution of Guyana, Article 52 (2).

6. Article 52 (3).

7. Article 52 (5).

8. Article 53.

9. In Denmark, Finland and Norway, the Ombudsman has jurisdiction to investigate the administrative actions of Ministers. In Sweden, where his powers of investigation do not extend to the Ministers, the administrative departments are independent of the Ministers. They have no political responsibility for the measures decided upon by subordinate, but independent officials. (See Rowat : *The Ombudsman : Citizen's Defender*, p. 26).:

10. that is, 26th May, 1966.

(iii) on his own motion when he considers that some person has or may have sustained such injustice.¹¹

The complaint may be made by the aggrieved person himself or by his representative in cases where he is unable to act for himself.¹²

He is precluded from investigating an action (or inaction) when the complainant has a remedy in Court, or a right of appeal, review or reference before any other independent tribunal. He may, however, conduct an investigation if he is satisfied that in the particular circumstances it is not reasonable to expect the complainant to take or to have taken proceedings in a Court.¹³ Further, he is not precluded from investigating an action on the ground that the complainant can apply to the High Court for redress in cases where contravention of his fundamental rights is alleged.

A schedule annexed to the Constitution lists a number of matters exempted from the jurisdiction of the Ombudsman. They are:

(i) matters certified by a Minister to affect relations between Guyana and other States or international organisations,

(ii) action taken for protecting the security of the State or investigating crime, including action taken in regard to passports for any of these purposes.

(iii) proceedings in a Court,

(iv) appointments to offices under the Crown, appointments made by or with the approval of the Governor-General or any Minister, action taken in relation to any present or former holder of any such office or employment,

(v) action taken in respect of orders or directions to naval, military,¹⁴ air or police force or prison service,

(vi) the exercise of the prerogative of mercy.

(vii) the grant of honors, awards and privileges,

(viii) action taken in matters relating to contractual or other commercial dealings with the members of the public other than action by any authority empowered to determine the persons with whom any contract shall be made by the government and any authority specified by Parliament.

(ix) action taken in any country outside Guyana by or on behalf of a representative of the government of Guyana or any officer of that government.

(x) any action which under the terms of the Constitution is precluded from inquiry by a Court.

Action taken by the Judicial Service Commission is also exempted from his jurisdiction.¹⁵ But authorities empowered to determine with whom the government is to enter into contracts as well as any other authorities specified by Parliament are subject to his investigatory powers.¹⁶

11. Article 53 (2).

12. Article 53 (7).

13. Article 53 (3) (i).

14. In Sweden, Norway and West Germany, there are Ombudsmen for Military Affairs.

15. Article 53 (6).

16. Article 53 (5)

The Ombudsman can, in general, act in his individual judgment in deciding whether to initiate, continue or discontinue an investigation.¹⁹ When he decides not to initiate or to discontinue an investigation, he is required to report the matter to the person who made the complaint or the request to investigate.²⁰ He may refuse to initiate or may discontinue an investigation if it appears to him that

(i) the complaint is in relation to an action of which the complainant had knowledge for more than twelve months,

(ii) the subject matter is trivial,

(iii) the complaint is frivolous or vexatious or not made in good faith,

(iv) the complainant has no sufficient interest in the subject matter of the complaint.²¹

After conducting an investigation he should report to the department or authority concerned the results of his investigation and in cases where he is of the opinion that a person or body of persons has sustained an injustice on account of a fault in administration, he should communicate his reasons for the opinion to the department or authority and make suitable recommendations to rectify the fault.²² He should also inform the complainant or the Minister or the member of the legislature who made the request for investigation of the nature of the injustice when he is of the opinion that a person or body of persons has sustained injustice.²³ When he is of the opinion that no injustice has been sustained, he should inform the person concerned of the opinion and give him the reason for it.²⁴ If no action has been taken within a reasonable time by the department or authority on the basis of his recommendation where an injustice has been sustained, he may make a special report to the National Assembly²⁵. He is also required to make an annual general report to the Assembly¹. Parliament may make such supplementary and ancillary provisions as appear necessary and expedient for the procedure to be followed by the Ombudsman in his investigations, for the manner in which complaints and requests are to be made, for the payment of a fee in respect of any complaint or investigation, and also for the powers, duties and privileges of the Ombudsman or of other persons or authorities in obtaining or disclosing information for the purpose of investigation or report by the Ombudsman².

The Constitution defines fault in administration to include contravention of the constitutional provision prohibiting discrimination on grounds of race, place of origin, political opinion, colour, or creed.³ It may also be mentioned that a reference to an action by the administration includes its failure to act.⁴

In Mauritius

Before attempting to appraise the system in Guyana, it may be useful to look at the institution as established in Mauritius, so that comparisons may be drawn easily and more intelligibly.

19. Article 53 (4).

20. Article 53 (9).

21. Article 53 (4).

22. Article 54 (1).

23. Article 54 (2) (a).

24. Article 54 (2) (b).

25. Article 54 (3).

1. Article 54 (4).

2. Article 55.

3. Article 56.

4. Article 53 (10).

The Constitution in Mauritius has a whole chapter devoted to the Ombudsman⁵. In a number of matters, the provisions are not dissimilar to those in the Constitution of Guyana. But there are also differences and some of them appear to be important. It may therefore be advisable, at the risk of some repetition, to summarise the main provisions so that a complete picture can be presented without the aid of a multitude of cross-references.

In Mauritius the Ombudsman is not empowered to investigate administrative action (or inaction) of Ministers. But this exemption from jurisdiction appears to have been envisaged as a temporary and transitional measure. The Constitutional Commissioner for Mauritius reported in 1964:

"I found that there are differences of opinion over the question whether he should be empowered to investigate the acts and decisions of Ministers themselves. In view of the conflict it might be better to exclude the personal acts and decisions of Ministers from his purview in the first instance"⁶.

This recommendation for exclusion of Ministers in the first instance was on the basis of a compromise to accommodate conflicting views rather than on any concept of ministerial responsibility. For the Commissioner made it very clear that

"Far from weakening the principle of ministerial responsibility he (the Ombudsman) could make it more efficacious".⁷

In Mauritius the Ombudsman's powers of investigation extend to all departments of Government, the Police Force, the Prison Service and any other service maintained and controlled by the Government or any officer or authority of any such service, and any authority empowered to invite tenders for Government contracts⁸.

The following officers and authorities are excluded from his jurisdiction:

- (i) The Governor-General and his personal staff;
- (ii) the Chief Justice;
- (iii) any Commission established by the Constitution and their staff;
- (iv) the Director of Public Prosecution and any persons acting under or in accordance with his instructions;

5. Chapter IX.

6. S.A. de Smith, *Report of the Constitutional Commissioner*, Mauritius Legislative Assembly, Sessional Paper No. 2. of 1965 page 13.

7. *Ibid.* p. 11. In New Zealand where the Ombudsman's jurisdiction does not extend to inquiring into the decisions of the Ministers, any recommendation made to a Minister by a department or agency, even if the Minister has already acted upon it, may be inquired into and, if necessary, reported upon by the Ombudsman. In the light of the Ombudsman's findings the Minister would eventually be called upon to justify his action in Parliament and thus he would be obliged to account for his administrative acts. And the New Zealand Ombudsman reports that "so far there is no cause to feel that the parliamentary principles of ministerial responsibility are likely to stand in the way of the effective operation of the Ombudsman, or themselves to suffer by reason of his activities." (Sir Guy Powles, "The Office of Ombudsman in New Zealand", *Journal of Administration Overseas* (1968) 287 at 288.

8. Constitution of Mauritius, section 97 (1).

(v) any person exercising powers delegated to him by the Public Service Commission or the Police Service Commission.⁹

In cases where the Premier gives a written notice to the effect that the action complained of was taken by a Minister or a Parliamentary Secretary in person in the exercise of his own deliberate judgment, the Ombudsman is precluded from conducting an investigation of the action in question.¹⁰ This appears to be a provision fraught with serious peril for the citizen. When Ministers and Parliamentary Secretaries are made immune from investigation, the Ombudsman's function may prove ineffective in many cases, as Ministers and Parliamentary Secretaries can insulate any matter from the Ombudsman's authority by either making a decision or giving an order personally or claiming that they have personally made the decision or given the order.

The Ombudsman in Mauritius is to be appointed by the Governor-General after consultation with the Premier, the Leader of the Opposition and such other persons as appear to the Governor-General, acting in his own deliberate judgment, to be leaders of parties in the Legislative Assembly.¹¹ These consultations emphasise the representative character of the Ombudsman. But he shall not be a member of the Legislative Assembly or any local authority or a local Government officer, nor shall he perform the functions of any other public office.¹²

The Ombudsman is empowered to investigate any action taken by any officer or authority, barring the exceptions already mentioned, in the exercise of administrative functions, in any case in which a member of the public claims, or appears to the Ombudsman, to have sustained injustice in consequence of maladministration in connection with the action.¹³ He may make the investigation upon complaint from the aggrieved person, or when invited to do so by any Minister or other member of the Legislative Assembly or on his own initiative.¹⁴ A complaint may be made by any individual or body of persons except certain publicly elected or appointed authorities.¹⁵ It should be made by the aggrieved person himself or in certain circumstances (as when he is dead or unable to act for himself) by his personal representative or some other individual who is suitable to represent him.¹⁶ Legislative provisions may be made requiring, among other things, that complaints should be transmitted through a member of the Legislative Assembly.¹⁷

He is generally precluded from conducting an investigation when the aggrieved person has or had a right of appeal to a tribunal or a remedy in a Court of law. Nevertheless he may conduct an investigation if he is satisfied that in the particular

9. Section 97 (1).

10. Section 97 (7).

11. Section 96 (2).

12. Section 96 (3).

13. Section 97 (1).

14. Section 97 (1).

15. A complaint may not be made by the following :

(a) an authority of the Government or a local authority or other authority or body constituted for the purposes of the public service or local Government.

(b) any other authority or body whose members are appointed by the Governor-General or a Minister or whose revenues consist wholly or mainly of moneys provided from public funds.

16. Section 97 (4).

17. Section 102 (2).

circumstances it is not reasonable to expect the aggrieved person to avail himself of that right or remedy.¹⁸ Further, he is not precluded from conducting an investigation as to whether any of the provisions relating to fundamental rights and freedoms of the individual has been contravened.¹⁹ This is complementary to the provision which enshrines a person's right to apply for redress to the Supreme Court if any of the fundamental rights and freedoms guaranteed by the Constitution has been, is being, or is likely to be contravened in relation to him.²⁰

He is precluded from investigating a matter if he is given notice by the Prime Minister that the investigation of that matter would not be in the interests of the security of the State²¹. He shall not make any investigation when it appears to him that the complaint is vexatious or frivolous, that the subject matter of the complaint is trivial, that the complainant has no sufficient interest in the subject matter, or that the complaint has been unreasonably delayed for more than twelve months.²²

The investigation is expected to be informal, and is to be conducted in private. The Ombudsman may obtain his information in any manner he thinks fit and may decide whether any person should be represented by Counsel in the investigation.²³ He is, however, required to afford an opportunity to the principal officer of the department or authority concerned and to any other person who is alleged to have taken or authorised the action in question to comment on the allegation in a complaint.²⁴

The State is not entitled to claim any privilege in relation to the production of documents or the giving of evidence as is allowed in legal proceedings,²⁵ but information and documents relating to the proceedings of the Cabinet or any Committee of the Cabinet are privileged.¹ When the Attorney-General gives notice that in his opinion the disclosure of any document or information specified in the notice would be against public interest in relation to defence, external relations or internal security, the Ombudsman and the members of his staff are not permitted to communicate to any person the specific document or information.^{1-a}

When the Ombudsman is of the opinion that the action which is the subject matter of the investigation was

- (i) contrary to law,
- (ii) based wholly or partly on a mistake of law or fact,
- (iii) unreasonably delayed,
- (iv) otherwise unjust or manifestly unreasonable,
- (a) that the matter should be given further consideration,
- (b) that an omission should be rectified,
- (c) that the decision should be cancelled, reversed or varied,

18. section 97 (6) (i).

19. Section (1) (ii).

20. Section 17 (1).

21. Section 97 (9).

22. Section 97 (8).

23. Section 98 (2).

24. Section 98 (1).

25. Section 99 (3).

1. Section 99 (4).

1-a. Section 99 (5).

(d) that any practice on which the act, omission, decision or recommendation was based should be altered,

(e) that any law on which the act, omission, decision or recommendation was based should be reconsidered,

(f) that reasons should have been given for decision, or

(g) that any other steps should be taken,

he is to report his opinion, giving reasons, to the principal officer of the department or authority concerned, together with his recommendations and request the official to notify him of the steps which it is proposed to take to give effect to the recommendations. He shall also send a copy of the report and recommendations to the Prime-Minister and the Minister concerned.² If no adequate or appropriate action is taken by the department or authority within a reasonable time, he may send a copy of the report and recommendations to the Prime Minister and the Minister concerned.³ Further he may make such reports to the Legislative Assembly on the matter as he thinks fit.⁴ He is required to make an annual report to the Governor-General concerning the discharge of his functions and it will be laid before the Assembly.⁵

In the performance of his duties, the Ombudsman is not subject to the direction or control of any authority and his proceedings are not to be called in question in any Court of law.⁶ But provision will be made defining offences in connection with the functions of the Ombudsman and his staff and prescribing the method of trial and penalties for such offences.⁷ Supplementary and ancillary provisions which may appear necessary and expedient are to be prescribed and they may include, among others, provisions for the procedure to be followed by the Ombudsman in the performance of his duties⁸.

Both Guyana and Mauritius have a multi-racial population and the presence of an Ombudsman may prove valuable in protecting the rights and interests of the minorities from discrimination by administrative agencies. In Guyana the Ombudsman received about 150 complaints during his first year in office; it is gratifying to note that only one of them alleged racial discrimination.⁹ It appears that the people in Guyana appreciate the necessity for his office and the value of his services. No appraisal of the work of the Ombudsman can be made about Mauritius as no one has yet been appointed to the office, though a few months have passed since provisions was made for the institution.

Commission of Enquiry in Tanzania

In a number of developing countries where corruption based on bribery or nepotism appears to assume the character of an inalienable right of the administrator the question may be posed: who will guard the Guardian Angel?¹⁰ The fact

2. Section 100 (1) & (2)

3. Section 100 (3)

4. Section 100 (3).

5. section 101 (3).

6. Section 101 (1).

7. Section 102 (e).

8. Section 102 (a).

9. See D C. Rowat. "The Spread of the Ombudsman Idea", in S.V. Anderson (ed.) *Ombudsman for American Government* ? p. 23.

10 Referring to the proposals for an Ombudsman for India, Mr. Justice P. B. Mukherji said "Soon after the Ombudsman we will have to have an Ombudsman for the Ombudsman" (*The Critical Problems of the Indian Constitution*, Bombay, 1968.)

that the Ombudsman is a parliamentary delegate and not an administrator may not allay the fears of the ordinary citizen who associates most officials and employees of the State with an inveterate weakness for corrupt practices. A helpful method to resolve his suspicions may be to adopt a collegiate character for the institution.¹¹ This has been done in Tanzania, though Tanzania's Permanent Commission of Enquiry would hardly qualify for ombudsmanship,¹² as it is not a delegate of the legislature. But then Tanzania is a one-party State with a presidential regime. The Commission, however, purports to serve the same purpose as the Ombudsman does in parliamentary regimes, where he is a representative of the legislature and is sometimes styled Parliamentary Commissioner as in the United Kingdom, New Zealand, Denmark (*Folketing Ombudsmand*) and Norway (*Stortingets Ombudsmann*).

The Interim Constitution of Tanzania provides for a Permanent Commission of Enquiry which has jurisdiction to inquire into the official conduct of any person in the service of the United Republic, persons holding office in the party, members and persons in the service of a local Government authority and members and persons in the service of such commissions, public corporations, public authorities or bodies as may be specified by Act of Parliament¹³. The President and the Head of the Executive for Zanzibar are exempt from its jurisdiction. It shall conduct an inquiry when directed by the President to do so; it may make an inquiry, unless the President directs otherwise, in cases where it considers that an allegation of misconduct or abuse of authority or office ought to be investigated¹⁴. It has no power to question or review any decision made by a Court or a tribunal in the exercise of its judicial functions¹⁵. It reports its finding and recommendations to the President¹⁶.

The Permanent Commission consists of a chairman and two other members. They are appointed by the President and may be removed from office by him for inability to discharge their official functions or for misbehaviour¹⁷. A member holds office for two years; he is not qualified for reappointment within two years after vacating his office¹⁸.

Under the Permanent Commission of Enquiry Act, 1966, the Commission may hear or obtain information from such persons or carry out such investigation as it thinks fit. It is not obliged to hold any hearing, nor is any person entitled, as of right, to be heard. If, however, its report or recommendation might adversely.

11. See J. Minattur "Ombudsman in India" (1968) 1 S.C.J. (Journal) 37.

12. Professor Rowat emphasises the three essential features which characterise the original Ombudsman systems. They are

"(1) The Ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the Constitution, who supervises the administration;

(2) he deals with specific complaints from the public against administrative injustice and maladministration; and

(3) he has the power to investigate, criticize and publicize, but not to reverse, administrative action." (Rowat, *The Ombudsman: Citizen's Defender*; 2nd Edn. 1967, p. 24.)

13. The Interim Constitution of Tanzania section 67 (1) and (4).

14. *Ibid* section 67 (2).

15. *Ibid* section 67 (5).

16. *Ibid*. section 67 (3).

17. *Ibid* section 68 (1) and (5).

18. Section 68 (3).

affect a person or department or organisation it should give such person, department or organisation an opportunity to be heard ; further, no adverse comment may be made in the report, unless the person, department or organisation against which the comment is made has been given an opportunity to be heard¹⁹. The Commission can require any person who is able to give information relating to the subject of the inquiry to furnish it with such information and to produce papers or documents or to attend before the Commission at a specific time and place²⁰. It may after notifying the appropriate authority, enter any premises of any department or organisation and carry out investigations there²¹. The President may, however, exempt certain premises from this general rule regarding entry and investigation, if he is satisfied that such entry and investigation might prejudice the security, defence or international relations of Tanzania, including Tanzanias' relations with the Government of any other country or with any international organisation²².

Except on a trial for perjury and similar offences or for an offence against the Official Secrets Ordinance, no statement made to the Commission by any person in the course of an inquiry will be admissible in evidence against any person in any Court²³.

The State may claim privilege in regard to giving information or producing documents in cases where the President certifies that it might prejudice the security defence or international relations of Tanzania, or the investigation or detection of offences, or might involve the disclosure of deliberations of the Cabinet, or the disclosure of the proceedings of the Cabinet or any of its Committees relating to matters of a secret or confidential nature, and would therefore be injurious to public interest²⁴.

The Commission's powers of investigation are not restricted by any privative clause in any legislation²⁵.

The framers of the Constitution of Tanzania, it would appear, felt that the principle of check should not be abandoned at the threshold of the Commission's office. That is probably the reason why, while adopting a number of provisions from the (New Zealand) Parliamentary Commissioner (Ombudsman) Act, 1962, Tanzania has departed from it in providing for a three member permanent Commission rather than a solitary Commissioner.

Concluding Comments.

(i) *Jurisdiction.*—A word may be said about Ombudsman's jurisdiction. We have seen that in some of the Commonwealth countries Ministers are kept insulated from his investigations. This does not appear to be due to any serious apprehension

19. The Permanent Commission of Enquiry Act, 1966, section 10 (2).

20. *Ibid* section 11 (1).

21. *Ibid* section 12 (1) and (2).

22. *Ibid* section 12 (3).

23. *Ibid* section 13 (2).

24. *Ibid* section 14 (1).

25. *Ibid* section 8.

regarding ministerial responsibility; we have indicated that his work may help to strengthen this responsibility.¹

Ministers may not be regarded as being devoid of an instinct for self-preservation when they try to influence Parliamentary voting in regard to limiting his jurisdiction.

It would appear that in Guyana a wide variety of public authorities are exempt from his jurisdiction. It is not uncommon to keep the armed forces out of his purview. In Sweden and Norway there is a separate Ombudsman—a Military Commissioner—for these forces.² Where the Chief Justice is excluded from his jurisdiction in Mauritius, in "Guyana" the commencement or conduct of civil or criminal proceedings in any Court³ is placed beyond his investigatory powers. There is much to be said in favour of keeping the Courts outside his domain. In fact Deputy Judges in Denmark were under his jurisdiction in the first instance; later on when this was found to be inexpedient they, as well as other Judges, were excluded from his jurisdiction by an amendment of the Ombudsman Act in 1959. In Sweden and Finland the judges are not beyond the reach of his supervisory powers. The Constitution of Sweden states that as a representative of Parliament and pursuant to its instructions, he should supervise the observance of laws and statutes as they are applied by the Courts and by public officials and employees⁴. As has been made clear by Parliament's instructions, 'supervision' in this context does not include power to control but it does include power to commence prosecution or disciplinary proceedings. In Finland where the Constitution stresses that "The judicial power shall be exercised by independent tribunals. . ."⁴ both the Ombudsman and the Chancellor of Justice are empowered to concern themselves with Judges and other law administrators. They are not expected to interfere with the judiciary in their official duties, but only to supervise them. As a result of this supervision, prosecutions of Judges are not rare in Finland though they are usually for minor offences⁵.

In countries where the official conduct of the lower judiciary wears in fact a thick and not very temporary veneer of scathing critical whispers, it may be a matter of doubtful wisdom to exempt them from the Ombudsman's investigation. It may not be a bad idea to give him jurisdiction over them with a direction that he need not investigate any of their official actions except when such action appears to betray manifest injustice.

The same may be said about his jurisdiction over certain authorities who make appointments to public service. It is one thing to exclude the members of the Public

1. See J. Minattur, "Ombudsman in India" (1968) 1 S.C.J. (Journal) p. 37 where this point has been dealt with in some detail.

2. In West Germany there is a Military Commissioner, but no Ombudsman until now for Civil Affairs.

3. Article 96.

4. Article 2.

5. Most of the prosecutions are for offences under 40-21 of the Penal Code: "An official who commits an error in office through carelessness, omission, imprudence, lack of understanding, or lack of skill shall be sentenced to a fine or suspension from duty unless the error be so minor that a reminder be deemed the appropriate sanction: if the circumstances warrant, he may be removed from office." See W. Gellhorn, *Ombudsman and others*, p. 59.

Service Commission or the Police Service Commission ; it is quite another to grant exemption from his purview, as is done in Guyana, to any " action taken in respect of appointments to offices or other employment in the service of the Crown or appointments made by or with the approval of the Governor-General or any Minister, and action taken in relation to any person as the holder or former holder of any such office, employment or appointment ". When, as in Mauritius, provision may be made for the definition and trial of offences connected with the function of the Ombudsman and his staff and the imposition of penalties for such offences there is no good reason why the staffs of Commissions established by the Constitution or persons exercising powers delegated to them by the Public Service Commission or the Police Service Commission should be placed beyond the reach of the Ombudsman's investigatory powers. . If they are brought under his jurisdiction, the members of the Commissions themselves may tend to be more careful and scrupulous in the exercise of their powers, especially their supervisory powers, since an allegation of misconduct on the part of a subordinate may not reflect very happily on them.

It is refreshing to note that in the Constitution of Guyana acts of discrimination on grounds of race, place of origin, political opinion, colour or creed, are specially mentioned as constituting a fault in administration entailing the invocation of the Ombudsman's investigatory powers, though it is already provided that he is not precluded from conducting an investigation as to whether any of the provisions of the Constitution relating to the protection of fundamental rights and freedoms has been contravened with regard to the complainant. This attempt at reinforcement in the matter of enforcing this fundamental right regarding protection from discrimination is doubly salutary in countries where people tend to create divisions among themselves on account of race, colour, creed, language, place of origin, or political opinion.

If and when Ombudsmanship is contemplated for a developing country, it is advisable to invest the officer with jurisdiction in the whole field of public administration. When exceptions are made, they should assume and retain the character of an exception. They may not be permitted to cover large areas of administration or a large number of authorities. It has been said that,

" Injury of the citizen's interest by unjust or arbitrary conduct of the administration can be brought about by any part of the public service and a limitation of the Commissioner's competence on this point will lead to an ill-balanced system that will satisfy no one. Every citizen that feels himself injured, either by delay of a decision, unsatisfactory grounds for a decision, wrong application of the law, excess of competence, or by an unjust or unreasonable decision, must be given access to the Parliamentary Commissioner ⁶."

Alfred Bexelius, the Swedish Ombudsman, said that in Sweden the matters which the Ombudsman has to deal with concern everything that can happen to a citizen in his dealings with the authorities⁷.

6. Rene Crinice de Roy, " The Netherlands " in Rowat *op. cit.*, p. 212.

7. A. Bexelius, " The Swedish Ombudsman," *University of Toronto Law Journal* (1967) 170 at p. 174.

(ii) *Removal from Office.*

The Guyanese provision for the removal of the Ombudsman from office on the recommendation of a Tribunal appointed on the advice of the Prime Minister does not appear to go a long way to fortify his independence. As he is a representative of the Legislature, the powers of removal may best be left with that body, even if his appointment was not made or formally approved by the Legislature. The recommendation of the Tribunal may be reported to the Legislature, and if the Legislature by a two-thirds majority of its membership approves the recommendation, he may be removed from office. The Model Ombudsman Statute prepared for American States provides for appointment of the Ombudsman by the Chief Executive of the State,⁸ subject to confirmation by two-thirds of the members of the Legislature present and voting and for his removal by vote of two thirds of the members of the Legislature upon "their determining that he has become incapacitated or has been guilty of neglect of duty or misconduct."⁹ In Sweden it is only Parliament which can remove the Ombudsman from office during his term. In Denmark he may be dismissed from office whenever he no longer has the confidence of Parliament. While in Finland he is irremovable during his term of office which is four years, in Norway his removal requires the vote of two thirds of the members of the Storting (Parliament).

(iii) *Consultation with the Administrative Agency.*

The Mauritian provision that the Ombudsman should afford an opportunity to the principal officer of the department or authority concerned and to any other person who is alleged to have taken or authorised the action in question to comment on the allegation in a complaint, though very fair to the administrative agency, appears to be fraught with some danger to the proper conduct of the investigation. The department or authority concerned should be given a hearing, but the question is when should it be. If an announcement of the allegation is made beforehand, it is not improbable that in an agency riddled with corruption papers from the files in question might disappear and communications never sent may be hatched in white heat and placed in them. Again the provision in the Model Statute appears; to some extent, to meet this difficulty. It provides:

"Before announcing a conclusion or recommendation that criticizes an administrative agency or any person, the Ombudsman shall consult with that agency or person."

The weakness about this scheme is that when once the Ombudsman has made up his mind regarding the allegations on the basis of his investigation, it would require very good contrary grounds to persuade him to change his mind, and very good grounds there may not be; persuasive evidence may be all that is available. It seems hard to be fair in an unfair world.¹⁰

8. Hawaii's Ombudsman Act provides: The Legislature, by a majority vote of each house in joint session, shall appoint an Ombudsman.

9. S.V. Anderson *Ombudsman for American Government* ? p. 162.

10. Sir Ronald Algie said of the Ombudsman in New Zealand:

"The Ombudsman system probably would not work well everywhere. It works well in New Zealand because we have a fine public service. Corruption is so rare as to be deemed virtually non-existent.

.... Our Ombudsman may stimulate officials to be even a little bit better than they have been. But the Ombudsman system is succeeding here precisely because, really, there is n't a staggering lot to do." Does this mean that where there is a lot to do, the system would collapse ?

(iv) *Other Matters of Interest.*

The Ombudsman may receive a complaint from any source concerning an administrative act.¹¹ If he believes that the complainant has no sufficient interest in the subject-matter he may refuse to investigate. It may happen that a conscientious person, impelled by public spirit, reports to the Ombudsman some unfair administrative act with a view to getting it rectified. When there is a provision made that the Ombudsman may conduct an investigation on his own initiative, there seems to be no good reason why the submission of complaints should be restricted to the aggrieved person or his representative in the Legislature.

A provision in the Model Statute which is absent from the Constitutions of Guyana and Mauritius may be mentioned. This relates to the Ombudsman's recommending disciplinary action against public officials and employees.

The Model Statute provides:

If the Ombudsman has reason to believe that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings he shall refer the matter to the appropriate authority.¹²

This provision will be of special interest and benefit in countries where the Ombudsman, as instituted, is considered emasculated. Where nagging fails, biting may succeed.

Another point which appears to deserve repetition is the collegiate principle which may be usefully ascribed to Ombudsmanship. Three or five heads will be fairer than one, especially where blondness is not in evidence.¹³

11. This is how it is ordered in Denmark.

12. In Denmark, Finland, and Sweden, the Ombudsman is empowered to initiate prosecutions or disciplinary proceedings against public officials. In Norway he may recommend such proceedings.

13. See J. Minattur, "Ombudsman in India" (1968) S C.J. (Journal) 37 at pp. 45-46. Professor Rowat recommends for populous countries a commission of three members in preference to a single individual. He endorses the view that important and complex cases of a judicial nature should not be decided by a single person. (See Rowat, "An Ombudsman Scheme for Canada." 28 *Canadian Journal of Economics and Political Science* (1962) 543 at p. 550.

INDIAN OXYGEN LTD. v. THEIR WORKMEN¹.

By

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Although facts giving rise to the case are easy to understand, the law according to which persons are to be bound by the decision is not clear. The Indian Oxygen Co., was the employer and in its employment at Jamshedpur there were 352 workmen who were organised into Indoxco Labour Union. There were other industrial units of the employer with employments similar to those of the employees in question in other parts of Bihar. But with them or their Unions no difference or dispute was known to exist. Industrial dispute arose between the employer and 352 workmen in the Jamshedpur Unit. Joint application for reference to the Industrial Tribunal on five agreed questions was made by the employer and 352 employees. Accordingly, the Bihar Government made a reference to the Industrial Tribunal under section 10 (2) of the Industrial Disputes Act for adjudication on the agreed questions between the Indian Oxygen Company and their workmen represented by the Indoxco Labour Union. In the statement signed by the parties it was mentioned that 352 workmen were affected by the dispute.

The Union claimed that even prior to the dispute it changed its name to Indian Oxygen Workers Union and expanded its scope of membership to include all workmen of the establishments of the employer in Bihar.² The Tribunal in making the award held that it should be effective in respect of all workmen of the employer in Bihar and that its operation could not be restricted to the employees in Jamshedpur unit. It was of the view that the dispute between the Company and the Indoxco Labour Union did not materially affect the position that the dispute was in respect of the employees of the Company wherever stationed.

An appeal was taken to the Supreme Court by the employer contending that the Tribunal exceeded its jurisdiction in making the award applicable not only to the employees who signed the agreement for reference, but to all employees under the employer wherever stationed. The Supreme Court upheld the contention of the employer making the award operative only to the employees who were members of the Indoxco Labour Union and signatories to the agreement.

The Supreme Court did not think it necessary to disturb the decision of the Tribunal on the questions referred to it. But the persons on whom the award would be binding was the subject of difference of opinion between the Supreme Court and the Tribunal. The Tribunal thought that after the amendment of the constitution of the Union, the statement in the reference that the dispute was one between the employer and Indoxco Labour Union might well be taken to mean that it was a dispute between the employer and employees wherever stationed.

1. A I R. 1969 S C. 306 : (1969) 2 S C J. 235 : (1969) 35 F J R. 106.

2. Joint application to the Government was dated 7th September, 1963. On 6th January, 1963, in its general meeting Indoxco Labour Union changed its constitution. By a letter dated 21st January 1963, the Secretary of the Union informed the District Manager of the Company at Jamshedpur of the fact of amendment. Notification of reference to the Tribunal was made on 23rd October, 1963.

The Trade Unions Act requires that a registered Trade Union should have rules in regard to membership³. Regulations made by the Government under the Act may add to the provisions of the Act.⁴ Those regulations have effect as if enacted in the Act.⁵ Rules of a Trade Union may be amended only in the manner provided in its rules.⁶ Amendments of the rules have to be communicated to the Registrar within 15 days from the amendment.⁷ If the Registrar is satisfied that the rules have been amended in the manner provided, he should make an entry in the Register prescribed for the purpose and inform the fact to the Secretary of the Trade Union.⁸ The Supreme Court held that the amendment of the rules did not become effective until the Registrar notified the fact of registration to the Union's Secretary. The correctness of the observation of the Supreme Court is questionable. Neither the Act nor the Central Trade Union Regulations provide that the amendment of the rules made by the Trade Union becomes effective on the Registrar's intimation to the Secretary of the Union. The Act specifically, on the other hand, laid down that amendment to the rules involving change of name⁹ or amalgamation¹⁰ of two or more Unions has effect from the date of registration. Both the Act and the Regulations are silent as to the date on which the amendments to the rules become effective. Silence may be taken even to mean that the rules become effective on amendment and that registration is only evidentiary. Section 9 (1) of the Central Regulations says:

"On receiving a copy of an alteration made in the rules of a Trade Union under section 28 (3), the Registrar, unless he has reason to believe that the alteration has not been made in the manner provided by the rules of the Registered Trade Union, shall register the alteration in a register to be maintained for the purpose and shall notify the fact that he has done so to the Secretary of the Trade Union."

Thus a valid amendment to the rules has necessarily to be registered and the Registrar has no choice in the matter but to register. Citrine says:¹¹

"In the case of registered trade unions, any alteration of rules must be registered with the Registrar of Friendly Societies for the country in which the registered office of the union is situate. Except as to other countries, however, the alteration if valid takes effect independently of registration as from the date agreed upon by the members, i.e., the date of the resolution or such other date, if any, as is specified in it."

In any event, it is difficult to construe silence in the Act and Regulations as tantamount to a provision that amendment becomes effective on the date of the Registrar's intimation to the Secretary.

It does not appear to have been suggested by the Supreme Court that by amendment of the rules, the Union has become a new Union. If it has assumed the charac-

3. Section 6 (e) of the Trade Unions Act, 1926.

4. Section 29

5. Section 30 (3).

6. Section 6 (g).

7. Section 28 (3).

8. Reg. 9 of the Central Trade Union Regulations, 1938.

9. Section 25 (3).

10. Section 25 (4).

11. Citrine, *Trade Union Law*, 2nd Edn. 238 and 239 (1960) England, Scotland and Ireland were different countries for the purpose of registration of Trade Unions.

ter of a new Union, without registration, it is not entitled to represent all its members. What all is said by the Supreme Court is that without communication to the Registrar of the amendment of the rules, and without communication of the fact of registration by the Registrar to the Secretary of the Union, the amended rules did not become effective. As there was no evidence in this case that the rules were communicated and registered, they did not become effective according to the Supreme Court. In the result, the old Union and not the new one, was legally existent.

Although the correctness of the decision of the Supreme Court on the ground that it was only the Indoxco Union and not the Union with expanded membership was deemed to be in existence is questionable, it is supportable on other grounds.

When parties make an application to the Government for reference to the Tribunal the Government 'shall' make a reference, if it is satisfied that the persons making the application represent the majority of each party¹². At the time of reference, it was fairly clear that the parties were the employer and the employees of the Jamshedpur Unit. The notification made by the Bihar Government read:

"Whereas the Governor of Bihar is of the opinion that an industrial dispute exists or is apprehended between the management of the Indian Oxygen Limited, Jamshedpur-7, and their workmen represented by Indoxco Labour Union, Jamshedpur, regarding the matters specified in their joint applications dated 7th September, 1963, annexed hereto....."

The award of the Tribunal could not be made binding on parties who were not contemplated by the reference. If the employees in other units in Bihar desired to be parties to the dispute in the reference, the proper course would have been to apply to the Government to refer their dispute also to the Tribunal. The Government might at any time after reference and before the award was made include other establishments likely to be affected by the award in the reference.¹³ This was not done in the case under consideration. Nor is there any evidence to show that employees in other units under the employer were represented before the Tribunal. In that case also the award would be binding on them.¹⁴

By amendment of the rules which in substance means an agreement between the members¹⁵, neither the scope of the reference nor that of the award might be enlarged. In other words, agreement of one of the parties cannot confer jurisdiction on the Tribunal. Thus the decision of the Supreme Court is unassailable on the ground of want of jurisdiction in the Tribunal.

It is interesting to find that the Indoxco Labour Union, despite change in its name and expansion of membership by amendment of the rules, represented in the application to the Government and allowed itself to be referred in its old name in the reference. The amendment of the rules, perhaps, was not meant in earnestness. Although the membership was expanded, it was not in evidence that the employees in other units of the employer joined the Union. Going behind the rules and considering the substance, what was bargained for was achieved by the decision of the Supreme Court.

12. Section 10 (2) of the Industrial Disputes Act, 1947.

13. Section 10 (5) of the Industrial Disputes Act.

14. Section 18.

15. Citrine, Trade Union Law, 2nd Edn. 182 and 183 (1960).

[S.C. N.C. 16]

V. Bhargava and
K. S. Hegde, JJ.
2-12-1969.

Sayed Rehmanmiya Mustafamiya v.
The State of Gujarat.
C.A. Nos. 2468 and 2470-2479 of 1966.

Saurashtra Barkhali Abolition Act (XXVI of 1951), sections 18 and 19—Saurashtra Land Reforms Act (XXV of 1951) and Bombay Land Revenue Code (V of 1879), section 52—Payment of compensation—Mamlatdar determining assessment as per section 19—Initial payment on the basis of such assessment—Collector fixing assessment under section 52 of the Code—Payment of compensation on the basis of Collector's assessment, instead of on the basis of Mamlatdar's assessment—Validity of.

At the time when the Saurashtra Barkhali Abolition Act (XXVI of 1951) was passed, the only manner of survey which was laid down by any law applicable in the State of Saurashtra was that contained in Chapter VIII of the Code and the only manner of settlement was that contained in Chapter VIII-A. There was at the same time provision contained in section 52 of the Code for assessment of the amount to be paid as land revenue on all lands ; but in that section, neither the word "survey" nor "settlement" or any of their derivatives was used. In the circumstances, the submission made by counsel for appellants that the words "surveyed and settled" used in section 19 of the Act were intended to refer to the survey and settlement under Chapter VIII and VIII-A of the Code has great force. If the Legislature had intended that the Mamlatdar's assessment made by the summary manner laid down in section 19 itself be superseded by any assessment made under the Code, including an assessment by the Collector under section 52 of the Code, the language used in section 19 would certainly have been different. Instead of saying that the assessment made by the Mamlatdar under section 19 is to be effective until the village in which such land is situate is surveyed and settled, the Legislature could have easily laid down that the assessment shall remain effective until an assessment is made under the Code. The requirement prescribed by the Legislature was that the assessment by the Mamlatdar was to continue in force until the village is surveyed and settled and not merely until an assessment of revenue payable in respect of the land is determined either under section 52 of the Code or Chapter VIII-A of the Code. Under section 19 of the Act, the assessment made by the Mamlatdar under that section itself must continue in force until there is a survey and settlement in accordance with Chapter VIII and VIII-A of the Code. Even under section 52 of the Code and rule 17 of the Rules made thereunder, there is, in fact, no survey at all.

The Saurashtra Legislature, in passing the Act, for the temporary period until there could be a regular survey and settlement, created a machinery by granting power to the Mamlatdar to make a summary assessment and that was clearly intended not to be superseded by another summary fixation of assessment by the Collector under section 52 of the Code.

Held, there having been no survey and settlement of the village, the assessment made by the Mamlatdar continued to be assessment for purpose of the Act and the Government was, therefore, not justified in varying the payment of annuity under section 18 of the Act which should have been continued to be paid in accordance with that assessment.

S.V.J.

Appeals allowed.

[S.C. N.C. 17]

J. C. Shah and
K. S. Hedge, JJ.
4-12-1969.

C.I.T., Madras v.
RN. AR. AR. Veerappa Chettiar.
C.A. No. 2315 of 1966.

Income-tax Act (XI of 1922)—Joint Hindu family—Levy of estate duty by Revenue Authorities in Ceylon consequent on death of two members—Later, levy set aside—Deposit of duty levied with interest in 1957—Partition settlement in the family in February, 1947—Interest accrued prior to February, 1947 on refunded estate duty, whether capital or revenue—Taxability of.

After the death of A Senior the property was held by the three widows as members of the Hindu undivided family. Under the Hindu law it is not predicted of a Hindu joint family that there must be a male member, so long as the property which was originally of the joint Hindu family remains in the hands of the widows of the members of the family and is not divided among them, the joint family continues. Payment of the estate duty was doubtless made out of the joint family fund and the interest which accrued due, also acquired the character of joint family property when received. The joint family status came to an end only on 17th February, 1947. On the severance of the joint status the assessee became entitled to a share in the family estate. The amount of interest on the estate duty accrued as income to the joint family but it was income of the joint family and not of the individual members. But when a share out of the estate which included the interest on estate duty was received by the assessee it had not the character of income. Once the income was received by the joint family, the amount lost its character of income. It became merged (in) the joint family assets and became the capital of the share received by the assessee was therefore a share in the capital of the family.

Held, the share in the joint family property which included interest on the estate duty which accrued prior to 17th February, 1947 was rightly held by the High Court to be not of the nature of revenue and accordingly not taxable.

(No opinion was expressed on the correctness of the finding of the High Court that interest accrued due after February, 1947, must be regarded as income to the extent of the share of each of the members of the family.)

S.V.J.

Appeal dismissed

[S.C. N.C. 18.]

Reform Flour Mills (P.) Ltd. v.

J.C. Shah, Ag. C.J.-and
I.D. Dua, J.

Commr. of Income-tax.

11-12-1969.

C.A. Nos. 2560 and 2561 of 1969.

Income-tax Act (XI of 1922), section 66 (2)—Rejection of application under, after issuing a rule—High Court must deliver judgment giving reasons.

V.K.

Appeals allowed and cases remanded.

[S.C. N.C. 19.]

J.C. Shah and
K.S. Hegde, JJ.
18-12-1969.

Sudhir Kumar Saha v.
The Commissioner of Police, Calcutta.
W.P. No. 378 of 1969.

Preventive Detention Act (IV of 1950), section 3 (2)—Power of detention under the Act—An exceptional power—Detention for maintenance of "public order"—When justified—"Law and order" distinguished from "public order."

The freedom of the individual is of utmost importance in any civilised society. It is a human right. Under our Constitution it is a guaranteed right. It can be deprived of only by due process of law. The power to detain is an exceptional power to be used under exceptional circumstances. It is wrong to consider the same, as the executive appears to have done in the present case, that it is a convenient substitute for the ordinary process of law.

The three incidents mentioned in the grounds in the present case are stray incidents spread over a period of one year and four months. These incidents cannot be said to be inter-linked. They could not have prejudiced the maintenance of 'public order' nor can they be held to be subversive of 'public order.' They were at best, prejudicial to "law and order", being mere breaches of law.

Disturbance of "public order" is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of "Law and order."

V.K.

Petition allowed.

[S.C. N.C. 20.]

J.M. Shelat and
C.A. Vaidialingam, JJ.
18-12-1969.

Hindustan Steel Ltd. v.
A.K. Roy.
C.A. No. 2127 of 1969.

Industrial Disputes—Wrongful termination of service—Relief to be awarded—Reinstatement or compensation—Discretion of Tribunal—How to be exercised—Interference with the discretion exercised, by High Court in writ petition—Scope.

There can be no doubt that the right of an employer to discharge or dismiss an employee is no longer absolute as it is subjected to severe restrictions. In cases of both termination of service and dismissal, industrial adjudication is competent to grant relief, in the former case on the ground that the exercise of the power was *mala fide* or colourable and in the latter case if it amounts to victimisation or unfair labour practice or is in violation of the principles of natural justice or is otherwise not legal or justified. In such cases, a tribunal can award by way of relief to the concerned employee either reinstatement or compensation.

In the earlier stages the question whether one or the other of the two reliefs should be granted was held to be a matter of discretion for the tribunal. Later on, however, the earlier flexibility appears to have been abandoned and it was ruled that although no hard and fast rule can be laid down, the normal rule in such cases should be reinstatement.

As exceptions to the general rule of reinstatement, there have been cases where reinstatement has not been considered as either desirable or expedient. These were the cases where there had been strained relations between the employer and the employee, where the post held by the aggrieved employee had been one of trust and confidence or where, though dismissal or discharge was unsustainable owing to some infirmity in the impugned order, the employee was found to have been guilty of an activity subversive of or prejudicial to the interests of the industry. These are, however, illustrative cases and no hard and fast rule as to which circumstances would in a given case constitute an exception to the general rule can possibly be laid down as the tribunal in each case, keeping the objectives of the industrial adjudication in mind, must in a spirit of fairness and justice confront the question whether the circumstances of the case require that an exception should be made and compensation would meet the ends of justice.

The tribunal, therefore, has to exercise its discretion judicially and in accordance with well recognised principles in that regard and has to examine carefully the circumstances of each case and decide whether such a case is one of those exceptions to the general rule. If the tribunal were to exercise its discretion in disregard of such circumstances or the principles laid down by the Supreme Court it would be a case either of non-exercise of discretion or of one not legally exercised. In either case, the High Court in exercise of its writ jurisdiction, can interfere and cannot be content by simply saying that since the tribunal has exercised its discretion it will not examine the circumstances of the case to ascertain whether or not such exercise was properly and in accordance with the well settled principles, made,

There is ample authority to the effect that if a statutory tribunal exercises its discretion on the basis of irrelevant consideration or without regard to relevant considerations, *certiorari* may properly issue to quash its order.

On a consideration of all the circumstances of the present case, it must be held that it was one of those exceptional cases where compensation and not reinstatement should have been ordered.

V.K.

Appeal allowed.

[S.C. N.C. 21.]

S. M. Sikri,
J. M. Shelat,
V. Bhargava,
G.K. Mitter and
C. A. Vaidialingam, JJ.
18-12-1969.

Prof. Chandra Prakash Agarwal v.
Chaturbhuj Das Parikh.
C.A. No. 2331 of 1968.

Constitution of India (1950), Article 217 (2) (b)—Appointment as a High Court Judge—Qualification required—“Has at least ten years been an advocate of a High Court”—Meaning of.

The expression “an advocate of a High Court” in its ordinary plain meaning must mean a person who has by enrolling himself under the relevant provisions of law become an advocate of a High Court. If it was intended that the qualification under Article 217 (2) (b) should be that a person appointed to the office of a Judge of a High Court should have practised in a High Court and that practising in a Court or Courts subordinate to it would not answer the qualification, the language used in Article 217 (2) (b) would have been different.

The distinction, if any, between the words “an advocate” in Article 233 (2) and the words “an advocate of a High Court” in Article 217 (2) (b) has no significance, in any event, after the coming into force of the Advocates Act, 1961, as by virtue of section 16 of that Act there are now only two classes of persons entitled to practice, namely, senior advocates and other advocates.

V.K.

Appeal dismissed.

[S.C.N.C. 22.]

M. Hidayatullah, C. J.,
A. N. Grover,
A. N. Ray,
P. Jaganmohan Reddy and
I. D. Dua, JJ.
19-12-1969.

Dr. S. L. Agarwal v.
General Manager, Hindustan Steel, Ltd.
C.A. No. 524 of 1967.

Constitution of India (1950), Article 311 (2)—Protection under—To whom available—Employee of Hindustan Steel Ltd.—If holds a civil post under the Union entitled to protection under Article 311.

The protection under Article 311 of the Constitution of India is available to (i) persons who are members of (a) a Civil Service of the Union, or (b) an All India Service or (c) a Civil Service of a State, or (ii) to persons who held a civil post under the Union or a State Categories (a), (b) and (c) mentioned above refer the standing to services which have been created in the Union and the States and which are permanently maintained in strength. In addition to the standing services there are certain posts which are outside the permanent services. The last category in Article 311 therefore speaks of such posts on the civil side as opposed to the military side. Incumbents of such posts also receive protection.

The Hindustan Steel Limited is not a department of the Government nor are the servants of it holding posts under the State. It has its independent existence and by law relating to corporations it is distinct even from its members. In these circumstances, the appellant, who was employed as a doctor by the Hindustan Steel Limited, does not answer the description of a holder of a civil post under the Union as stated in Article 311. He was not entitled to the protection of Article 311. The High Court was therefore right in not affording him the protection.

V.K.

Appeal dismissed.

[S.C.N.C. 23.]

J. C. Shah, and
K. S. Hegde, JJ.
8-1-1970.

Om Prakash v.
Lauti Ram.
C. A. No. 1253 of 1967.

Constitution of India (1950), Article 136—Decree passed in second appeal by High Court—Interference with by Supreme Court under Article 136—Scope.

Article 136 of the Constitution of India does not give a right to a party to appeal to the Supreme Court. Normally the Supreme Court will entertain an appeal against a decree passed in second appeal if a substantial question of law of general or public importance arises which may not only determine the dispute between the parties but will be a precedent for guidance for determination of similar disputes in other cases. The Court, may, if it appears that substantial injustice has resulted or that there had been no proper trial of the case or other similar reason interfere with the order or the decree passed by the High Court in second appeals. But the right to appeal is not as of right and the mere fact that some question of law arises out of the decision of the High Court will not enable a party to claim a right to appeal to the Supreme Court.

V.K.

Appeal dismissed.

[S.C.N.C. 24.]

J. M. Shelat,
C. A. Vaidialingam and
P. Jagannmohan Reddy, JJ.
9-1-1970.

Western India Watch Co., Ltd. v.
The Western India Watch Co., Workers Union.
C.A. No. 1914 of 1968.

U. P. Industrial Disputes Act (XXVIII of 1947), section 2 (1) and 4 (k)—Individual dispute—Conversion into industrial dispute by espousal by a union—Conditions precedent—Concerned workmen if should have been a member when the cause of action accrued—Power of Government “at any time” to refer a dispute for adjudication under section 4 (k)—Scope—“At any time” meaning of Government refusing to refer a dispute—If can reconsider its decision—Time limit.

For an individual dispute being converted into an industrial dispute as a result of its being espoused by a union, it is not necessary that the concerned workman should have been a member of such union at the time when the cause of such dispute arose. If it is insisted that the concerned workman must be a member of the union at the date of his dismissal, the result would be that if at that period of time there is no union in that particular industry and it comes into existence later on, then the dismissal of such a workman can never be an industrial dispute although the other workman have a community of interest in the matter of his dismissal. The only condition for an individual dispute turning into an industrial dispute as laid down in the case at *Dimakuchi Tea Estate* 1958 S.C.R. 115, is the necessity of a community of interest and not whether the concerned workman was or was not a member of the union at the time of his dismissal. The parties to the reference being the employer and his employees, the test must necessarily be whether the dispute referred to adjudication is one in which the workmen or a substantial section of them have a direct and substantial interest even though such a dispute relates to a single workman. It must follow that the existence of such an interest, evidenced by the espousal by them of the cause, must be at the date when the reference is made and not necessarily at the date when the cause occurs.

The argument, therefore that the reference in the present case was not competent on the ground that the concerned workman was not a member of the union at the date when the cause giving rise to the dispute arose, and that therefore, the union could not have espoused the dispute to convert it into an industrial dispute is not correct and cannot be upheld.

From the words used in section 4 (k) of the U. P. Industrial Disputes Act there can be no doubt that the Legislature has left the question of making or refusing to make a reference for adjudication to the discretion of the Government. But the

discretion is neither unfettered or arbitrary for the section clearly provides that there must exist an industrial dispute as defined by the Act or such a dispute must be apprehended when the Government decides to refer it for adjudication. No reference can thus be made unless at the time when the Government decides to make it an industrial dispute between the employer and his employees either exists or is apprehended. Therefore, the expression "at any time" in section 4 (k) though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through. But the Government need not wait until such a procedure has been completed in an urgent case.

There is a considerable body of judicial opinion according to which so long as an industrial dispute exists or is apprehended and the Government is of the opinion that it is so, the fact that it had earlier refused to exercise its power does not preclude it from exercising it at a later stage. In this view, the mere fact that there has been a lapse of time or that a party to the dispute was, by the earlier refusal, led to believe that there would be no reference and acts upon such belief does not affect the jurisdiction of the Government to make the reference.

It is true that where a Government reconsiders its previous decision and decides to make the reference such a decision might cause inconvenience to the employer because the employer in the meantime might have acted on the belief that there would be no proceedings by way of adjudication of the dispute. Such a consideration would be taken into account by the Government whenever, in exercise of its discretion, it decides to reopen its previous decision as also the time which elapsed between its earlier decision and the date when it decides to reconsider it. These are matters which the Government would have to take into account while deciding whether it should reopen its former decision in the interest of justice and industrial peace but have nothing to do with the jurisdiction under section 4 (k). Whether the intervening period may be short or long would necessarily depend upon the facts and circumstances of each case and therefore, in construing the expression at any time, in section 4 (k) it would be impossible to lay down any limits to it.

In the present case though nearly four years had gone by since the earlier decision not to make the reference if the Government was satisfied that its earlier decision had been arrived at on a misapprehension of facts and therefore, required reconsideration, neither its decision to do so nor its determination to make the reference can be challenged on the ground of want of power.

V.K.

Appeal dismissed.

[S.C.N.C. 25.]

J. C. Shah and
K. S. Hegde, JJ.
9-1-1970.

A. C. Moideen Kutty v.
Richardson and Cruddas & Co., Ltd.
C.A. No. 30 of 1967.

Constitution of India (1950), Article 133 (1) (a)—When attracted.

The present appeal is incompetent. By the judgment under appeal the decree of the Court of first instance was reversed by the High Court, but the condition for granting a certificate under Article 133 (1) (a) is that the amount or value of the subject matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000. The value of the subject-matter of the dispute in the Court of first instance (as valued in the plaint) was Rs. 17,488-4-6, and no more. The fact that the trial Court granted a decree for the amount exceeding Rs. 20,000 will not attract the application of Article 133 (1) (a).

V.K.

Appeal dismissed.

[S.C.N.C. 26.]

J. C. Shah and
K. S. Hegde, JJ.
15-1-1970.

Piloo Dhunajishaw Sidhwa v.
Municipal Corporation of the City of Poona.
C.A. No. 19 of 1967.

Bombay Provincial Municipal Corporation Act (LIX of 1949), sections 73, 74, 75 and rules in Chapter V of the Schedule—Applicability.

Contract Act (IX of 1872), section 70—Person delivering goods under an unenforceable contract—If can claim compensation.

It cannot be held that the provisions of sections 73 and 74 and the relevant rules in Chapter V of the Schedule to the Bombay Provincial Municipal Corporations Act, 1949 did not apply before the election of Councillors to the Corporation were held and the statutory committees were constituted. There is nothing in the transitory provisions which excludes the operation of section 74 (2) till the elections of the Councillors. Granting that it is not possible to comply with the rules, until the elections are held, there is no warrant for holding that the provisions of section 74 (2) will not apply and the Commissioner or the Transport Manager may enter into contracts without seal which are enforceable at law, notwithstanding the absolute terms of the Act.

Under section 70 of the Contract Act, a person lawfully delivering goods to another and not intending to do so gratuitously is entitled to demand that the goods delivered shall be returned or that compensation for the goods shall be made. Compensation would normally be the market price of the goods. By refusing to return the goods, the person to whom the goods have been delivered cannot improve his position and seek to pay less than the market value of the goods. Thus, a person without an enforceable contract in his favour supplying goods is entitled to money equivalent of the goods delivered, assessed at the market rate prevailing on the date on which the supplies were made.

V.K.

Appeal allowed in part.

[S.C. N.C. 27.]

J. C. Shah and
K. S. Hegde, JJ.
15-1-1970.

The D. F. O., South Kheri v.
Ram Sanahi Singh.
C.A. No. 1638 of 1969.

Constitution of India (1950), Article 226—Unlawful action of public authorities infringing contractual rights—Writ, if maintainable —Administrative order—Applicability of rules of natural justice.

It cannot be held that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of the Supreme Court in *K. N. Guruswamy's case*, (1955) 1 S.C.R. 305, there can be no doubt that a writ is maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged is of a public authority invested with statutory power.

Granting that the impugned order was administrative and not quasi-judicial, the order had still to be made in a manner consonant with the rules of natural justice when it affected the respondent's rights to property.

V.K.

Appeal dismissed.

[S.C. N.C. 28.]

*M. Hidayatullah, C. J.,
J. M. Shelat,
C. A. Vaidialingam,
A. N. Grover and
A. N. Ray, JJ.*

National Coal Development
Corporation Ltd. v.
Mammohan Mathur.
C.A. No. 1639 of 1966.

15-1-1970.

Coal Bearing Areas (Acquisition and Development) Act (XX of 1957) as amended by Act (LI of 1957) and Act (XXIII of 1969), sections 3-A and 28 (3)—Effect of the amendments—Validity.

"It is obvious that now under the scheme of Act XX of 1957, as amended by Act LI of 1957 and Act XXIII of 1969 a notification under section 4 (1) of the Land Acquisition Act, 1894 is by fiction a notification under section 4 of Act XX of 1957; an objection under section 5-A of the Land Acquisition Act, 1894 is deemed to be an objection under section 8 of Act XX of 1957. It is also provided that if no objection had been preferred under section 5-A of the Land Acquisition Act, 1894 within the period specified in that Act, then it shall be deemed that a notification has been issued under section 7 of this Act in respect of the land and further that no objection to the acquisition of the land or any rights in or over that land has been preferred under section 8 of the Act and accordingly the Central Government may at any time make a declaration under section 9 of Act XX of 1957 in respect of that land. By section 3 the effect of a decision of a Court is removed as if the provisions of section 28 of Act XX of 1957, as amended by Act XXIII of 1969 were in force at all material times.

Learned Counsel for the respondent could not point to anything by which the amending Act could be called in question. It was conceded that it was within the competence of Parliament to create the fictions it has created in the original Act XX, of 1957 and again by the amending Act XXIII of 1969. Learned Counsel, however said that we must take a humane view of the position of a person like the respondent who would lose his all by the acquisition and that too through legislation which makes the provisions fictional rather than real. As to the first part we can only say that if the law allows it, the Court must award it and as to the second part we say that this kind of legislation by making obligatory notifications fictional does not accord with our sense of propriety but we cannot say anything against it since Parliament undoubtedly possesses the power to make such fictions."

Appeal allowed.

V.K.

[S.C. N.C. 29.]

*M. Hidayatullah, C. J.,
J. M. Shelat,
C. A. Vaidialingam,
A. N. Grover and
A. N. Ray, JJ.*

15-1-1970.

The Twyford Tea Co., Ltd. v.
The State of Kerala.
W.P. Nos. 135-137 of 1969.

Kerala Plantation (Additional Tax) Act (XVII of 1960) as amended by Kerala Plantation (Additional Tax) Amendment Act (XIX of 1967)—Constitutionally valid—Not hit by Article 14 of the Constitution of India.

By majority (*M. Hidayatullah, C. J. and C. A. Vaidialingam and A. N. Ray, JJ.*) with *J. M. Shelat and A. N. Grover, JJ.* dissenting: The Kerala Plantation (Additional Tax) Act, 1960, as amended by Kerala Plantation (Additional Tax) Amendment Act, 1967, (hereinafter referred to as the Act) no doubt deals with seven different kinds of plantations and imposes a uniform rate of Rs. 50 per hectare but it lays down principles on which equal treatment is ensured. In the case of coconut, arccanut, rubber, coffee and pepper plantations, plants capable of yielding produce are to be counted and then the hectares are determined by dividing the total number of plants by a certain figure. This is intended to equalise the different plantations for purposes of taxability. In the remaining two cases, viz., tea and cardemom, the extent of land yielding crop is itself taken as the measure for the tax because it is considered fair and just to treat one actual hectare of crop yielding plantation as equal to the

other areas converted into hectares on the basis of the number of plants or trees. It is obvious that the Legislature has made an attempt at equalisation of tax burden for different plantations. This is not a case where barren lands have been subjected to equal tax with productive lands. The tax is only levied on crop yielding land. In some cases where the crop may be scattered over a wide area, there is an elaborate mechanism to determine the extent of the crop yielding plantation. The Court cannot regard the law to be discriminatory.

The burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. The burden is, proving *not* possible 'inequality' but hostile "unequal" treatment. This is more so when uniform taxes are levied.

What is meant by the power to classify without unreasonably discriminating between persons similarly situated, has been stated in several decisions. The same applies when the Legislature reasonably applies a uniform rate after equalising matters between diversely situated persons. Simply stated the law is this. Differences in treatment must be capable of being reasonably explained in the light of the object for which the particular legislation is undertaken. This must be based on some reasonable distinction between the cases differentially treated. When differential treatment is not reasonably explained and justified the treatment is discriminatory. If different subjects are equally treated there must be some basis on which the differences have been equalised otherwise discrimination will be found. To be able to succeed in the charge of discrimination, a person must establish conclusively that persons equally circumstanced have been treated unequally and *vice versa*.

Taking these principles into consideration it cannot be said that the Act singles out any particular plantation for hostile or unequal treatment. As between different tea gardens, it is not possible to say that the difference in the yield is entirely due to natural circumstances and not other causes. It is, therefore not possible to say that there is discrimination notwithstanding the uniform rate for each plantation based on the actual crop yielding area.

Per Shelat and Grover, JJ. (dissenting): The fact that a person holds a large area of land and is taxed according to the area he holds cannot by itself mean that in taxing him he is meted out equal treatment as compared to a person who holds a lesser quantity of land but of a better and more productive quality, merely on the ground that both hold land and are taxed according to the quantity each of them holds. A uniform tax without consideration of its incidence, when actually implemented must result in inequality of treatment amongst persons similarly situated, and therefore, would be violative of Article 14 of the Constitution of India.

The tax under the Kerala Act XVII of 1960, as amended by Act XIX of 1967, is imposed in respect of lands as an *ad hoc* uniform tax irrespective of the kind of their soil or their capacity, etc. and only for the reason of their particular user. *Prima facie*, the incidence of such a tax by reason of its uniformity is bound to be unequal on persons similarly situated and would, therefore, be hit by the equality clause in Article 14. Imposing a uniform rate of tax in respect of lands without classifying them on the basis of their productivity, actual or potential, and without differentiating the inferior from the superior kind of soil or without taking into consideration the fact of some of those lands being situated in more advantageous position than the rest, must inevitably result in unequal incidence of the tax on those who hold those lands. Hence the present case is one where inequality emerges as a result of imposing an *ad hoc* tax, uniformly levied without making any rational or intelligible classification.

Even amongst the selected plantations inequality as a result of uniformity of tax must result because it is possible that the user of the land for one specified purpose may give a better and more valuable yield than the user of another land though situated in the same area for another specified purpose.

[S.C. N.C. 30.]

M. Hidayatullah, C. J.,
A. N. Ray and
I. D. Dua, JJ.
19—1—1970

Gottipulla Venkata Siva Subramanyam v.
The State of Andhra Pradesh.

Crl.A. No. 75 of 1967.

Penal Code (XLV of 1860), sections 96 to 106—Right of private defence—Nature and extent—Accused pleading alibi and not right of private defence—Court if precluded from giving benefit of right of private defence.

The right of private defence of person and property is recognised in all free, civilised, democratic societies within certain reasonable limits. Those limits are dictated by two considerations: (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrongs done to them or to punish the wrongdoer for commission of offences. The right of private defence serves a social purpose and as observed by the Supreme Court more than once, there is nothing more degrading to the human spirit than to run away in face of peril. But this right is basically preventive and not punitive.

(Provisions of sections 96 to 106 of Penal Code summarised).

On the fact and circumstances of this case the use of his gun by the accused was justified. In a situation like this it is not possible for an average person whose mental excitement can be better imagined than described, to weigh the position in golden scales and it was well-nigh impossible for the person placed in the position of the accused to take a calm and objective view expected in the detached atmosphere of a Court and calculate with arithmetical precision as to how much force would effectively serve the purpose of self-defence and when to stop.

The fact that the plea of self defence was not raised by the accused and that he had on the contrary pleaded *alibi* does not preclude the Court from giving to him the benefit of the right of private defence, if, on proper appraisal of the evidence and other relevant material on the record, the Court concludes that the circumstances in which he found himself at the relevant time gave him the right to use his gun in exercise of this right. When there is evidence proving that a person accused of killing or injuring another acted in the exercise of the right of private defence, the Court would not be justified in ignoring that evidence and convicting the accused merely because the latter has set up a defence of *alibi* and set forth a plea different from the right of private defence. The analogy of estoppel or of the technical rules of civil pleadings is, in cases like the present, inappropriate and the Courts are expected to administer the law of private defence in a practical way with reasonable liberality so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive.

V.K.

Appeal allowed.

in foreign countries. The cultural Colombo Plan and Thailand scholars are given admission in medical institutions in this country by reason of reciprocal arrangements of educational and cultural nature. Regarding Jammu and Kashmir scholars it must be remembered that the problems relating to them are of peculiar nature and there do not exist adequate arrangements for medical education in the State itself for its residents. The classification in all these cases is based on intelligible differentia which distinguishes them from the group to which the appellants belong.

The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends *inter alia* on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the Courts to interfere with the manner and method of making the classification.

The main purpose of admission to a medical college is to impart education in the theory and practice of medicine. The sources from which students have to be drawn are primarily determined by the authorities who maintain and run the institution, e.g., the Central Government in the present case. In (*Minor*) *P. Rajendran v. State of Madras*¹ it has been stated that the object of selection for admission is to secure the best possible material. This can surely be achieved by making proper rules in the matter of selection but there can be no doubt that such selection has to be confined to the sources that are intended to supply the material. If the sources have been classified in the manner done in the present case it is difficult to see how that classification has no rational nexus with the object of imparting medical education and also of selection for the purpose.

Held also that, the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no *locus standi* in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded.

Appeal from the Judgment and Order, dated the 3rd December, 1968 of the Delhi High Court in Civil Writ Petition No. 817 of 1968.

B. C. Mishra, Senior Advocate, (*M. V. Goswami*, Advocate, with him), for Appellants.

B. Sen, Senior Advocate, (*S. P. Nayar*, Advocate, with him), for Respondents Nos. 1, 2 and 4.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by certificate from a judgment of the Delhi High Court dismissing a petition filed by the appellants under Articles 226 and 227 of the Constitution in the matter of their admission to the Maulana Azad Medical College, New Delhi, hereinafter called the "Medical College."

The appellants are residents of Delhi. They passed the pre-medical examination of the Delhi University held in April 1968 and obtained 62.5 per cent marks. In June 1968 they applied for admission to the first year M.B.B.S. class at the Lady Hardinge Medical College, New Delhi but they were not admitted. Thereafter they applied for admission to the Maulana Azad Medical College. This college, which is a constituent of the University of Delhi, was established by the Government of India in June 1958. According to the college prospectus, 125 students are admitted annually; 15 per cent. seats are reserved for scheduled caste candidates and 5 per cent. for scheduled tribes candidates; 25 per cent. of these seats (excluding the seats reserved for Government of India nominees) are reserved for girl students who are taken on the basis of merit. The following categories of students only are eligible for admission:

(a) Residents of Delhi.....

(b) (i) Sons/daughters of Central Government servants posted in Delhi at the time of the admission.

(ii) Candidate whose father is dead and is wholly dependent on brother/sister who is a Central Government servant posted in Delhi at the time of the admission.

(c) Sons/daughters of residents of Union territories specified below including displaced persons registered therein and sponsored by their respective Administration of Territory :—

(i) Himachal Pradesh (ii) Tripura (iii) Manipura (iv) Naga Hills
(v) N.E.F.A. (iv) Andaman.

(d) Sons/daughters of Central Government servants posted in Indian Missions abroad.

(e) Cultural scholars.

(f) Colombo Plan scholars.

(g) Thailand scholars.

(h) Jammu and Kashmir State scholars.

According to the note 23 seats are reserved for categories (c) to (h) above. The minimum percentage of marks which a candidate seeking admission must have obtained in the aggregate of compulsory subjects is 55.

Now the appellants had obtained 62.5 per cent marks and were domiciled in Delhi. According to them they were entitled to admission and would have been admitted but for the reservation of the seats which were filled by nominations by the Central Government. In the year 1968 when the appellants sought admission 9 students had been nominated by the Central Government out of the 23 seats which had been reserved for categories (c) to (h) mentioned above. These students had obtained less percentage of marks than the appellants. The appellants filed a writ petition in the High Court challenging primarily the power of the Central Government to make the nominations. It was prayed that these nominations, be struck down and the respondents (Union of India, Medical College, University of Delhi, etc.) be directed to admit the appellants and all other students who were eligible strictly in the order of merit. The writ petition was disposed of by a Division Bench of the High Court. The authority of the Central Government to select candidates for the reserved seats was upheld. It was however, found that among the nine seats filled in the Medical College by the Government, two nominations had been made contrary to the admission rules. The High Court was of the view that these two seats would also become a part of the general pool for admission of candidates on merit. The order was, therefore, made in the following terms :

“ We, therefore, direct the respondents 1 to 4 as follows : two seats shall be filled immediately for admission to the first year M.B.B.S. Course of the College from the merits list in which petitioner No. 1 is number 4 and petitioner No. 2 is number 9. The respondents 1 to 4 shall immediately enquire from the candidates who are above the petitioners in order of merit whether they want the admissions and on their failure to reply in a short time or on their refusal to accept the offer, the admission shall be made either of the petitioners or of other candidates who are above them in the merits list within one week from today.”

In December 1968, the appellants filed a petition under section 114 and Order 47, rule 1 read with section 141, Civil Procedure Code seeking a review of the judgment and order dated 3rd December 1968. This petition was dismissed by the High Court by a detailed order dated 27th January 1969. On 1st February 1969, a petition was filed under Articles 133 (1) (c) and 132 (1) of the Constitution for leave to appeal to this Court. In the prayer Leave was sought against the judgment dismissing the writ petition as also the order by which the review petition was disposed of. In the certificate, however, in the heading only the judgment dated 3rd December 1968 is

mentioned. It would appear that the certificate was limited to the appeal against the writ petition. This would be so because under Order 47, rule 7 the order of the Court rejecting the application for review is not appealable. If the appellants desired to challenge that order it could have been done only by asking for leave of this Court under Article 136 which was never done. In these circumstances the arguments of Mr. B. C. Misra for the appellants were confined to the matters decided by the judgment dated 3rd December, 1968.

It is common ground that the University of Delhi is a statutory body incorporated by the Delhi University Act of 1922 as amended from time to time. Under section 30 of that Act Ordinances can be made providing for various matters which include the admission of students to the University and their enrolment as such. Ordinance II provides that there shall be a Medical Courses Admission Committee. It is this committee which finalises the cases of admission except those which are to be referred to the Standing Committee on account of any special features. The Medical Courses Admission Committee at its meeting held on 5th November, 1965, recognised that 23 seats in the Medical College shall be reserved for certain categories for nomination. This reservation was approved by the Standing Committee of the Academic Council of the Delhi University and finally by the Academic Council itself by means of a resolution dated 3rd March, 1966. In the High Court and before us both sides argued on the footing that the rules set out in the prospectus of the Medical College relating to admission have statutory sanction and are not of a purely administrative nature.

Before the High Court only two questions were raised. The first was whether the provision for reservation for seats was unconstitutional. The second was whether the nominations to the reserved seats had been made contrary to the rules. Mr. Misra has amplified the first submission by urging that the reservation of seats for admission to the Medical College was not based on any reasonable classification and suffered from the vice of discrimination. According to him such reservation was hit by Article 14 read with clauses (1) and (4) of Article 15 and clause (2) of Article 29 of the Constitution. In addition the system of nominations being made by the Government and not by the Admission Committee was *per se* discriminatory.

Article 29 (2) may be read first. It says, no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Under clause (1) of Article 15 the State cannot discriminate against any citizen on grounds only of religion, caste, sex, place of birth or any of them. Clause (4), however, provides that nothing in the Article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and tribes. According to Mr. Misra the categories (c) to (h) contained in rule 4 relating to eligibility for admission for whom seats are reserved do not fall within the exception contained in clause 4 of Article 15. The persons in these categories, it is said, cannot be regarded as socially and educationally backward classes of citizens nor can it be supposed that all of them must belong to scheduled castes and tribes.

We are unable to see how Article 15 (1) can be invoked in the present case. The rules do not discriminate between any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Nor is Article 29 (2) of any assistance to the appellants. They are not being denied admission into the Medical College on grounds only of religion, race, caste, language or any of them. This brings us to Article 14. It is claimed that merit should be the sole criterion and as soon as other factors like those mentioned in clauses (c) to (h) to rule 4 are introduced, discrimination becomes apparent.

As laid down in *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and others*¹, Article 14 forbids class legislation; it does not forbid reasonable classification. In

1. (1959) S.C.J. 147; (1959) 1 A.N.W.R. S.C.R. 279.
S.C. 67; (1959) 1 M.L.J. (S.C.) 67; (1959)

other to pass the test of permissible classification two conditions must be fulfilled: (i) that the classification is founded on intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that differential must have a rational relation to the object sought to be achieved. The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility for doing so. As regards the sons and daughters of Central Government servants posted in Indian Missions abroad it is equally well known that due to exigencies of their service these persons are faced with lot of difficulties in the matter of education. Apart from the problems of language, it is not easy or always possible to get admission into institutions imparting medical education in foreign countries. The cultural, Colombo Plan and Thailand scholars are given admission in medical institutions in this country by reason of reciprocal arrangements of educational and cultural nature. Regarding Jammu and Kashmir scholars it must be remembered that the problems relating to them are of a peculiar nature and there do not exist adequate arrangements for medical education in the State itself for its residents. The classification in all these cases is based on intelligible differential which distinguishes them from the group to which the appellants belong.

It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends *inter alia* on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the Courts to interfere with the manner and method of making the classification.

The next question that has to be determined is whether the differential on which classification has been made has rational relation with the object to be achieved. The main purpose of admission to a medical college is to impart education in the theory and practice of medicine. As noticed before the sources from which students have to be drawn are primarily determined by the authorities who maintain and run the institution, e.g., the Central Government in the present case. In (*Minor*) *P. Rajendran v. State of Madras*¹, it has been stated that the object of selection for admission is to secure the best possible material. This can surely be achieved by making proper rules in the matter of selection but there can be no doubt that such selection has to be confined to the sources that are intended to supply the material. If the sources have been classified in the manner done in the present case it is difficult to see how that classification has no rational nexus with the object of imparting medical education and also of selection for the purpose.

The case of (*Minor*) *P. Rajendran*¹ is clearly distinguishable because there the classification had been made districtwise which was considered to have no reasonable relation with the object sought to be achieved. Nor can the decision of a Full Bench of the Patna High Court in *Umesh Ch. Sinha v. V. N. Singh, Principal, P.M.C. and Hospital and others*², be of any avail to the appellants. In that case preferential treatment had been given to the children of the employees of the Patna University in the matter of admission to the Patna Medical College. It was held that there was no reasonable nexus between the principle governing admission to the college on the one hand and the pecuniary difficulties or the meritorious services reserved seats cannot be considered to be preferential treatment of any kind. Preferential treatment to

1. (1968) 2 S.C.J. 801 : (1968) 2 An.W.R. (S.C.) 121 : (1968) 2 M.L.J. S.C. 121 : A.I.R.

1968 S.C. 1012.

2. 1967 I.L.R. 46 Pat. 616.

the children of these employees would amount to favouritism and patronage. There is no question of any preferential treatment being accorded to any particular category or class of persons desirous of receiving medical education in the present case. The mere fact that the Central Government has to make the nominations with regard to the reserved seats cannot be considered to be preferential treatment of any kind. As the candidate for the reserved seats have to be drawn from different sources it would be difficult to have uniformity in the matter of selection from amongst them. The High Court was right in saying that the standards of the examination passed by them, the subjects studied by them and the educational background of each of them would be different and divergent and therefore the Central Government was the appropriate authority which could make a proper selection out of those categories. Moreover this is being done with the tacit approval and consent of the Medical Courses Admission Committee. It appears that the Central Government has been acting in a very reasonable way inasmuch as when nominations were made only to nine seats the rest were thrown open to the general pool.

The other question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nomination made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no *locus standi* in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded. The Central Government is under no obligation to release those seat to the general pool. It may in the larger interest of giving maximum benefit to candidates belonging to the non-reserved seats release them but it cannot be compelled to do so at the instance of students who have applied for admission from out of the categories for whom seats have not been reserved. In our opinion the High Court was in error in going into the question and holding that out of the nine seats filled by nomination two had been filled contrary to the admission rules and these would be converted into the general pool. Since no appeal has been filed against that part of the order we refrain from making any further observations in the matter.

Finally Mr. Misra attempted to agitate the question of some of the nominations being illegal as the candidate who had been nominated had not applied in time—the prescribed date being 1st August, 1968. This contention cannot be entertained for two reasons. The first is that no such point appears to have been raised before the High Court when the writ petition was disposed of on 3rd December, 1968. It is only at the stage of review that this matter seems to have been pressed. Secondly it has been held by us that the appellants had no right to challenge the nominations which had been made by the Central Government. It was not therefore, open to them to assail any of the nominations which had been made.

The appeal fails and it is dismissed with no order as to costs.
V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—M. HIDAYATULLAH, *Chief Justice* AND G. K. MITTER, J.

Shaikh Mahamad Umarsaheb

.. *Appellant**

v.

Kadalaskar Hasham Karimsab and others

.. *Respondents.*

Maharashtra Municipalities Act, 1965 [XL of 1965], section 7—Scope—Election petition—Reception of evidence of two witnesses called as Court witnesses, if vitiates the whole trial—Order 16, rule 14, Civil Procedure Code.

The case of the election petitioner was that the appellant was guilty of publication of two pamphlets which cast serious aspersions on his character and conduct

and prejudiced him materially in the eyes of the voters as a result whereof he lost the election and that the first of these also aroused the religious sentiments of Muslim voters to his detriment. The appellant was found guilty of publication of the first pamphlet only. This was signed by six persons. There was no evidence as to where it was printed or who got it printed. The evidence adduced by the election petitioner was that the appellant had published all the pamphlets mentioned in the petition and distributed the same amongst the voters and the petitioner had come across the first pamphlet during the process of distribution. There can be no two opinions about the contents of the pamphlet being defamatory of the election petitioner's character. It may be that in the instant case, if the two persons had not been examined, the Judge might well have decided the issue the other way. But the Act certainly gave him the power to do so and no exception can be taken to the course adopted by the Judge although it must be recorded that his earlier order refusing to issue summons to them in the first instance when asked to do so on the 21st August was hardly justifiable. Probably the learned Judge realised that his order of the 21st August, needed recalling. The appellant would have had a real cause for grievance if he had asked for an opportunity to rebut the evidence of these two witnesses and had been denied the same but this has nowhere been alleged. On the evidence no exception can be taken to the course adopted by the Judge in deciding the issue against the appellant on the facts and circumstance of this case. It may be that the evidence which was adduced was not so immaculate that another learned Judge deciding the petition might not have taken a different view. But it cannot be said that there was no evidence on which the Judge could have come to the conclusion he did.

Appeal by Special Leave from the Order dated the 4th October, 1968 of the Bombay High Court in Special Civil Application No. 2053 of 1968.

N. N. Keswani, for Appellant.

M/s. R. B. Datar and S. N. Prasad, for Respondent No. 1.

S. P. Nayar, for Respondents Nos. 2 to 4.

The Judgment of the Court was delivered by

Mitter, J.—This is an appeal by Special Leave from an order of the Bombay High Court dismissing *in limine* an application under Articles 226 and 227 of the Constitution and refusing to quash the judgment and order of the Assistant Judge at Sangli rendered in Election Petition No. 10 of 1967. The facts are as follows :

On 3rd June, 1967 election of councillors to the Sangli City Municipality was held under the Maharashtra Municipalities Act, 1965 (hereinafter referred to as the 'Act'). The counting of votes took place with regard to Ward No. 25 on 4th June, 1967. According to the election petition, the results were published in the Official Gazette on 15th June, 1967 and the petition was filed on 24th June, 1967. The petitioner who was himself a candidate for election from the said ward challenged the election of the appellant before us on several grounds set forth in paragraph 3 of the petition. The first of these was to the effect that the appellant had, with the help of his supporters, published an undated pamphlet and circulated the same on a large scale among the voters in Ward No. 25 and that the said pamphlet contained untrue, false and defamatory statements about the petitioner thereby prejudicing the voters generally against him and in particular instigating the Muslim voters to vote against him by arousing their religious sentiments. Another similar ground based on a defamatory pamphlet dated 30th May, 1967 was urged in the petition. Charges of terrorising voters and securing votes by false personation were also levelled therein. Statements were made in the petition that the appellant's name as councillor had been declared in the Official Gazette on 15th June, 1967 and the petitioner's cause of action had arisen on that date. The first of these was expressly accepted as correct in the written statement of the appellant and the second remained unchallenged. The appellant however repelled the charges mentioned above and denied that he was responsible for the publication of any of the impugned pamphlets.

Of the four issues framed at the hearing of the petition, the first was :

“Whether the petitioner proved that opponent No.1 who was elected as Municipal Councillor for Ward No. 25 had used malpractices at the time of the election by arousing religious sentiments of the voters and making defamatory statements against the petitioner by publishing pamphlets ?”

The petitioner gave evidence himself about the allegations in the petition to substantiate the charges raised by him. The appellant examined himself to contradict the said evidence. It appears that the petitioner had in the list of witnesses filed by him, mentioned the names of two persons, Hakim Abdul Razhiman Shaikh and Gopal Chintaman Ghugare and that these two persons had attended the Court on certain days when they were not examined. On 21st August, 1968 the petitioner made an application before the Judge for issuing summons on these two persons as his witnesses but the learned Judge rejected that application. The appellant's case was closed on the same day and the arguments started on 22nd August, 1968. On that date the Court adjourned the hearing of the case to 24th August, 1968 for recording the evidence of these two witnesses in respect of whom an application had been made by the election petitioner on the previous day. The order Exhibit 36, dated 22nd August, 1968 tends to show that the learned Judge was persuaded to do so by the mere fact that they were Government servants. He however recorded that the ends of justice required that these witnesses should be examined. He fixed 24th August, 1968 for further hearing of the matter and directed the issue of summonses to these two persons. These two persons were examined on the 24th August as Court witnesses and thereafter the argument of Counsel was resumed and concluded. By judgment delivered on 30th August, 1968, the learned Judge allowed the election petition holding in favour of the petitioner on the first issue. The appellant before us presented an application to the High Court under Articles 226 and 227 of the Constitution for quashing the order of the Judge; but the High Court dismissed the writ petition *in limine* on 4th October, 1968 and the appellant has now come up before this Court by Special Leave.

Learned Counsel for the appellant raised five points before us. The first point was that the procedure adopted by the trial Court was wrong in that the two witnesses who were examined as Court witnesses had been cited by the election petitioner earlier and the learned Judge had in the exercise of jurisdiction vested in him refused to issue summonses to them when he was asked to do so on 21st August, 1968. It was urged that having rejected this application, it was not open to the Judge to examine these two persons as Court witnesses and this was a serious irregularity which the High Court should have set right by quashing the order of the Judge based on the evidence of these witnesses. The second point was that the election petition was filed beyond the period prescribed by the Act and as such it was not maintainable. The third point was that the first issue which was decided against the appellant was so confusing and misleading that there was no fair trial of the petition to the prejudice of the appellant. The fourth point was that in any event there was no evidence of corrupt practice of which the appellant could be found guilty. The fifth point was that the order of the Judge disqualifying the appellant for a period of five years was unduly harsh and ought to be set aside.

With regard to the first point it is to be noted that the case of the election petitioner was that the appellant was guilty of publication of two pamphlets which cast serious aspersions on his character and conduct and prejudiced him materially in the eyes of the voters as a result whereof he lost the election and that the first of these also aroused the religious sentiments of the Muslim voters to his detriment. The appellants was found guilty of publication of the first pamphlet only. This was signed by six persons. There was no evidence as to where it was printed or who got it printed. The evidence adduced by the election petitioner was that the appellant had published all the pamphlets mentioned in the petition and distributed the same amongst the voters and the petitioner had come across the first pamphlet during the process of distribution. There can be no two opinions about the contents of the pamphlet being defamatory of the election petitioner's character. The pamphlet read :

"H. K. Kadlaskar, who contests the election from Ward No. 25 is an independent candidate, has been ostracized from the Muslim community and he has no support of the Muslim community and therefore nobody should vote for him."

While Kadlaskar was in charge of the management of the Kabarasthan, he was extracting Rs. 12 for allowing the members of Muslim community to bury their dead and had prohibited the burial of the dead bodies of dancing girls and had extracted hundreds of rupees from the persons whose dead were buried there. He turned the Kabarasthan into a brothel and was trading in illicit liquor for which he was convicted. Recently he got published a pamphlet in the name of his mistress Noorjahan Bapulal Kavathekar to defame Mohamad Umar Shaikh and he is making some imputations against the private character of Mohamad Umar and Moulana hannan and nobody should vote for this mean-minded and anti-social person.

In a meeting of the Muslim workers held on 29th April, 1967 in the Madina Masjid Hall under the presidentship of M.G. Shaik it was resolved unanimously that in the place of Shaikh Usman Abdul Bidiwale the Congress ticket should be given to Umar Shaikh, who had the backing of Muslim community and that he did great public service in the past. So all the voters should cast vote in favour of Mohamad Umar Shaikh whose symbol is a pair of bullocks.

(1) Ramjan Mohiddin Jamadar (Hundekari), Chairman Idgah Committee. (2) Shaik Abdul Sattur Rahimanbhai Bidiwale, Treasurer, Idgah Fund Committee. (3) Moulana Hannan, manager of Madarsa-e-Hidayatul Islam, and member of Madina Masjid. (4) Kamalsaheb Babasaheb Shiledar, Chairman of Madina Masjid and member of Idgah Committee. (5) Sayyed Amin, member of Madarsac-Hidayatul Islam and Idgah Committee. (6) Jalaluddin Allabux Sayyad, B-A., Ll. B., member of Madarsa-e-Hidayatul Islam."

The appellant who led evidence on his own behalf denied the publication of the pamphlet and the distribution of it by him as alleged by the petitioner. Nothing came out in cross-examination of the appellant to substantiate the election petitioner's averment that he was responsible for its distribution. Of the two witnesses who were examined as Court witnesses by the Judge, the witness Gopal Chintaman Ghugare did not say anything material on the point of distribution by the appellant. He merely said that he had seen people reading the pamphlet but he did not know who had distributed it. The other witness Hakim Abdul Rahiman Shaik stated categorically that he had received a copy of the pamphlet on the day previous to the municipal election, that is to say, on 2nd June 1967 and he gave full particulars as to how he came to receive it. He stated that he had attended a prayer meeting at a mosque on the 2nd June and after the Namaj was over the appellant had read over the pamphlet and one Moulana Hannan lent support to the appellant. In cross-examination it was elicited from him that although he had occasion to see the distribution of other pamphlets, he could give no details thereof, i.e., either about the person who distributed them on the dates when that was done. In cross-examination of this witness serious accusations were made against his character and probably no exception could have been taken if the Judge hearing the matter had refused to believe him. However that may be, the learned Judge accepted his testimony and came to the conclusion that the appellant had been personally responsible for the distribution of the first pamphlet and as such found him guilty of a corrupt practice and made an order disqualifying him under the Act from taking part in municipal elections for the next five years.

It was strenuously argued by learned Counsel for the appellant that the reception of evidence of the two witnesses called as Court witnesses vitiated the whole trial and therefore the High Court was not right in refusing to quash the order. Our attention was drawn to the provisions of Order XVI rule 14 of the Code of Civil Procedure and particularly to the conditions under which the Court may examine any person other than a party to the suit and not called as a witness by a party to the suit but of its own motion to give evidence therein. It was argued that after having

turned down the application of the election petitioner on the 21st August for issue of summons to these two persons, the learned Judge clearly went wrong in allowing them to be called as Court witnesses. In this connection we may note the provisions of section 21, sub-section 7 of the Maharashtra Municipalities Act, 1965. It provides as follows :—

“ * * * * *

(7) For the trial of such petition, the Judge shall have all the powers of a civil Court including power in respect of the following matters:—

- (a) discovery and inspection ;
- (b) enforcing the attendance of witnesses and requiring the deposit of their expenses ;
- (c) compelling the production of documents :
- (d) examining witnesses on oath ;
- (e) granting adjournments ;
- (f) reception of evidence on affidavit ; and
- (g) issuing commissions for the examination of witnesses ;

and the Judge may summon *suo motu* any person whose evidence appears to him to be material. The Judge shall be deemed to be a civil Court, within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.”

It appears that under this section, the Judge is given powers wider than those given by the Code of Civil Procedure under Order 16 rule 14 inasmuch as the section does not prescribe any prerequisite to the examination of a person as Court witness as envisaged by the Code of Civil Procedure. In our view, the learned Judge had jurisdiction to call these two persons as witness under the provisions of the Act. We may note that even under the Representation of the People Act, 1951 which does not contain a similar provision it has been held by this Court that

“although the trial Court should be at arms length and the Court should not really enter into the dispute as a third party, but it is not to be understood that the Court never has the power to summon a witness or to call for a document which would throw light upon the matter, particularly of corrupt practice which is alleged and is being sought to be proved. If the Court was satisfied that a corrupt practice has in fact been perpetrated, may be by one side or the other, it was absolutely necessary to find out who was the author of that corrupt practice.” [See *R.M. Seshadri v. G. Vasanta Pai*]¹.

In that case, the corrupt practice with which the appellant was charged was having used a large number of motor vehicles for the free conveyance of voters at an election. The trial Judge examined two witnesses as Court witnesses and it is quite clear that but for the evidence of these two persons, it would have been very difficult, if not impossible, for the Judge to have come to the conclusion he did and find the appellant guilty of corrupt practice. Although one of the two witnesses so examined had been cited earlier as a witness by one of the parties, he was not examined but during the course of the evidence led before the trial Court, it became quite clear that the two persons who were called as Court witnesses were fully conversant with the engagement of the motor vehicles and the Court therefore examined them as Court witnesses and on the basis of their evidence, found the appellant guilty of a corrupt practice. There this Court had to deal with the provisions of Order 16, rule 14 and the quotation from that judgment shows that the powers of the Court in this respect are of wide amplitude, specially when investigation is being made into allegations about the commission of a corrupt practice. It may be that in the instant case, if the two persons had not been examined, the Judge might well have decided the issue the other way.

1. (1969) 2 S.C.J. 208 : (1969) 2 M.L.J. 1969 S.C. 692.
(S.C.) 50: (1969) 2 An. W.R. (S.C.) 50; A.I.R.

But the Act certainly gave him the power to do so and no exception can be taken to the course adopted by the Judge although it must be recorded that his earlier order refusing to issue summons to them in the first instance when asked to do so on the 21st August was hardly justifiable. Probably the learned Judge realised that his order of the 21st August needed recalling. The appellant would have had a real cause for grievance if he had asked for an opportunity to rebut the evidence of these two witnesses and had been denied the same but this has nowhere been alleged. On the evidence no exception can be taken to the course adopted by the Judge in deciding the issue against the appellant on the facts and circumstances of this case. It may be that the evidence which was adduced was not so immaculate that another learned Judge deciding the petition might not have taken a different view. But it cannot be said that there was no evidence on which the Judge could have come to the conclusion he did. The first point therefore fails.

With regard to the second point, the learned Counsel argued by reference to two publications in the Maharashtra Gazette, the one of 8th June, 1967 and the other of 15th June, 1967 that the first publication having taken place on the 8th June the time-limit of ten days fixed under section 21, sub-section (1) of the Act began to run from that date and the petition which was filed on the 24th June was beyond time and should not have been entertained. It is difficult for us to see why two Gazette notifications had become necessary. One seems to be the verbatim reprint of the other. The first publication dated 8th June is headed "Maharashtra Government Gazette—Extraordinary—Official publication" while the other is headed "Maharashtra Government Gazette—Official Publication". The first bears the date 8th June and the second bears the date 15th June and both start with the sentence,

"in accordance with section 19 (1) of the Maharashtra Municipalities Act, 1965 it is declared that in respect of the Sangli Municipal Council General Elections held on 3rd June 1967, the below mentioned candidates are elected from the below mentioned wards for the seats mentioned as against their names".

As a matter of fact, it does not appear that there is any difference between the two Gazettes with regard to the names of the successful councillors. The appellant might have, if so minded, set up the first Gazette publication as the one fixing the period of limitation in which case the trial Judge would have been required to go into the matter. But the appellant precluded himself from doing so by his unconditional acceptance of the statements in paragraphs 1 and 2 of the petition. If the point had been canvassed before the learned trial Judge he would certainly have gone into the matter and found out why there were two Gazette publications and which was the publication to be taken into account for computation of the period of limitation prescribed by section 21 (1) of the Act. There was no error apparent on the face of the record before the High Court and consequently the jurisdiction under Article 226 of the Constitution could not have been exercised on the facts of the case by the issue of a writ of *certiorari*. Neither could the High Court have set aside the order of the trial Court under Article 227 of the Constitution under which the High Court's power of superintendence is confined to seeing that the trial Court had not transgressed the limits imposed by the Act. On the facts of the case the High Court was not called upon to go into this question.

There is certainly some substance in the grievance raised on behalf of the appellant that the first issue was rather confusing and misleading. Instead of framing a separate issue with regard to each charge of corrupt practice raised in the petition, the learned Judge framed the issue in a manner which leaves much to be desired. For instance he should have framed separate issue with regard to each of the pamphlets. The issues should further have specified the different heads of corrupt practice committed in respect of each of the pamphlets. We cannot, however, come to the conclusion that because of the unsatisfactory nature of the issues framed, the whole trial is vitiated. The appellant knew exactly what points he had to meet. Evidence was adduced about the publication and distribution of the pamphlets by the election petitioner and contradicted by the appellant. As we

have already stated, although the evidence about the distribution of the pamphlet was meagre and not beyond reproach, it was not for the High Court to take the view that the order ought to be quashed on the ground that there was no evidence. It was urged by learned Counsel for the appellant that there was enough material for the Court to come to the conclusion that Hakim Abdul Rahiman Shaik was not a person whose veracity could not be depended upon. There is much that can be said against him but this does not mean that everything deposed to by him should be rejected and when the trial Judge accepted the evidence with regard to the distribution of the pamphlet by the appellant the High Court which was not hearing an appeal could not be expected to take a different view in exercising jurisdiction under Articles 226 and 227 of the Constitution and for ourselves, we see no reason to interfere with the order of the High Court.

The fourth point too is not one of substance. If the distribution of the pamphlet be accepted, there can be no doubt that the appellant was guilty of trying to arouse religious sentiments of the voters of the particular ward a majority of whom were Muslims. The pamphlet starts off by describing the election petitioner as a person ostracised from the Muslim community. If this statement was true, naturally any right thinking Muslim would think twice before casting his vote in favour of such person. There was also a charge in that pamphlet that he had turned the Kabaraasthan into a brothel and was trading in illicit liquor for which he was alleged to have been convicted. In our view, there is no merit in this point raised by the learned Counsel.

As regards the last point, it was for the learned Judge to have come to his own conclusion as to the period of disqualification. The maximum penalty which the Act allowed him to impose was disqualification for six years and we see no reason to take any exception to the disqualification actually imposed. As noted above, the allegations of corrupt practice were of a serious nature and if the appellant was found guilty of the commission thereof, the period of five years' disqualification would certainly not be inappropriate.

In the result, therefore, the appeal fails ; but in the circumstances of this case we make no order as to costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.

The State of Gujarat

.. *Appellant**

v.

Patel Raghav Natha and others

.. *Respondents.*

Bombay Land Revenue Code (V of 1879), sections 65 and 211—Interpretation—Order of the Collector—Revisional powers—Exercise of—No stipulation of time—Commissioner to exercise his powers within reasonable time.

The question arises whether the Commissioner can revise an order made under section 65 of the Bombay Land Revenue Code, 1879 at any time. It is true that there is no period of limitation prescribed under section 211, but it seems plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised. Section 65 itself indicates the length of the reasonable time within which the Commissioner must act under section 211. Under section 65 of the Code if the Collector does not inform the applicant of his decision on the application within a period of three months the permission applied for shall be deemed to have been granted. This section shows that a period of three months is considered ample for the Collector to make up his mind and beyond that

the Legislature thinks that the matter is so urgent that permission shall be deemed to have been granted. Reading sections 211 and 65 together it seems to us that the Commissioner must exercise his revisional powers within a few months of the order of the Collector. This is reasonable time because after the grant of the permission for building purposes the occupant is likely to spend money on starting building operations at least within a few months from the date of the permission. In this case the Commissioner set aside the order of the Collector on 12th October, 1961, i.e., more than a year after the order, and it seems that this order was passed too late. The order of the Commissioner should be quashed on the ground that he did not give any reasons for his conclusions.

Appeal by Special Leave from the Judgment and Order, dated the 25th/27th July, 1964 of the Gujarat High Court in Special Civil Application No. 31 of 1962.

R. H. Dhrbar, Urmila Kapoor and S. P. Nayar, Advocates, for Appellant.

Purshottam Trikamdas, Senior Advocate, (*I. N. Shroff*, Advocate, with him), for Respondent No. 1.

N. S. Bindra, Senior Advocate, (*K. L. Hathi*, Advocate of *M/s. Hathi & Co.*, with him), for Respondent No. 3.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by Special Leave is directed against the judgment of the High Court of Gujarat (Vakil, J.) allowing the application filed by Patel Raghav Natha, respondent before us and hereinafter referred to as the petitioner, and quashing the order, dated 12th October, 1961, passed by the Commissioner Rajkot Division. The Commissioner by this order had set aside the order of the Collector, dated 2nd July, 1960, granting permission to the petitioner to use some land in Survey No. 417 for non-agricultural purposes.

In order to appreciate the contentions raised before us it is necessary to set out a few facts. The petitioner was a resident of the State of Rajkot and at an auction effected by the State he acquired on or about 22nd September, 1938, agricultural land bearing survey No. 417 which in all measured about 12 acres and 12 *ganthas*. After some acquisitions by the State out of this survey number he was left with 2 acres and 10 *ganthas* of agricultural land. On 20th October, 1958, the petitioner applied to the Collector for permission to convert this land to non-agricultural use, under section 65 of the Bombay Land Revenue Code, 1879, hereinafter referred to as the Code. This petition was first rejected by the Collector, but the Divisional Commissioner remanded the matter to the Collector. On remand, the then Collector of Rajkot, after holding an enquiry, granted permission to the petitioner to use the land for non-agricultural use by his order dated 2nd July 1960. Pursuant to this order a *sanad* was issued by the Collector to the petitioner on 27th July 1960. It appears that the *sanad* was amended on 3rd November, 1960 and 1st December, 1960. The *sanad* was in form M-1 and a number of conditions were appended to the *sanad*. Condition 6 of the main *sanad* provided that "save as herein provided, the grant shall be subject to the provisions of the said code." The special conditions originally included a condition that the land shall be used exclusively for constructing residential houses (condition 5) but this condition was altered in November, 1960.

It appears that the Municipal Committee of Rajkot had objected to the grant of permission before the Collector when a sketch of the land was sent to the Municipality. The objections as they appear from the order of the Collector granting the *sanad* were directed against the accuracy of the sketch, showing the northern and the western corners of the Ramkrishna Ashram, and regarding the boundaries and situation of the roads in survey Nos. 417 and 418. The Collector had overruled these objections.

The Municipal Committee approached the Commissioner to exercise powers under section 211 of the Code. The Commissioner noted the objections of the Municipality and after reciting the objections and the arguments of the learned Counsel for the petitioner and after inspecting the site, observed :

“ From this inspection the contentions of the Municipality as to the existence of various roads as well as the nature of the Kharaba land has been proved beyond doubt.

In light of the above arguments as well as the site inspection and the papers of the case, I set aside the order of the Collector granting N.A. Permission. I consider, on weighing all evidence cited above, that the land does not belong to Shri Raghav Natha.”

It is this order which has been quashed by the High Court.

The following grounds were urged before the learned Judge :

(1) The Commissioner or the State Government had no authority under section 211 of the Code to revise the order of the Collector so as to affect the agreement or *sanad* granted to him.

(2) The Commissioner's order is not a speaking order as no reasons are given by him for setting aside the Collector's order and, therefore, it should be quashed.

(3) The question of title to the land was not in controversy at all before the Collector and, therefore, it was not open to the Commissioner to permit the Municipality to agitate that question and the Commissioner had no jurisdiction to decide that question.

(4) In case the above points are not accepted, the order of the Commissioner is bad even on merits as the Commissioner had erred in law in allowing the questions to be agitated before him which were not agitated before the Collector and which involved considerations which were completely foreign to those which were actually before the Collector.

While dealing with ground No. 1 the learned Judge held that the Commissioner had no jurisdiction to pass an order which would nullify the *sanad*, and that the *sanad* was binding on both the parties till it was set aside in due course of law. On the second ground he held that there was some force in the submission. But he observed:

“ But at the same time if I had to decide this case on this contention raised. I may not have interfered only on this ground, with the decision of the Commissioner.”

On the third ground he found that it was true that the question of title was agitated by the Municipal Committee for the first time before the Commissioner, though it was primarily for the petitioner to show that he was an occupant within the meaning of section 65 of the Code. But then the learned Judge decided not to enter into the merits of the case as he had come to the clear conclusion that the Commissioner had no authority to pass the order that he did under section 211 of the Code.

The learned Counsel for the State of Gujarat, Mr. Dhebar, challenges the decision of the High Court that the Commissioner had no jurisdiction to pass the order dated 12th October, 1961. The relevant provisions of the Code and the Land Revenue Rules, 1921, hereinafter referred to as the Rules, are as follows :

“ *The Bombay Land Revenue Code, 1879.*

48. (1) The land revenue leviable on any land under the provisions of this Act shall be assessed, or shall be deemed to have been assessed, as the case may be, with reference to the use of the land—

(a) for the purpose of agriculture,

(b) for the purpose of building, and

(c) for a purpose other than agriculture or building.

(2) Where land assessed for use for any purpose is used for any other purpose, the assessment fixed under the provisions of this Act upon such land shall, notwithstanding that the term for which such assessment may have been fixed has

not expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as the State Government may prescribe in this behalf.

(3) Where land held free of assessment on condition of being used for any purpose is used at any time for any other purpose, it shall be liable to assessment.

(4) The Collector or a survey officer may, subject to any rules made in this behalf under section 214, prohibit the use for certain purposes of any unalienated land liable to the payment of land revenue, and may summarily evict any holder who uses or attempts to use the same for any such prohibited purpose.

65. An occupant of land assessed or held for the purpose of agriculture is entitled by himself, his servants, tenants, agents or other legal representatives, to erect farm-buildings, construct wells or tanks, or make any other improvements thereon for the better cultivation of the land, or its more convenient use for the purpose aforesaid.

But, if any occupant wishes to use his holding or any part thereof for any other purpose the Collector's permission shall in the first place be applied for by the occupant.

The Collector, on receipt of such application,

(a) shall send to the applicant a written acknowledgment of its receipt, and

(b) may, after due inquiry, either grant or refuse the permission applied for;

Provided that, where the Collector fails to inform the applicant of his decision on the application within a period of three months, the permission applied for shall be deemed to have been granted; such period shall, if the Collector sends a written acknowledgment within seven days from the date of receipt of the application be reckoned from the date of the acknowledgment, but in any other case it shall be reckoned from the date of receipt of the application.

Unless the Collector shall in particular instances otherwise direct, no such application shall be recognized except it be made by the occupant.

When any such land is thus permitted to be used for any purpose unconnected with agriculture it shall be lawful for the Collector, subject to the general order of the State Government, to require the payment of a fine in addition to any new assessment which may be leviable under the provisions of section 48.

66. If any such land be so used without the permission of the Collector being first obtained, or before the expiry of the period prescribed by section 65, the occupant and any tenant, or other person holding under or through him, shall be liable to be summarily evicted by the Collector from the land so used and from the entire field or survey number of which it may form a part, and the occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of section 48 for the period during which the said land has been so used, such fine as the Collector may, subject to the general orders of the provincial Government, direct.

Any tenant of any occupant or any other person holding under or through an occupant, who shall without the occupant's consent use any such land for any such purpose, and thereby render the said occupant liable to the penalties aforesaid, shall be responsible to the said occupant in damages.

67. Nothing in the last two preceding sections shall prevent the granting of the permission aforesaid on such terms or conditions as may be prescribed by the Collector, subject to any rules made in this behalf by the Provincial Government."

"Land Revenue Rules, 1921.

87. (a) Revision of non-agricultural assessment—

.....

(b) When land is used for non-agricultural purposes is assessed under the provisions of rules 81 to 85, a *sanad* shall be granted in the Form M if the land is used for building purposes, in Form NI if the land is used temporarily for N-A purposes other than building in Form N in all other cases.

Provided that if the land to be used for building purposes is situated within the limits of a Municipal Corporation constituted under the Bombay Municipal Corporation Act or the Bombay Provincial Municipal Corporation Act, 1949 the *sanad* shall be granted in Form M-1 ;....."

The relevant extracts from the agreement (*sanad*) are given below :

"Whereas application has been made to the Collector (hereinafter referred to as "the Collector" which expression shall include any officer whom the Collector shall appoint to exercise and perform his powers and duties under this grant) under section 65 of the Bombay Land Revenue Code 1879 (hereinafter referred to as "the said Code" which expression shall where the context so admits include the rules and orders thereunder) by inhabitant of Madhya Saurashtra being the registered occupant of survey No. 417 in the village of in the Taluka (hereinafter referred to as "the applicant" which expression shall where the context so admits include his heirs, executors, administrators and assigns) for permission to use for building purposes the plot of land (hereinafter referred to as the 'said plot'), described in the first schedule hereto and indicated by the letters.....on the site plan annexed hereto, forming part of survey No. 417 and measuring acres 2 *ganthars* 17, be the same a little more or less.

When used under rule 51 for land already occupied for agricultural purposes within certain surveyed cities the period for which the assessment is leviable will be ordered to coincide with the expiry of 99 year's period running in that city.

Now this is to certify that permission to use for building purposes, the said plot is hereby granted subject to the provisions of the said code, and on the following conditions, namely :—

(1) Assessment.....

.....

(6) Code provisions applicable:—Save except as herein provided, the grant shall be subject to the provisions of this code :

.....

In witness whereof the Collector of _____ has set his hand and the seal of his office on behalf of the Governor of Bombay, and the applicant has also hereunto set his hand, this _____ day _____ the of _____ 19 _____

Signature of Applicant

Signatures and designations of witnesses.

Signature of Collector

Signature and designations of witnesses.

We declare that who has signed this notice is, to our personal knowledge, the person he represents himself to be, and that he has affixed his signature hereunto in our presence".

It will be noticed that application is made under section 65 of the Code and it is under section 65 that the Collector either grants or refuses the permission applied for. It will be further noticed that if the Collector fails to inform the applicant of his decision on the application within a period of three months the permission applied for shall be deemed to have been granted, but if the Collector sends a written acknowledgment within seven days from the date of receipt of the application then the three months period is reckoned from the date of acknowledgment, and in other cases this period is reckoned from the date of receipt of the application. The Collector having given permission under section 65 he can prescribe conditions under section 67 of the Code. Under section 48 (2) where the land assessed for use, say for agricultural pur-

poses, is used for industrial purposes, the assessment is liable to be altered and fixed at a different rate by such authority and subject to such rules as the State Government may prescribe in this behalf. The rates for non-agricultural assessment are fixed under rules 81, 82, 82-A, 82-AA, 84 and 85 of the Rules. Rule 87 (b) provides that where land is assessed under the provisions of rules 81 to 85, a *sanad* shall be granted. Under the proviso to rule 87 (b) it is obligatory for the *sanad* to be granted in form N-1.

Relying on *Shri Mithoo Shahani v. Union of India*¹ the learned Counsel contends that there is a distinction between an order granting permission under section 65 and the agreement contained in the *sanad* which is issued under rule 87 (b). He urges that even if the *sanad* may not be revisable under section 211 of the Code, the order granting permission under section 65 is revisable under section 211, and if this order is revised the *sanad* falls along with the order.

We need not give our views on this alleged distinction for two reasons ; first, that this point was not debated before the High Court in this case or in earlier cases,² and secondly, because we have come to the conclusion that the order of the Commissioner must be quashed on other grounds.

Section 211 reads thus :

“211. The State Government and any revenue officer, not inferior in rank to an Assistant or Deputy Collector or a Superintendent of Survey, in their respective departments, may call for and examine the record of any inquiry or the proceedings of any subordinate revenue officer, for the purpose of satisfying itself or himself, as the case may be, as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer.

The following officers may in the same manner call for and examine the proceedings of any officer subordinate to them in any matter in which neither a formal nor a summary inquiry has been held, namely, a Mamlatdar, a Mahalkari, an Assistant Superintendent of Survey and an Assistant Settlement Officer.

If in any case it shall appear to the State Government or to such officer aforesaid that any decision or order or proceedings so called for should be modified, annulled or reversed, it or he may pass such order thereon as it or he deems fit ;

Provided that an Assistant or Deputy Collector shall not himself pass such order in any matter in which a formal inquiry has been held, but shall submit the record with his opinion to the Collector, who shall pass such order thereon as he may deem fit.”

The question arises whether the Commissioner can revise an order made under section 65 at any time. It is true that there is no period of limitation prescribed under section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised.

It seems to us that section 65 itself indicates the length of the reasonable time within which the Commissioner must act under section 211. Under section 65 of the Code if the Collector does not inform the applicant of his decision on the application within a period of three months the permission applied for shall be deemed to have been granted. This section shows that a period of three months is considered ample for the Collector to make up his mind and beyond that the Legislature thinks

1. (1964) 7 S.C.R. 103 : (1964) 2 S.C.J. 579.

2. The Government of the Province of Bombay v.

Harraji Maraji, (1940) Letters Patent Appeal No 40, 1938 decided on 8th Aug., 1940.

that the matter is so urgent that permission shall be deemed to have been granted. Reading sections 211 and 65 together it seems to us that the Commissioner must exercise his revisional powers within a few months of the order of the Collector. This is reasonable time because after the grant of the permission for building purposes the occupant is likely to spend money on starting building operations at least within a few months from the date of the permission. In this case the Commissioner set aside the order of the Collector on 12th October, 1961, *i.e.*, more than a year after the order, and it seems to us that this order was passed too late.

We are also of the opinion that the order of the Commissioner should be quashed on the ground that he did not give any reasons for his conclusions. We have already extracted the passage above which shows that after reciting the various contentions he baldly stated his conclusions without disclosing his reasons. In a matter of this kind the Commissioner should indicate his reasons, however briefly, so that an aggrieved party may carry the matter further if so advised.

We are also of the opinion that the Commissioner should not have gone into the question of title. It seems to us that when the title of an occupant is disputed by any party before the Collector or the Commissioner and the dispute is serious the appropriate course for the Collector or the Commissioner would be to refer the parties to a competent Court and not to decide the question of title himself against the occupant.

In the result the appeal is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

Ram Gopal Chaturvedi

.. *Appellant**

v.

The State of Madhya Pradesh

.. *Respondent.*

Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules (1960) Rule 12 and Constitution of India (1950), Articles 14, 16, 311 and 320 (3) (c)—Temporary Government servant (Civil Judge)—Termination of services—Validity of—Whether violative of Articles 14 and 16 of Constitution of India—Order passed without consulting State Public Service Commission under Article 320 (3) (c)—Effect of—Order not by way of punishment—Article 311 not attracted.

Constitution of India (1950), Article 136—Appeal by Special Leave—Plea raising mixed questions of law and facts not raised below, cannot be permitted for first time.

The appellant was a temporary Government servant and was not in quasi-permanent service. His services could be terminated on one month's notice under rule 12. There was no provision in the order of appointment or in any agreement that his services could not be so terminated. It is immaterial that the advertisement did not specifically mention that the services could be so terminated.

Rule 12 applies to all temporary Government servants who are not in quasi-permanent service. All such Government servants are treated alike. The argument that rule 12 confers an arbitrary and unguided discretion is devoid of any merit. The services of a temporary Government servant may be terminated on one month's notice whenever the Government thinks it necessary or expedient to do so for administrative reasons. It is impossible to define before-hand all the circumstances in which the discretion can be exercised. The discretion was necessarily left to the Government.

The provisions of Article 320 (3) (c) are not mandatory and will not confer any rights on the public servant and the absence of consultation with the State Public Service Commission will not afford him a cause of action.

The order did not cast stigma on the appellant's character or integrity nor did it visit him with any evil consequences. It was not passed by way of punishment and the provisions of Article 311 were not attracted. It was immaterial that the order was preceded by an informal inquiry into the appellant's conduct with a view to ascertain whether he should be retained in service.

On facts held, the impugned order did not involve any element of punishment nor did it deprive the appellant of any vested right to any office.

The High Court is vested with the control over the subordinate judiciary. If the High Court found that the appellant was not a fit person to be retained in service, it could properly ask the Government to terminate his services. Following the advice tendered by the High Court, the Government rightly terminated his services under rule 12.

The contention that rule 12 was unconstitutional as it was framed without consulting the State Public Service Commission and the High Court raises mixed questions of law and fact. As it was not raised in the High Court, the appellant cannot be allowed to raise it in this Court for the first time. *Likewise, the contention* that the High Court had recommended the appellant's confirmation cannot be allowed to be raised.

Appeal by Special Leave from the Order, dated the 27th July, 1964 of the Madhya Pradesh High Court in Misc. Petition No. 272 of 1964.

S. C. Chaturvedi, Miss. K. Mehta and M. V. Goswami, Advocates, for Appellant.

I. N. Shroff, Advocate, for Respondent.

The Judgment of the Court was delivered by

Bachawat, J.—The appellant was a temporary Civil Judge in Madhya Pradesh. On 14th March, 1961 an order was issued in the name of the Governor of Madhya Pradesh State that the appellant "is appointed temporarily, until further orders, as Civil Judge". Rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-permanent Service) Rules, 1960 provided :—

"12 (a) Subject to any provision contained in the order of appointment or in any agreement between the Government and the temporary Government servant, the service of a temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant :

Provided that the services of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice, or as the case may be, for the period by which such notice falls short of one month or any agreed longer period ;

Provided further that the payment of allowances shall be subject to the conditions under which such allowances are admissible.

(b) The periods of such notice shall be one month unless otherwise agreed between the Government and the Government servant."

On 25th March, 1964 an order was issued by and in the name of the Governor terminating the appellant's services. The order stated :—

"The services of Shri Ram Gopal Chaturvedi, temporary Civil Judge, Waidhan, are terminated with effect from the 1st June, 1960, forenoon."

The appellant filed a writ petition in the Madhya Pradesh High Court for quashing the order, dated 25th March, 1964. The High Court summarily dismissed the petition. It held that the impugned order was not by way of punishment and that

the appellant's services were liable to be terminated under the aforesaid rule 12 on one month's notice. The appellant has filed the present appeal after obtaining special leave.

The appellant was a temporary Government servant and was not in quasi-permanent service. His services could be terminated on one month's notice under rule 12. There was no provision in the order of appointment or in any agreement that his services could not be so terminated.

Counsel for the appellant submitted that rule 12 was unconstitutional as it was framed without consulting the State Public Service Commission and the High Court. The contention raises mixed questions of law and fact. It was not raised in the High Court, and we indicated in the course of arguments that the appellant could not be allowed to raise it in this Court for the first time.

Counsel next submitted that rule 12 was violative of Articles 14 and 16 of the Constitution. There is no merit in this contention. Rule 12 applies to all temporary Government servants who are not in quasi-permanent service. All such Government servants are treated alike. The argument that rule 12 confers an arbitrary and unguided discretion is devoid of any merit. The services of a temporary Government servant may be terminated on one month's notice whenever the Government thinks it necessary or expedient to do so for administrative reasons. It is impossible to define before-hand all the circumstances in which the discretion can be exercised. The discretion was necessarily left to the Government.

It was argued that the appellant's services could not be terminated on one month's notice as (a) his confirmation was recommended by the High Court after the expiry of the probationary period and (v) the advertisement, dated 9th September, 1960 inviting applications for the temporary posts of civil judges did not specifically mention that their services could be so terminated. The point that the High Court had recommended the appellant's confirmation was not raised in the High Court and cannot be allowed to be raised in this Court for the first time. The appellant's services were subject to the relevant rules and could be terminated on one month's notice under rule 12. It is immaterial that the advertisement did not specifically mention that his services could be so terminated.

It was argued that the impugned order was invalid as it was passed without consulting the State Public Service Commission under Article 320 (3) (c) of the Constitution. There is no merit in this contention. The case of *State of U.P. v. M.L. Sriyastava*¹ decided that the provisions of Article 320 (3) (c) were not mandatory and did not confer any rights on the public servant and that the absence of consultation with the State Public Service Commission did not afford him a cause of action.

It was next argued that the impugned order was passed by way of punishment without giving the appellant an opportunity to show cause against the proposed action and was therefore violative of Article 311 of the Constitution. In this connection, Counsel for the appellant drew our attention to the statement of case filed on behalf of the respondent. It appears that there were complaints that the appellant was associating with a young girl named Miss Laxmi Surve against the wishes of her father and other members of her family. The Chief Justice of Madhya Pradesh made inquiries into the matter and on 19th February, 1954 he admonished the appellant for this disreputable conduct. On his return to Jabalpur on 28th February, 1964 the Chief Justice dictated the following note :—

“During my recent visit to Gwalior, I probed into the matter of Shri R. G. Chaturvedi, Special Magistrate (Motor Vehicles) Gwalior, giving shelter to a girl named Kumari Laxmi Surve, the daughter of a Chowkidar employed in the J. C. Mills, Gwalior. Chaturvedi has been associating with this girl for over a year and his relations with her are not at all innocent. He

is sheltering and supporting Miss Surve against the wishes of her father and other members of her family. This is evident from the fact that on 14th December, 1963, when the girl was at the residence of Shri Chaturvedi and when her younger brother came to take her back, his house was stormed by a mob of 300 to 400 persons. A report of this incident was also recorded in the Roznamcha-Am of Lashkar Kotwali. The statement published by Miss Surve in some newspapers published from Gwalior explaining her action and her relations with her parents is significant. In that statement Miss Surve gave her address as 'C/o. Shri Chaturvedi'. That the statement is one inspired by Shri Chaturvedi is obvious enough. Shri Chaturvedi is still maintaining the girl. Shri Chaturvedi did not enjoy good reputation at Morena and Kolaras where he was posted before his posting at Gwalior. Shri Bajpai, District Judge, Gwalior also informed me that Shri Chaturvedi was not honest and that in collaboration with the Traffic Inspector he has taken money from accused persons in many cases under the Motor Vehicles Act."

No charge-sheet was served on the appellant nor was any departmental inquiry held against him. On 10th March, 1964 the Madhya Pradesh High Court passed a resolution that the State Government should terminate the appellant's services. Having regard to this resolution the State Government passed the impugned order dated 25th March, 1964. On the face of it, the order did not cast stigma on the appellant's character or integrity nor did it visit him with any evil consequences. It was not passed by way of punishment and the provisions of Article 311 were not attracted.

It was immaterial that the order was preceded by an informal inquiry into the appellant's conduct with a view to ascertain whether he should be retained in service. As was pointed out in the *State of Punjab v. Sukh Raj Bahadur*¹ :—

"An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution."

It was next argued that the impugned order was in violation of the principles of natural justice and in this connection reliance was placed on the decision of this Court in *State of Orissa v. Dr. Miss. Binapani Dei and others*² and *Ridge v. Baldwin*³. In *Binapani's case*² the appellant was an assistant surgeon in the Orissa medical service. The State Government accepted the date of birth given by her on joining the service. Later the Government reflexed the date of her birth on *ex parte* inquiry and passed an order compulsorily retiring her. The Court held that its order was invalid and was liable to be quashed. The appellant as the holder of an office in the medical service had the right to continue in service. According to the rules made under Article 309 she could not be removed from the office before superannuation except for good and sufficient reasons. The *ex parte* order was in derogation of her vested rights and could not be passed without giving her an opportunity of being heard. In the present case, the impugned order did not deprive the appellant of any vested right. The appellant was a temporary Government servant and had no right to hold the office. The State Government had the right to terminate his services under rule 12 without issuing any notice to the appellant to show cause against the proposed action. In *Ridge v. Baldwin*³ the House of Lords by a majority held that the order of dismissal of a chief constable on the ground of neglect of duty without informing him of the charge made against him and giving him an opportunity of being heard was in contravention of the principles of natural justice and was liable to be quashed. Section 191 of the Municipal Corporations Act, 1882 provided that the watch committee might at any time suspend and dismiss any

1. (1969) 1 S.C.J. 51 : A.I.R. 1958 S.C. 625.
1089, 1095.

3. L.R. (1964) A.C. 40.

2. (1967) 2 S.C.J. 339 : (1967) 2 S.C.R.

borough constable whom they thought negligent in the discharge of his duty or otherwise unfit for the same. The chief constable had the right to hold his office and before depriving him of his right the watch committee was required to conform to the principles of natural justice. The order of dismissal visited him with the loss of office and involved an element of punishment for the offences committed. In the present case, the impugned order did not involve any element of punishment nor did it deprive the appellant of any vested right to any office.

It was next argued that the State Government blindly followed the recommendations of the High Court. We find no merit in this argument. The State Government properly followed those recommendations. The High Court is vested with the control over the subordinate judiciary, see: *The State of West Bengal v. N. N. Bagchi*¹. If the High Court found that the appellant was not a fit person to be retained in service, it could properly ask the Government to terminate his services. Following the advice tendered by the High Court, the Government rightly terminated his services under rule 12.

In the result, the appeal is dismissed. There will be no order as to costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND C. A. VAIDIALINGAM, JJ.

Yuvraj Digvijay Singh

.. *Appellant**

v.

Yuvrani Pratap Kumari

.. *Respondent.*

The Hindu Marriage Act (XXV of 1955) S. 12 (1) (a)—Application by husband for annulment of his marriage on ground that his wife is impotent—Burden of proof—Failure to establish entails dismissal of the application.

A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity he will have to establish that his wife, the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceedings.

On facts held, that the Courts below have neither ignored nor misconstrued important pieces of evidence when they came to the conclusion that the appellant's case regarding the impotency of the respondent could not be believed. When once the finding has been arrived at that the appellant has not established that the respondent was impotent at the time of marriage and continued to be so until the institution of the proceeding, the inevitable result is the dismissal of the appellant's application under section 12 (1) (a) of the Act.

Appeal by Special Leave from the Judgment and Order dated the 25th August, 1966 of the Punjab High Court (Circuit Bench) Delhi in F.A.O. No. 132-D of 1961.

I. N. Shroff and Anand Prakash, Advocates for Appellant.

S. T. Desai Senior Advocate, (*I. M. Lall, S. R. Agarwal, Champat Rai, Sampat and E. G. Agarwal*, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Vaidialingam, J.—This appeal, by Special Leave, is directed against the judgment, dated 25th August, 1966 of the Circuit Bench of the High Court of Punjab at New Delhi, confirming the judgment of the District Judge, Delhi, dismissing the petition

* C.A. No. 905 of 1968: 1. (1966 2 S.C.J. 59 : (1966) 1 S.C.R. 771.

28th April, 1969. 2nd May, 1969

filed by the appellant under section 12 of the Hindu Marriage Act, 1955 (Act XXV of 1955) (hereinafter called the Act).

At the conclusion of the hearing of this appeal on 28th April, 1969 we had indicated our conclusion that no interference with the judgment of the High Court was called for and that the appeal is dismissed without any order as to costs. The detailed reasons for our decision were to be given later. Accordingly we hereby give our reasons for coming to the said conclusion.

The appellant had married the respondent according to Hindu rites on 20th April 1955. After the marriage the parties lived together for about three years at various places such as Delhi, Alwar, Bombay and Europe and, according to the appellant, during this period the marriage was not consummated. The appellant filed an application before the District Judge at Delhi on 15th March, 1960 under section 12 of the Act praying that the marriage between himself and his wife, the respondent, being voidable, may be annulled by a decree of nullity. In brief, the case of the appellant was that since his marriage he had made frequent attempts to consummate it, but, due to an invincible and persistent repugnance on the part of the respondent to the act of consummation, he had failed to achieve it and, as such, the marriage had remained unconsummated. He further averred that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the filing of his petition. According to him the impotency of the respondent was responsible for the non-consummation of the marriage.

The respondent-wife contested the application on various grounds. She emphatically denied that she had shown any repugnance whatsoever to the act of consummation of marriage. She further stated that she had lived with the appellant for about three years and had also accompanied him on his visit to England and the Continent and, during that period she was always ready and prepared to give full access to the petitioner to her person for consummating the marriage. She specifically averred that the consummation could not take place because the appellant was suffering from some physical disability or impotency and that he never made any attempt at consummation. She repudiated the allegation that she was either impotent at the time of the marriage or that she was importent at the time of the institution of the proceedings. She reiterated that the appellant was physically and emotionally unable to consummate the marriage and he had made a false excuse of impotency of the wife as being the cause for non-consummation of the marriage. She further stated, that the appellant was physically and sexually impotent and, consequently, unable to perform the normal sexual functions and, in view of this, he had never expressed his willingness, by his conduct or behaviour, to consummate the marriage, even though the parties lived together for a number of years and had occupied the same bed in the same room.

It will therefore be seen that while the appellant filed the application on the ground that the respondent was impotent, the respondent, in turn, had alleged that it was the appellant who was impotent. The material provision of the Act under which the application was filed by the appellant is section 12 (1) (a) which is as follows:

“12. (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding:

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A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the

respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.

Both the appellant and the respondent have been examined by doctors and their oral evidence and reports are on record. Though the impotency of the appellant does not strictly arise for consideration in a petition filed by him, nevertheless the trial Court framed issues even in that regard. Issues Nos. 1 and 2, which are material, are as follows :

" 1. Whether the respondent was impotent at the time of the marriage and has continued to be so till the filing of the present petition ?

2. Is the petitioner impotent and consequently unable to perform the normal sexual function with the respondent ? If so, what is the effect thereof ?

The learned District Judge, after a consideration of the evidence on record, ultimately held that the appellant had failed to prove that the respondent was at any time impotent and, as such, decided issue No. 1 against the appellant. He further held, on issue no 2 that the facts of the case, on the contrary, showed that because of some physical or psychological cause, it was the appellant who was not able to consummate the marriage with the respondent. In this view the petition filed by the husband-appellant was dismissed.

On appeal by the appellant, the learned Judges of the Circuit Bench of the Punjab High Court differed from the finding of the trial Court on issue No 2. The learned Judges however held that it had not been proved that the appellant was impotent, but, on the material issue regarding the impotency of the respondent-wife, the learned Judges were of the view that there were various factors and circumstances throwing a serious doubt on the allegation made by the appellant. The High Court held that it had not been established by the appellant that non-consummation of the marriage was due to the impotency of the respondent. It further held that on the state of evidence it did not believe that the respondent-wife had been proved to be impotent. The High Court also declined to believe the case of the appellant that the respondent had persisted in her attitude of exhibiting repulsion to the sexual act.

It is not really necessary for us to deal elaborately with the evidence in the case on the basis of which concurrent findings have been recorded by the District Court and the High Court, rejecting the case of the appellant that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.

Mr. Shroff, learned Counsel for the appellant, found considerable difficulty in satisfying us that the finding recorded by the two Courts on this aspect was erroneous or not supported by the evidence. No doubt, there was a feeble attempt made by the learned Counsel to urge that the evidence of the respondent that she had always been ready and willing to allow her husband to consummate the marriage should not be believed. When the two Courts have accepted her evidence, it is futile on the part of the appellant to urge this contention.

The reliance placed by Mr. Shroff on the decision of this Court in *Earnest John White v. Kathleen Olive White*¹, is misplaced. In that decision, it has been laid down that though it is not usual for this Court to interfere on questions of fact, nevertheless, if the Courts below ignore or mis-construe important pieces of evidence in arriving at their finding, such finding is liable to be interfered with by this Court. We are satisfied that the Courts below, in the instant case, have neither ignored nor mis-construed important pieces of evidence when they came to the conclusion that the appellant's case, regarding the impotency of the respondent, could not be believed.

On the findings that both the appellant and the respondent were not impotent and the marriage had not been admittedly consummated, Counsel urged that the

1. (1958) S.C.J. 839 : (1959) 2 An.W.R. M.L.J. (CrI). 631 : (1958) S.C.R. 1410.
(S.C.) 125 : (1958) 2 M.L.J. (S.C.) 125 : (1958)

conclusion to be drawn was that such consummation was not possible because of an invincible repugnance on the part of the wife. Counsel further urged that taking into account the practical impossibility of consummation, the application filed by the appellant should be allowed.

So far as the charge of 'invincible repugnance to the sexual act' on the part of the respondent is concerned, it is only necessary to refer to the finding of the High Court that the allegation had not been proved but that on the other hand lack of proper approach by the appellant for consummating the marriage might have been responsible for non-consummation. It is the further view of the High Court that the evidence of the appellant that he went on making attempts on several occasions for consummation of the marriage cannot be believed.

Mr. Shroff referred us to the decision of the House of Lords in *G. v. G*¹. That was an action by a husband against his wife for a decree of nullity of marriage on the ground of impotency. It was established that the husband was potent and had made frequent attempts to consummate the marriage; but he could not succeed in owing to the unreasoning resistance of the wife. The wife was declared on medical examination not to suffer from any structural incapacity. Under those circumstances the House of Lords held that the conclusion to be drawn from the evidence was that the wife's refusal was due to an invincible repugnance to the act of consummation, and as such, the husband was entitled to a decree of nullity. This decision does not assist the appellant, as we have already referred to the finding of the High Court disbelieving the evidence of the appellant on this aspect.

Mr. Shroff next relied on the decision in *G. v. G*², holding that a Court would be justified in annulling a marriage if it was found that the marriage had not been and could not be consummated by the parties thereto, though no reason for non-consummation was manifest or apparent. In that decision both the husband and the wife were perfectly normal and each charged the other as being responsible for non-consummation of the marriage. The Court held that without going into the question as to who was the guilty party, it was evident that the marriage had not been consummated and could not be consummated in future also. Accordingly the Court annulled the marriage for the reason that it was satisfied that—

"quoad hunc et quoad hunc, these people cannot consummate the marriage."

The Court further held that the two people should not be tied up together for the rest of their lives in a state of misery. The position in the case before us is entirely different. Neither of the two Courts have found that the marriage cannot be consummated in further (future?) and they have not also accepted the appellant's plea that the respondent had always resisted his attempts to consummate the marriage.

When once the finding has been arrived at that the appellant has not established that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding, the inevitable result is the dismissal of the appellant's application under section 12 (1) (a) of the Act. The result is that the appeal fails and is dismissed. There will be no order as to costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT: M. Hidayatullah, Chief Justice, J. C. SHAN, V. RAMASWAMI, C. K. MITTAL AND A.M. CHOWDHURY, JJ.

The Assistant Commissioner of Urban Land Tax, Madras and
others etc.

.. Appellants*

v.

The Buckingham and Carnatic Co., Ltd., etc.

.. Respondents.

Madras Urban Land Tax Act (XII of 1966), section 6 and Constitution of India (1950), Articles 14 and 19 (1) (8), Schedule VII, List I, Entry 86 and Schedule VII, List II, Entry 49 - Validity of the Act - Whether ultra vires of Articles 14 and 19 (1) Constitution of India - Act whether falls under Schedule VII, List I, Entry 86 or Schedule VII, List II, Entry 49 - Legislative entries to be given liberal interpretation - No overlapping - Retrospective operation of laws - Whether unreasonable.

There is no warrant for the assumption that Entries 86, 88 of List I and Entry 49 of List II form a special group embodying any particular scheme. The directive principle embodied in Article 39 (c) applies both to Parliament and to the State Legislature and it is difficult to conceive how Entries 86 to 88 of List I would exclude any power of the State Legislature to implement the same principle. The Legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subject to the list is not by way of scientific or logical definition but by way of a mere *simplex enumeratio* of broad categories. There is no reason for holding that Entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II. There is no conflict between entry 86 of List I and Entry 49 of List II. The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under the Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owns no debts and is under no enforceable obligation to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of total assets of the assessee. But Entry 49 of List II contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. by legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49 List II the State Legislature may adopt for determining the incidence of tax

*C.A. Nos. 51 to 53, 56, 57, 175 and
574 of 1969.

the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject-matter. In pith and substance the new Act in imposing a tax on urban land at a percentage of the market value is entirely within the ambit of Entry 49 of List II and within the competence of the State Legislative and does not in any way trench upon the field of legislation of Entry 86 of List I.

The legislative history of Entry 49, List II does not lend support to the argument that Entry 49, of List II relating to tax on lands and buildings cannot be separated. Entry 49 "Taxes on lands and buildings" should be construed as taxes on lands and taxes on buildings and there is no reason for restricting the amplitude of the language used in the Entry. Having regard to the language and context of section 6 of the new Act the opinion which the Assistant Commissioner has to form under that section is not subjective but should be reached objectively upon the relevant evidence after following the requisite formalities laid down in sections 7 to 11. After considering the relevant sections, it was held that the Act envisages a detailed procedure regarding submission of returns the making of an assessment after hearing objections and a right of appeal to higher authorities and that provisions of section 6 are not violative of Article 14 of the Constitution.

It is not possible to put the test of reasonableness into the straight jacket of a narrow formula. The object to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the Courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power put as limitation upon the power which would otherwise be practically without limit. As a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory or extortionate the reasonableness of the tax cannot be questioned.

A tax on land values and a tax on letting value though both are taxes under Entry 49 of List II cannot be clubbed together in order to test the reasonableness of one or the other for the purposes of Article 19 (1). But so far as the new Act is concerned the levy of 0.4 per cent. of the market value of the urban land is by no means confiscatory in effect.

It is not right to say as a general proposition that the imposition of tax with retrospective effect *per se* renders the law unconstitutional. In applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itself. *Held*, in view of the legislative background of the present case the imposition of the tax retrospectively from 1st July, 1963 cannot be said to be an unreasonable restriction.

Held Madras Urban Land Tax Act 1966 is constitutionally valid.

Appeals from the Judgment and Orders, dated the 10th April, 1968 of the Madras High Court in Writ Petitions Nos. 387 of 1968, etc.

S. V. Gupte, Senior Advocate (G. Ramanujam, Government Pleader, Madras High Court and A. V. Rangam, Advocate, with him), for Appellants (In C.As. Nos. 21 to 23 of 1969) and the Respondents (In C.As. Nos. 45, 47, 125 and 274 of 1969).

V. K. T. Chari, Senior Advocate (T. N. C. Rangarajan and D. N. Gupta, Advocates, with him), for Appellants (In C.As. Nos. 46 and 47 of 1969) and Respondents (In C.As. Nos. 21 and 23 of 1969).

V. K. T. Chari, Senior Advocate. (*A. R. Ramanathan*, *T. N. C. Rangarajan* and *R. Gopalakrishnan*, Advocates, with him), for Appellant (In C.A. No. 125 of 1969).

K. C. Rajappa, Advocate and *S. Balakrishnan* and *S. Laksminarasu*, Advocates of *Aiyar and Aiyar*, for Appellant (In C.A. No. 274 of 1969).

K. C. Rajappa, Advocate, *S. Balakrishnan* and *S. Laxminarasu*, Advocates of *Aiyar and Aiyar*, and *N. M. Ghatate*, Advocate, for Respondents (In C.A. No. 22 of 1969).

The Judgment of the Court was delivered by

Ramaswami, J.—In these appeals which have been heard together a common question of law arises for determination, namely, whether the Madras Urban Land Tax Act, 1966 (XII of 1966) is constitutionally valid.

In 1963 the Madras Legislature enacted the Madras Urban Land Tax Act, 1963 which came into force in the city of Madras on the 1st of July, 1963. In the Statement of Objects and Reasons of the 1963 Act it was stated that the Taxation Enquiry Commission and the Planning Commission were suggesting the need for imposing a suitable levy on lands put to non-agricultural use in urban areas. The State Government, after examining the report of the Special Officer, decided to levy a tax on urban land on the basis of market value of the land at the rate of 0.4 per cent. on such market value. Section 3 of the Act of 1963 (which will be referred to as the old Act) provided that there shall be levied and collected for every fasli year commencing from the date of the commencement of the Act, a tax on urban land from every owner of urban land at the rate of 0.4 per cent. of the average market value of the urban land in a sub-zone as determined under sub-section (2) of section 6. Section 7 provided for the determination of the highest and lowest market value in a zone. For determining the average market value, the Assistant Commissioner shall have regard to any matters specified in clauses (a) to (e) of sub-section (2) of section 6, namely :

- (a) the locality in which the urban land is situated ;
- (b) the predominant use to which the urban land is put, that is to say, industrial, commercial or residential ;
- (c) accessibility or proximity to market, dispensary, hospital, railway station educational institution, or Government Offices ;
- (d) availability of civil amenities like water supply, drainage and lighting ;
- and
- (e) such other matters as may be prescribed.

The constitutional validity of Act XXXIV of 1963 was challenged and in *Buckingham & Carnatic Co., Ltd. v. State of Madras*¹ a Division Bench of the Madras High Court held that the impugned Act fell under Entry 49, List II of Schedule VII to the Constitution and was within the legislative competence of the State Legislature. But the Act was struck down on the ground that Article 14 of the Constitution was violated, because the charging section of the Act levied the tax on urban land not on the market value of such urban land but on the average value of the lands in the locality known as a sub-zone. The new Act (Act XII of 1966) was passed by the State Legislature after the decision of the Madras High Court. In the new Act provisions relating to fixation of average market value in the sub-zone were omitted. Instead, section 5 of the new Act provides that there shall be levied and collected from every year commencing from the date of the commencement of the Act a tax on each urban land from the owner of such urban land at the rate of 0.4 per cent. of the market value of such urban land. Section 2 (10) defines "owner" as follows :

"Owner" includes—

(i) any person (including a mortgagee in possession) for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purposes the rent or profits of the urban land or the building constructed on the urban land in respect of which the word is used ;

(ii) any person who is entitled to the kudiwaram in respect of any inam land ; but does not include—

(a) a *shrotriampdar* : or

(b) any person who is entitled to the melwaram in respect of any inam land but in respect of which land any other person is entitled to the kudiwaram.

Explanation.—For the purposes of clause (9) and clause (10) inam land includes lakhiraj tenures of land and *shrotriam* land.

Section 2 (13) defines 'land' to mean any land which is used or is capable of being used as a building site and includes garden or grounds, if any, appurtenant to a building but does not include any land which is registered as wet in the revenue accounts of the Government and used for the cultivation of wet crops."

Section 6 states : "For the purposes of this Act, the market value of any urban land shall be estimated to be the price which in the opinion of the Assistant Commissioner, or the Tribunal, as the case may be, such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of this Act."

Section 7 provides for the submission of returns by the owner of urban land and reads :

"Every owner of urban land liable to pay urban land tax under this Act shall, within a period of one month from the date of the publication of the Madras Urban Land Tax Ordinance, 1966 (Madras Ordinance III of 1966) in the *Fort St. George Gazette*, furnish to the Assistant Commissioner having jurisdiction a return in respect of each urban land containing the following particulars, namely :

(a) name of the owner of the urban land,

(b) the extent of the urban land,

(c) the name of the division or ward and the street, survey number and sub-division number of the land and other particulars of such urban land, and

(d) the amount which in the opinion of the owner is the market value of the urban land."

Section 10 deals with the procedure for the determination of the market value by the Assistant Commissioner and states :

"(1) Where a return is furnished under section 7 the Assistant Commissioner shall examine the return and make such enquiry as he deems fit. If the Assistant Commissioner is satisfied that the particulars mentioned therein are correct and complete he shall, by order in writing determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(2) (a) Where on examination of the return and after the enquiry the Assistant Commissioner is not satisfied that the particulars mentioned therein are correct and complete he shall serve a notice on the owner either to attend in person or at his office on a date to be specified in the notice or to produce or cause to be produced on that date any evidence in which the owner may rely in support of his return.

(b) The Assistant Commissioner after hearing such evidence as the owner may produce in pursuance of the notice under clause (a) and such other evidence as the Assistant Commissioner may require on any specified points shall, by order

in writing, determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(c) Where the owner has failed to attend or produce evidence in pursuance of the notice under clause (a) the Assistant Commissioner shall, on the basis of the enquiry made under clause (a), by order in writing determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land."

Section 11 enacts :

"(1) Where the owner of urban land has failed to furnish the return under section 7 and the Assistant Commissioner has obtained the necessary information under section 9 he shall serve a notice on the owner in respect of each urban land specifying therein—

(a) the extent of the urban land,

(b) the amount which, in the opinion of the Assistant Commissioner, is the correct market value of the urban land, and direct him either to attend in person at his office on a date to be specified in the notice or to produce or cause to be produced on that date any evidence on which the owner may rely.

(2) After hearing such evidence, as the owner may produce and such other evidence as the Assistant Commissioner may require on any specified points, the Assistant Commissioner shall, by order in writing, determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(3) Where the owner has failed to attend or to produce evidence in pursuance of the notice under sub-section (1) the Assistant Commissioner shall, on the basis of the information obtained by him under section 9, by order in writing, determine the market value of the urban land and the amount of the urban land tax payable in respect of such urban land."

Section 20 provides for an appeal to the Tribunal from the orders of the Assistant Commissioner :

"(1) (a) Any assessee objecting to any order passed by the Assistant Commissioner under section 10 or 11 may appeal to the Tribunal within thirty days from the date of the receipt of the copy of the order.

(b) Any person denying his liability to be assessed under this Act may appeal to the Tribunal within thirty days from the date of the receipt of the notice of demand relating to the assessment :

Provided that no appeal shall lie under clause (a) or clause (b) of this sub-section unless the urban land tax has been paid before the appeal is filed.

(2) The Commissioner may, if he objects to any order passed by the Assistant Commissioner under section 10 or 11, direct the Urban Land Tax Officer concerned to appeal to the Tribunal against such order, and such appeal may be filed within sixty days from the date of the receipt of the copy of the order by the Commissioner.

(3) The Tribunal may admit an appeal after the expiry of the period referred to in clause (a) or clause (b) of sub-section (1) or in sub-section (2), as the case may be, if it is satisfied that there was sufficient cause for not presenting it within that period.

(4) An appeal to the Tribunal under this section shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by such fee as may be prescribed.

(5) The Tribunal may after giving both parties to the appeal an opportunity of being heard, pass such orders thereon, as it thinks fit and shall communicate

any such orders to the assessee and to the Commissioner in such manner as may be prescribed."

Section 30 confers power of revision in the Board of Revenue and is to the following effect :

"(1) The Board of Revenue may, either on its own motion or on application made by the assessee in this behalf, call for and examine the records of any proceeding under this Act (not being a proceeding in respect of which an appeal lies to the Tribunal under section 20) to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly :

Provided that the Board of Revenue shall not pass any order under this subsection in any case, where the decision or order is sought to be revised by the Board of Revenue on its own motion, if such decision or order had been made more than three years previously :

Provided further that the Board of Revenue shall not pass any order under this section prejudicial to any party unless he has had a reasonable opportunity of making his representations."

Section 33 states :

"(1) The Tribunal, the Board of Revenue, the Commissioner, the Assistant Commissioner, or the Urban Land Tax Officer or any other officer empowered under this Act shall, for the purposes of this Act, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (Central Act V of 1908), when trying a suit in respect of the following matters, namely :—

- (a) enforcing the attendance of any person and examining him on oath ;
- (b) requiring the discovery and production of documents ;
- (c) receiving evidence on affidavits ;
- (d) issuing commissions for the examination of witnesses ;

and any proceeding before the Tribunal, the Board of Revenue, the Commissioner, the Assistant Commissioners the Urban Land Tax Officer or any other officer empowered under this Act shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196, of the Indian Penal Code (Central Act XLV of 1860).

(2) In any case in which an order of assessment is passed *ex parte* under this Act, the provisions of the Code of Civil Procedure, 1908 (Central Act V of 1908), shall apply in relation to such order as it applies in relation to a decree passed *ex parte* by a Court."

The validity of the new Act was challenged in a group of writ petitions before the Madras High Court on various constitutional grounds. By a common judgment dated the 10th April, 1968 a Full Bench of five Judges overruled all the contentions of the petitioners with regard to the legislative competence of the Madras Legislature to enact the new Act. However, the Full Bench by a majority of 4 to 1 struck down section 6 of the new Act as being violative of Articles 14, 19 (1) (f) of the Constitution. The State of Madras and other respondents to the writ petitions (hereinafter called the respondents for the sake of convenience) filed appeals Nos. 21 to 23 of 1969 under a certificate granted by the High Court under Articles 132 and 133 (1) (a), (b) and (c) of the Constitution. The writ petitioners (hereinafter called the petitioners) have filed C.As. Nos. 46, 47, 125 and 274 of 1969 against the same judgment on a certificate granted by the High Court under Article 132 of the Constitution.

The first question to be considered in these appeals is whether the Madras Legislature was competent to enact the legislation under Entry 49 of List II of Schedule VII of the Constitution which reads : "Taxes on lands and buildings". It was argued on behalf of the petitioners that the impugned Act fell under Schedule VII, List I, Entry 86, that is "Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies". The argument of Mr. V. K.T. Chari may be summarised as follows :

The impugned Act was, both in form and substance, taxation of capital and was hence beyond the competence of the State Legislature. To tax on the basis of capital or principal value of assets was permissible to Parliament under List I, Entries 86 and 87 and to State under Entry 48 of List II. Taxation of capital was the appropriate method provided for effecting the directive principle under Article 39 of the Constitution, namely, to prevent concentration of wealth. Article 366 (9) contains a definition of 'estate duty' with reference to the principal value. Entry 86 of List I (Taxes on capital value of assets exclusive of agricultural land) and Entry 88 (Duties in respect of succession to such property) form a group of entries the scheme of which is to carry out the directive principle of Article 39 (c). The Constitution indicated that capital value or principal value shall be the basis of taxation under these entries and, therefore, the method of taxation of capital or principal value was prohibited even to Parliament in respect of other taxes and to the State except in respect of Estate Duty on Agricultural land. Such in effect is the argument of Mr. V.K. T. Chari. But in our opinion there is no warrant for the assumption that entries 86, 88 of List I and Entry 48 of List II form a special group embodying any particular scheme. The directive principle embodied in Article 39 (c) applies both to Parliament and to the State Legislature and it is difficult to conceive how entries 86 to 88 of List I would exclude any power of the State Legislature to implement the same principle. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere *simplex enumeratio* of broad categories. We see no reason, therefore, for holding that the entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II. In our opinion there is no conflict between Entry 86 of List I and Entry 49 of List II. The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the assets. It is not a tax directly on the capital values of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may, in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee. But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of

levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject-matters.

In *Ralla Ram v. Province of East Punjab*¹, the Federal Court held that the tax levied by section 3 of the Punjab Urban Immoveable Property Tax Act, XVII of 1940 on buildings and lands situated in a specified area at such rate not exceeding twenty per cent of the annual value of such buildings and lands, as the Provincial Government may by notification in the official Gazette direct in respect of each such rating area was not a tax on income but was a tax on lands and buildings within the meaning of Item No. 42 of List II of the Seventh Schedule of the Government of India Act, 1935. In that case it was contended that under the provisions of the Punjab Act the basis of the tax was the annual value of the buildings and since the same basis was used in the Income-tax Act for determining the income from property and generally speaking the annual value is the fairest standard for measuring income and, in many cases, is indistinguishable from it, the tax levied by the impugned Act was in substance a tax on income. The Court pointed out that the annual value is not necessarily actual income, but is only a standard by which income may be measured and merely because the Income-tax Act had adopted the annual value as the standard for determining the income, it did not follow that, if the same standard is employed as a measure for any other tax, that latter tax becomes also a tax on income. It was held by the Court that in substance the property tax levied by section 3, Punjab Urban Immoveable Property Tax Act, 1940 fell within item 42 of the Provincial List and was not tax on income falling within item 54 of the Federal List although the basis of the tax was the annual value of the building. The same view has been expressed by this Court in *Sudhir Chandra Nawn v. Wealth-tax Officer*², wherein it was held that the power to levy tax on lands and buildings under Entry 49 of List II did not trench upon the power conferred on Parliament by Entry 88 of List I and, therefore, the enactment of the Wealth-Tax Act by Parliament was not *ultra vires*.

The problem in this case is the problem of characterisation of the law or classification of the law. In other words the question must be asked: what is the subject-matter of the legislation in its "pith and substance" or in its true nature and character for the purpose of determining whether it is legislation with respect to Entry 49 of List II or Entry 86 of List I. In *Gallagher v. Lynn*³, the principle is stated as follows:

"It is well established that you are to look at the true nature and character of the legislation the pith and substance of the legislation. If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods e.g., direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed in 'respect of the forbidden subject'."

In the case of *Subrahmanyam Chettiar v. Muttuswami Goundan*⁴, Sir Maurice Gwyer, C.J. said:

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and

1. (1949) FLJ 8 : (1949) 1 M.L.J. 213 : 3. L.R. (1937) A.C. 863 at 870.
 (1948) F.C.R. 207. 4. (1940) F.C.R. 188 at 201 : (1941) 1
 2. (1968) 2 S.C.J. 790 : (1968) 2 I.T.J. 724 : M.L.J. (Supp.) 1.
 A.I.R. 1969 S.C. 59.

the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that : *Citizens Insurance Company of Canada v. Parsons*¹, *Russell v. The Queen*² ; *Union Colliery Co., of British Columbia v. Bryden*³ ; *Att. Gen. for Canada v. Att. Gen., for British Columbia*⁴ ; *Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters*⁵. In my opinion this rule of interpretation is equally applicable to the Indian Constitution Act."

For the reasons already expressed we hold that in pith and substance the new Act in imposing a tax on urban land at a percentage of the market value is entirely within the ambit of Entry 49 of List II and within the competence of the State Legislature and does not in any way trench upon the field of legislation of Entry 86 of List I.

It was then said that as Entry 49 of List II provides for taxes on lands and buildings, the impugned Act which imposes tax on lands alone cannot be held to fall under that entry. It was submitted that when the Legislature taxed land deliberately the legislation fell under Entry 45 of List II i.e., "land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights and alienation of revenues" and not under Entry 49 of that List. The legislative history of Entry 49 of List II does not however lend any support to this argument. Before the Government of India Act, 1935 lands and buildings were taxed separately and all that was done under the Government of India Act, 1935 and the Constitution was to combine the two entries relating to land and buildings into a single entry. Section 45-A of the Government of India Act, 1919 provided for making rules under the Act for the devolution of authority in respect of provincial subjects to local Governments, and for the allocation of revenues or other moneys to those Governments. The Government of India by a notification dated 16th December, 1920 made rules under that provision called the "Scheduled Tax Rules". These Rules contained two schedules. The first Schedule contained eight items of tax or fee. The Legislative Council of a Province may without obtaining the previous sanction of the Governor-General make and take into consideration any law imposing for the purposes of the local Government any tax included in Schedule I. Schedule II contained eleven items of tax. In making a law imposing or authorising any local authority to impose for the purposes of such local authority any tax in Schedule II, the Legislative Council required no previous sanction of the Governor General. In Schedule II, item No. 2 was tax on land or land values and item 3 was a tax on buildings. In the Government of India Act, 1935 the two entries were combined and List II, Entry 42 is "Taxes on lands and buildings and *hats* and Windows". The legislative history of Entry 49, List II does not, therefore, lend any support to the argument that Entry 49 of List II relating to tax on land and buildings cannot be separated. On the other hand we are of opinion that Entry 49 "Taxes on lands and buildings" should be construed as taxes on land and taxes on buildings and there is no reason for restricting the amplitude of the language used in the Entry. This view is also borne out by authorities. In *Raja Jagannath Baksh Singh v. The State of U.P.*⁶, the question at issue was whether the tax imposed by the U.P. Government on land holdings under the U.P. Large Land Holdings Tax Act, 1957 (U.P. Act XXXI of 1957) was constitutionally valid. It was held that the legislation fell under Entry 49 of List II and the tax on land would include agricultural land also. Similarly in *H.R.S. Murthy v. Collector of Chittoor and another*⁷, it was held that the land cess imposed under sections 78 and 79 of the Madras District Boards

1. L.R. (1881) 7 A.C. 96.

2. L.R. (1882) 7 A.C. 829.

3. L.R. (1899) A.C. 580.

4. L.R. (1930) A.C. 111.

5. L.R. (1940) A.C. 513.

6. (1964) 1 S.C.R. 220.

7. (1964) 2 S.C.J. 557: (1964) 2 M.L.J. (S.C.) 125: (1964) 2 An. W.R. (S.C.) 125: (1964) S.C.R. 666.

Act (Mad. Act XIV of 1920) and Mines and Minerals (Regulation and Development) Act (LXVII of 1957) was a tax on land falling under Entry 49 of the State List. We are of opinion that the argument of Mr. V.K.T. Chari on this aspect of the case must be rejected.

We proceed to consider the argument that no machinery is provided for determining the market value and the provisions of the new Act, therefore, violate Article 14 of the Constitution. The argument was stressed by Mr. V.K.T. Chari that the guidance given under the 1963 Act has been dispensed with and the Assistant Commissioner is not bound to take into account, among other matters, the sale price of similar sites, the rent fetched for use and occupation of the land, the principles generally adopted in valuing land under the Land Acquisition Act and the compensation awarded in recent land acquisition proceedings. We see no justification for this argument. The procedure for determining the market value and assessment of urban land is described in Chapter III of the new Act. Section 6 provides that the market value of the urban land "shall be estimated to be the price which in the opinion of the Assistant Commissioner, or the Tribunal, as the case may be, such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of this Act." It was said on behalf of the petitioners that the opinion which the Assistant Commissioner has to form is purely subjective and may be arbitrary. We do not think that this contention is correct. Having regard to the language and context of section 6 of the new Act we consider that the opinion which the Assistant Commissioner has to form under that section is not subjective but should be reached objectively upon the relevant evidence after following the requisite formalities laid down in sections 7 to 11 of the new Act. Instead of the Assistant Commissioner classifying the urban land and determining the market value in a zone, the present Act requires a return to be submitted by the owner mentioning the amount which, in the opinion of the owner, is the market value of the urban land. On receipt of the return, if the Assistant Commissioner is satisfied that the particulars mentioned are correct and complete, he may determine the market value as given by the owner of the land. If he is not satisfied with the return, he shall serve a notice on the owner asking him to attend his office with the relevant evidence in support of his return. After hearing the owner and considering the evidence produced, the Assistant Commissioner may determine the market value. In case the owner fails to attend or fails to produce the evidence, the Assistant Commissioner is empowered to assess the market value on the basis of an enquiry made by him. Section 11 prescribes the procedure for determining the market value when the owner fails to furnish a return as required under section 7. The section requires the Assistant Commissioner to serve a notice on the owner specifying amongst other things the amount, which in the opinion of the Assistant Commissioner, is the correct market value and directing the owner to attend in person at his office on a date specified in the notice or to produce any evidence on which the owner may rely. After hearing such evidence as the owner may produce and considering such other evidence as may be required, the Assistant Commissioner may fix the market value. The proceeding before the Assistant Commissioner is judicial in character and his opinion regarding the market value is reached objectively on all the materials produced before him. Section 20 provides for an appeal by the assessee objecting to the determination of the market value made by the Assistant Commissioner to a Tribunal within thirty days from the date of the receipt of the copy of the order. The Act requires that the Tribunal shall consist of one person only who shall be a judicial officer not below the rank of a Subordinate Judge. By section 30, the Board of Revenue is empowered either on its own motion or on application made by the assessee in this behalf, to call for and examine the records of any proceedings under the Act (not being a proceeding in respect of which an appeal lies to the Tribunal under section 20), to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein, and if it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly. Section 32 enables the urban land tax officer, or the

Assistant Commissioner, or the Board of Revenue or the Tribunal to rectify any error apparent on the face of the record at any time within three years from the date of any order passed by him or it. Section 33 confers power on the Assistant Commissioner to take evidence, to require discovery and production of documents and to receive evidence on affidavit etc. Thus, the Act envisages a detailed procedure regarding submission of returns, the making of an assessment after hearing objections and a right to appeal to higher authorities. We are hence unable to accept the contention of the petitioners that the provisions of section 6 of the new Act are violative of Article 14 of the Constitution.

It is necessary to state that the High Court decided the case in favour of the respondents mainly on the ground that investment of the power to determine value of the urban land under section 6 of the Act constituted excessive delegation of authority and so violative of Articles 19 (1) and 14 of the Constitution. (*see the judgment of Veeraswami, J., who pronounced the main judgment in the High Court*). But Mr. V. K. T. Chari did not support this line of reasoning in his arguments before this Court. On the other hand learned Counsel conceded that the power of determining the value of the urban land being judicial or quasi-judicial in character the doctrine of excessive delegation of authority had no application.

We pass on to consider the next contention raised on behalf of the petitioners namely that the Act should be struck down as an unreasonable restriction on the right to acquire, hold and dispose of property and as such violative of Article 19 (1) (f) of the Constitution. It was argued that the test of reasonableness would be that the tax should not be so high as to make the holding of the property or the carrying on of the activity (business or profession) which is subject to taxation, uneconomic according to accepted rates of yield. In this connection it was said that that the new Act by imposing a tax on the capital value at a certain rate was not correlated to the income or rateable value and, therefore, violates the requirement of reasonableness. We are unable to accept the proposition put forward by Mr. Chari. It is not possible to put the test of reasonableness into the straight jacket of a narrow formula. The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the Courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit. It was observed by this Court in *Rai Ramakrishna v. State of Bihar*¹ :

“It is of course true that the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the Legislature can be taxed by the Legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the contention raised by a citizen that that taxing statute contravenes Article 19 Courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such

1. (1964) 2 S.C.J. 749 : (1964) 1 S.C.R. 897 : A.I.R. 1963 S.C. 1667 at 1673.

that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes. This is illustrated by the decision of this Court in the case of *Kunnathat Thathunni Moopil Nair v. State of Kerala*¹ where taxing statute was struck down because it suffered from several fatal infirmities. On the other hand, we may refer to the case of *Jagannath Baksh Singh v. State of Uttar Pradesh*², where a challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed that unless the infirmities in the impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power, the Court would uphold a taxing statute."

As a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory, or extortionate the reasonableness of the tax cannot be questioned. Mr. Chari submitted that the existing property tax under section 100 of the City Municipal Corporation Act and the tax on urban lands under the new Act both enacted under Entry 49 of the State List, one of them imposing a tax on the capital value of urban lands and the other on the annual value of lands and buildings exhaust in unreasonably high proportion of income. For instance, it is pointed out that in W.P. No. 2835 of 1967 the annual income on property was Rs. 6,000 and the proposed market value for the lands alone comes to Rs. 10,40,000. The urban land tax at 0.4 per cent. of the market value is Rs. 4,160 and the income-tax at the rate applicable to the petitioner was Rs. 1,234. The total tax burden in the aggregate under the three heads was Rs. 6,794, which exceeds the rental income. In W.P. No. 3686 of 1967 the municipal annual value was Rs. 4,095, the property tax was Rs. 1,098 and the urban land tax at 0.4 per cent. was Rs. 1,523. The proportion of the two taxes together to yearly or annual municipal value worked out to Rs. 62.5 per cent. It was, therefore, said that the taxes put together would practically exhaust the total income and the charging section in the new Act was unreasonable. The answer to the contention is that the charge is on the market value of the urban land and not on the annual letting value on which the municipal property tax is based. The basis of the two taxes being different it is not permissible to club together the two taxes and complain of the cumulative burden. If the tax is on the market value of the urban land as it is in this case it does not admit of a complaint that it takes away an unreasonably high proportion of the income. A tax on land values and a tax on letting value, though both are taxes under Entry 49 of List II, cannot be clubbed together in order to test the reasonableness of one or the other for the purposes of Article 19 (1). But so far as the new Act is concerned we consider that the levy at 0.4 per cent. of the market value of the urban land is by no means confiscatory in effect. It was also pointed out by Mr. V. K. T. Chari that in certain cases the market value of the urban land was arrived at by applying what is known as the contractor's method not to the building which stands on the land whose value is ascertained by that means but to some other building on a different land taken for comparison. It was said that it was difficult enough for a man to apply the contractor's method of valuation to his own building which could be done by a competent architect after taking into account all measurements. But it is absolutely an impossible task to check up or make objections to the contractor's method applied to another man's property which cannot be trespassed upon. It was said that the contractor's method was the last resort in valuation when a building has to be valued apart from the land and that it was a wrong application of the formula to use it to value the land without the building particularly when valuation of land can be made by applying the principles of the Land Acquisition Act. But this argument has no bearing on the constitutional validity of the charging section or the machinery provisions of the Act. It is, however, open to the writ petitioners to challenge the validity of the particular valuation in any particular case by way of an appeal under a statute or to move the High Court for grant of writ under Article 226 of the Constitution.

1. (1961) 2 S.C.J. 267 : (1961) 3 S.C.R. 77 :
A.I.R. 1961 S.C. 552.

2. (1963) 1 S.C.R. 220 : A.I.R. 1962 S.C.
1563.

The impugned Act provides for the retrospective operation of the Act. Section 2 states that except sections 19, 47 and 48, other sections shall be deemed to have come into force in the City of Madras on the 1st day of July, 1963 and section 19 and 47 shall be deemed to have come into force in the City of Madras on the 21st May, 1966. It also provides that section 48 shall come into force on the date of the publication of the Act in the *Fort St. George Gazette*. Section 5 enacts that the market values of the urban lands shall be estimated to be the price which in the opinion of the Assistant Commissioner or the Tribunal such urban land would have fetched or fetch if sold in the open market on the date of the commencement of the Act, that is, from 1st July, 1967. The urban land tax is, therefore, payable from 1st July, 1963. It is contended on behalf of the petitioners that the retrospective operation of the law from 1st July, 1963, would make it unreasonable. We are unable to accept the argument of the petitioner as correct. It is not right to say as a general proposition that the imposition of tax with retrospective effect *per se* renders the law unconstitutional. In applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itself. Taking into account the legislative history of the present Act we are of opinion that there is no unreasonableness in respect of the retrospective operation of the new Act. It should be noticed that the Madras Act of 1963 came into force on 1st July, 1963, and provided for the levy of urban land tax at the same rate as that provided under the new Act. The enactment was struck down as invalid by the judgment of the Madras High Court which was pronounced on the 25th March, 1966. The Legislature by giving retrospective effect to Madras Act XII of 1966 that the urban land must be taxed on the date on which the 1963 Act came into force the new Act cured the defect from which the earlier Act was suffering. In *Rai Ramakrishna's case*¹ the question at issue was whether the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 (XVII of 1961) was violative of Article 19 (5) and (6) of the Constitution for the reason that it was made retrospective with effect from 1st April, 1950. It appears that the Bihar Finance Act, 1950 levied a tax on passengers and goods carried by public service motor vehicles in Bihar. In an appeal arising out of a suit filed by the passengers and owners of goods in a representative capacity the Supreme Court pronounced on the 12th December, 1960, a judgment declaring Part III of the said Act unconstitutional. Thereafter on Ordinance namely, Bihar Ordinance II of 1961 was issued on the 1st of August, 1961, by the State of Bihar. By this Ordinance the material provisions of the earlier Act of 1950 which had been struck down by this Court were validated and brought into force retrospectively from the date when the earlier Act had purported to come into force. Subsequently the provisions of the said Ordinance were incorporated in the Act namely the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 which was duly passed by the Bihar Legislature and received the assent of the President on 23rd September, 1961. As a result of the retrospective operation of this Act its material provisions were deemed to have come into force on 1st April, 1950, that is to say, the date on which the earlier Act of 1950 had come into force. The appellants challenged the validity of this Act of 1961. Having failed in their writ petition before the High Court the appellants came to this Court and the argument was that the retrospective operation prescribed by section 1 (3) and by a part of section 23 (b) of the Act so completely altered the character of the tax proposed to be retrospectively recovered that it introduced a serious infirmity in the legislative competence of the Bihar Legislature itself. The argument was rejected by this Court and it was held that having regard to the relevant facts of the case the restrictions imposed by the said retrospective operation was reasonable in the public interest under Article 19 (5) and (6) and also reasonable under Article 304 (b) of the Constitution. In our opinion the ratio of this decision applies to the present case where the material facts are of a similar character.

1. (1964) 2 S.C.J. 749 : (1964) 1 S.C.R. 897 : A.I.R. 1963 S.C. 1667 at 1673.

In this context a reference may be made to a recent review of retroactive legislation in the United States of America :

" It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called "small repairs." Moreover the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus the interest in the retroactive curing of such a defect in the administration of Government outweighs the individual's interest in benefiting from the defect The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount Governmental interest in obtaining adequate revenues but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of Government among those who benefit from it. Indeed, as early as 1935 one commentator observed that "arbitrary retroactivity" may continue to rear its head in tax briefs but for practical purposes in this field it is as dead as a dog." "

(Charles B. Hochman in 73 Harvard Law Review 692 at page 705).

In view of the legislative background of the present case we are of opinion that the imposition of the tax retrospectively from 1st July, 1963, cannot be said to be an unreasonable restriction. We, therefore, reject the argument of the petitioners on this aspect of the case.

For these reasons we hold that the Madras Urban Land Tax Act, 1966 (Act of 1966) must be upheld as constitutionally valid. We accordingly set aside the judgment of the Madras High Court dated the 10th April, 1968, and order that writ petitions filed by the petitioners should be dismissed. In other words C.A. Nos. 21 to 23 are allowed and C. As. Nos. 46, 47, 125 and 274 are dismissed. There will be no order with regard to costs of these appeals.

S.V.J.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

Union of India

.. Appellant*

v.

Surjeet Singh Atwal

.. Respondent.

Arbitration Act (X of 1940), sections 2 (c), 20, 31 (4) and 34—Agreement containing arbitration clause—Suit by one of the parties, ignoring arbitration clause, other party filing application under section 34 for stay of suit—Pending that suit—Application by other party under section 20 in a different Court—Maintainability of—Whether application under section 34 is an application in a reference within the meaning of section 31 (4).

Two conditions must be fulfilled in order to give a Court exclusive jurisdiction under section 31 (4) of the Act. In the first place an application under the Arbitration Act must be made to the Court competent to entertain it. In the second place the application must be made "in any reference". The application for stay of suit under section 34 in the present case is not an application in a reference within the wider meaning given to the phrase by this Court in *Kumbha Mawji v. Union of India*. (1953) S.C.R. 878: (1953) S.C.J. 436 : (1953) 1 M.L.J. 841. There are different sections in the Arbitration Act whereby an application is to be made even before any reference has been made. Applications under sections 8 and 20 are clearly applications anterior to the reference but they lead to a reference. Such applications are undoubtedly applications "in

the matter of a reference " and may fall within the purview of section 31 (4) of the Act even though these applications are made before any reference has taken place. But an application under section 34 is clearly not an application belonging to the same category. It has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private Tribunal.

The second condition imposed under section 31 (4) is that the application for stay must be made to a Court competent to entertain it. Section 34 provides for an application to a judicial authority before whom a legal proceeding is pending for the stay of that proceeding. An application for stay of legal proceeding to a judicial authority before whom it is pending is an application under the Arbitration Act to a judicial authority competent to entertain it. But the judicial authority need not necessarily be a Court competent under section 2 (c) to decide the question forming the subject-matter of the reference. A party to an arbitration agreement may choose to file a suit in a Court which has no jurisdiction to go into the matter at all and merely because the defendant in such a suit has to make an application to that Court under section 34 of the Act for the stay of the suit it cannot be said that the Court which otherwise has no jurisdiction in the matter becomes a Court within the meaning of section 2 (c) of the Act.

Held, the applications for stay under section 34 of the Act cannot be treated as an application in a reference under section 31 (4) of the Act and that the Subordinate Judge, Delhi was right in holding that the application under section 20 was maintainable in this Court and for making a reference of the dispute to the arbitrator mentioned in the agreement.

Appeal by Special Leave from the Judgment and Order, dated the 11th January, 1965 of the Punjab High Court, Circuit Bench at Delhi in F.A.O. No. 82-D of 1963.

Dr. L. M. Singhvi, Senior Advocate (*B. D. Sharma*, Advocate, with him), for Appellant.

M. G. Chagla and *C. B. Agarwala*, Senior Advocates (*Rameshwar Nath, Mahinder Narain* and *P. L. Vohra* Advocates of *M/s. Rajinder Narain & Co.*, with them), for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by Special Leave from the judgment of the Punjab High Court, dated 11th January, 1965 in F.A.O. No. 82-D of 1963.

The said appeal was filed under section 39 of the Arbitration Act, 1940 (hereinafter referred to as the Act) against the order of the Subordinate Judge, First Class, Delhi, dated 29th January, 1963, passed on an application under section 20 of the Act by the Union of India for filing the arbitration agreement in Court and to make a reference of the dispute to the officer mentioned in the agreement.

In the year 1942 tenders were invited by the Union of India for construction of certain runways and roads in an aerodrome at Dalbhumgarh. The tender of the respondent, Surjeet Singh Atwal, was accepted and the agreement was executed on 19th August, 1944. Clause 25 of the agreement provided for the settlement of the disputes by reference to the arbitration of the Superintending Engineer of the Circle for the time being, according to law. The respondent alleged that he had completed the work entrusted to him under the contract and made a claim of Rs. 50,000 on the basis of his last bill. On the other hand the Union of India made a demand against the contractor for a sum of Rs. 5,09,164 on the ground that the amount had been over-paid to the respondent. Ignoring the arbitration clause respondent filed a suit on the original side of the Calcutta High Court for the recovery of Rs. 50,000 being suit No. 531 of 1951. The Union of India made an application under section 34 of the Act for the stay of the suit. The suit was consequently stayed and the matter was referred to the arbitration of the Superintending

Engineer Calcutta Aviation Circle C.P.W.D. Calcutta. Before the arbitrator the Union of India made its counter-claim for a sum of Rs. 5,09,164. The contractor objected to the entertainment of the counter-claim. The stay of the suit which was granted by the Calcutta High Court was later on vacated. Pending the suit of the respondent in the Calcutta High Court the Union of India filed an application under section 20 of the Act in the Court of the Subordinate Judge, First Class, Delhi for getting the agreement of reference filed in the Court and for making the reference of the disputes between the parties to the arbitration of the Superintending Engineer Central Circle No. 1 C.P.W.D. Calcutta. The respondent opposed the petition mainly on the ground that the Court of Subordinate Judge, First Class, Delhi had no jurisdiction to entertain the application. It was contended that the appellant had filed an application under section 34 of the Act for stay of the suit filed in the Calcutta High Court, and, therefore any subsequent application relating to arbitration under the agreement should be filed in the Calcutta High Court. By its judgment dated 29th January, 1963, the Subordinate Judge, First Class, Delhi allowed the application of the appellant and ordered that the disputes between the parties be referred to the Superintending Engineer Calcutta Circle No. 1 C.P.W.D. The learned Subordinate Judge held that the contract of the parties was concluded at Delhi and it was signed at Delhi on behalf of the respondent and therefore the Delhi Court had jurisdiction to try the suit. Aggrieved by the judgment of the Subordinate Judge First Class the respondent filed an appeal under section 39 of the Act in the Punjab High Court. By his judgment dated 11th January, 1965, D. K. Mehajan, J., allowed the appeal and set aside the order of the Subordinate Judge First Class and dismissed the application of the appellant on the ground that the Delhi Court had no jurisdiction to entertain an application under section 20 of the Act.

The question involved in this appeal is whether the application made by the appellant under section 34 of the Act before the Calcutta High Court was an application in a reference within the meaning of section 31 (4) of the same Act. Section 2 (c) of the Act defines "Court" thus :

"Court" means a civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit but does not except for the purpose of arbitration proceedings under section 21 include a Small Cause Court";

Section 14 provides that the award may be filed in the Court. Section 31 (1) enacts that an award may be filed in any Court having jurisdiction in the matter to which the reference relates. Section 31 (2) provides that all questions regarding the validity effect or existence of an award or an arbitration agreement between the parties to the agreement shall be decided by the Court in which the award has been filed and by no other Court. Section 31 (3) states that all applications regarding the conduct of arbitration proceedings shall be made to the Court where the award has been filed and to no other Court. Section 31 (4) reads as follows :

"Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court."

Section 34 states :

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings and if satisfied that there is no sufficient reason why the matter should not be referred in accordance

with the arbitration agreement and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration such authority may make an order staying the proceedings."

Two conditions must be fulfilled in order to give a Court exclusive jurisdiction under section 31 (4) of the Act. In the first place an application under the Arbitration Act must be made to the Court competent to entertain it. In the second place the application must be made "in any reference." It was contended on behalf of the respondent that an application for stay of suit under section 34 of the Act was an application made "in a reference" within the meaning of section 31 (4) of the Act. In support of this proposition reference was made to the decision of this Court in *Kumbha Mawji v. Union of India*¹ in which it was held that the phrase "in any reference" in section 31 (4) of the Act was comprehensive enough to cover an application first made after the arbitration is completed and a final award made and the sub-section is not confined to applications made during the pendency of the arbitration proceeding. It was pointed out that sub-section (1) of section 31 determines the jurisdiction of the Court in which an award can be filed and that sub-sections (2) (3) and (4) of section 31 were intended to make that jurisdiction effective in three different ways (1) by vesting in one Court the authority to deal with all questions regarding the validity, effect of existence of an award or an arbitration agreement (2) by casting on the persons concerned the obligations to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one Court and (3) by vesting exclusive jurisdiction in the Court in which the first application relating to the matter was filed. The context therefore, of sub-section (4) would seem to indicate that the sub-section was not meant to be confined to applications made during the pendency of an arbitration. The necessity for clothing a single Court with effective and exclusive jurisdiction, and to bring about by the combined operation of these three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced. It was therefore held that the expression "in any reference" in section 31 (4) should be construed as "in the course of a reference". Even so we are of opinion that the application for stay of suit under section 34 in the present case is not an application in a reference within the wider meaning given to the phrase by this Court in *Kumbha Mawji's case*¹. There are different sections in the Arbitration Act whereby an application is to be made even before any reference has been made. Section 8 for instance provides for an application to invoke the power of the Court when the parties fail to concur in the appointment of an arbitrator to whom the reference can be made. So also section 20 provides for an application to file the arbitration agreement in Court so that an order of reference to an arbitrator can be made. These are clearly applications anterior to the reference but they lead to a reference. Such applications are undoubtedly applications "in the matter of a reference" and may fall within the purview of section 31 (4) of the Act even though these applications are made before any reference has taken place. But an application under section 34 is clearly not an application belonging to the same category. It has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private tribunal.

We do not, therefore, consider that an application for stay of suit under section 34 is an application in a reference even within the wider meaning given to that phrase by this Court in *Kumbha Mawji's case*¹. The second condition imposed by section 31 (4) is that the application for stay must be made to a Court competent to entertain it. It should be noticed that in section 34 the expression "judicial authority" is used. The section provides for an application to a judicial authority before

1. (1953) S.C.J. 426 : (1953) 1 M.L.J. 841 : (1953) S.C.R. 878.

whom a legal proceeding is pending for the stay of that proceeding. An application for stay of legal proceeding to a judicial authority before whom it is pending is an application under the Arbitration Act to a judicial authority competent to entertain it. But the judicial authority need not necessarily be a Court competent under section 2 (c) to decide the question forming the subject-matter of the reference. A party to an arbitration agreement may choose to file a suit in a Court which has no jurisdiction to go into the matter at all and merely because the defendant in such a suit has to make an application to that Court under section 34 of the Act for the stay of the suit it cannot be said that the Court which otherwise has no jurisdiction in the matter becomes a Court within the meaning of section 2 (c) of the Act. The view that we have expressed is borne out by the decisions of the Calcutta High Court in *Choteylal Sham Lal v. Cooch Behar Oil Mills Ltd.*¹; *Britania Building & Iron Co., Ltd. v. Gobinda Chandra Bhattacharjee*² and *Basanti Cotton Mills Ltd. v. Dhirga Brothers*³. For these reasons we consider that the application for stay under section 34 of the Act cannot be treated as an application in a reference under section 31 (4) of the Act. Therefore, the Subordinate Judge, First Class, Delhi was right in holding that the application under section 20 of the Act was maintainable in his Court and for making a reference of the dispute to the arbitrator mentioned in the agreement. Accordingly we set aside the order of the Punjab High Court and restore the order of the Subordinate Judge, First Class, Delhi, dated 29th January 1963 allowing the application filed by the appellant under section 20 of the Arbitration Act 1940. The appeal is allowed with costs.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.

The Cantonment Board, Meerut

... *Appellant**

v.

Narain Dass (dead) and another

... *Respondents.*

Cantonment Act (II of 1924), sections 185 (1) and 187 (1)—Relative scope and applicability.

The provisions of sections 185 and 187 of the Cantonments Act deal with different situations. While section 185 relates to erection or re-erection of buildings on private lands, section 187 deals with the construction of projections or structures over-hanging, projecting into or encroaching on any street, any drain or aqueduct. The one has nothing to do with the other.

Section 185 of the Act would apply only to cases where a building is erected or re-erected over a land belonging to some one other than the Cantonment Board. The notice contemplated under the section is also to be given only to the owner, lessee or occupier of such land and the period of twelve months prescribed under the section will apply only to cases of construction on private lands. Section 187 on the other hand relates to cases of encroachment on any street or drain. Obviously the Legislature does not intend that a Cantonment Board should be enabled to demolish buildings erected on private lands after the expiry of the time limit specified in section 185 (1). But public interest requires that no such limitation should be placed on the Cantonment Board while acting under section 187 (1) relating to encroachment on public streets and drains.

Quaere : Can a Cantonment Board take action under section 187 of the Act even after the expiry of the period of limitation prescribed for filing of suits by such bodies for removal of encroachments on public streets or parts thereof.

Appeal by Special Leave from the Judgment and Order dated the 2nd February, 1965 of the Allahabad High Court in Second Appeal No. 2097 of 1958.

1. I.L.R. (1954) 1 Cal. 418.

2. (1969) 64 C.W.N. 325.

* C.A. No. 747 of 1966.

3. A.I.R. 1949 Cal. 684.

C. B. Agarwala, Senior Advocate (*O. P. Rana*, Advocate, with him), for Appellant.

P. N. Bhardwaj, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Hegde, J.—The only question arising for decision in this appeal by Special Leave is whether the notices impugned in these proceedings are governed by section 185 (1) or section 187 (1) of the Cantonment Act, 1924. The trial Court held that section 185 (1) is the governing provision. The first appellate Court differed from it and held that section 187 (1) governs. The High Court in second appeal has restored the decision of the trial Court.

The respondent is the owner of shop No. 344 in Mohalla Bakri, Lal Kurti Bazar, Meerut Cantonment. The shop in question was constructed about 20 years before the institution of the suit from which this appeal arises. At about the time of the construction of that shop permission was obtained from the Cantonment Board to put up a stone projection over the drain by the side of the road in front of the shop to facilitate ingress into the shop and egress therefrom. The first appellate Court has found and that finding has been accepted by the High Court that about 18 years prior to the institution of the suit, the owner of the shop put up a wooden kiosk over the stone projection and the same is being used as a pan shop. According to the finding of those Courts the kiosk in question was put up without obtaining the permission of the Cantonment Board. On 9th November, 1953, the Cantonment Board issued a notice to the occupier of shop No. 344 under section 187, requiring him to demolish and remove the kiosk within 7 days from the receipt of that notice. As that demand was not complied with, a final notice under section 187 was given to him on 8th December, 1953. Thereafter the owner of the shop instituted the suit from which this appeal has arisen seeking a perpetual injunction restraining the Cantonment Board from getting the kiosk removed. As mentioned earlier, the trial Court decreed the suit holding that as the kiosk had been put up 18 years prior to the issue of the notice referred to earlier, the Cantonment Board cannot compel its removal in view of section 185 (1). This decision was reversed by the learned District Judge in appeal. The learned District Judge accepted the finding of the trial Court that the kiosk in question had been put up about 18 years prior to the date of the suit but yet according to him it was competent for the Cantonment Board to get the same removed under section 187 (1). The learned District Judge opined that section 185 (1) has no relevance to the facts of the case. In second appeal, the High Court agreed with the conclusion of the trial Court that section 185 (1) is the governing provision.

The established facts are : Shop No. 344 was constructed on the land belonging to the respondent. Cantonment Board had no right in or over that land. The stone projection was constructed over the drain adjoining the road after obtaining the permission of the Cantonment Board. It cannot be disputed that the property in the road including the drain statutorily vests in the Cantonment Board. The permission, given by the Cantonment Board to the owner of the shop to put up the projection does not confer on him any proprietary right over the drain. It merely gives him a licence to use the projection. He cannot exclude the public from using that projection. The kiosk had been put up without obtaining the permission of the Cantonment Board. The kiosk is a structure and it projects or encroaches upon the drain belonging to the Cantonment Board. It can even be said that it overhangs the drain. We have now to examine the provision of law applicable bearing in mind those facts.

Section 185 (1) reads :

“A (Board) may, at any time, by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the (Board) considers that such erection or re-erection is an offence under section 184, and may in such case (or in any other case in which the Board considers that the erection or re-erection of a

building is an offence under section 184, within (twelve months) of the completion of such erection or re-erection) in like manner direct the alteration or demolition as it thinks necessary, of the building or any part thereof, so erected or re-erected."

We are unable to agree with the High Court that this section applies to the facts of the present case. In our judgment that section applies only to cases where a building is erected or re-erected over a land belonging to someone other than the Cantonment Board. That is why that section says that a notice under that section can be given "to a owner, lessee or occupier of any land." A notice under that section cannot be given to any person other than the owner or lessee or the occupier of the land over which the building in question had been erected or re-erected. The notices with which we are concerned in this case were not given to the owner, lessee or occupier of the land over which kiosk is put up. As seen earlier the kiosk has been constructed over the land under the ownership of the Cantonment Board. Neither the owner of shop No. 344 or its occupier can be considered as a lessee of the land over which the projection was put up. Hence the provisions contained in section 185 (1) are not attracted to the present case.

This takes us to section 187 (1). It reads :

"No owner or occupier of any building in a cantonment shall, without the permission in writing of the (Board) add to or place against or in front of the building any projection or structure overhanging, projecting into, or encroaching on, any street or any drain, sewer or aqueduct therein."

This section deals with construction which are projections or structures overhanging, projecting into or encroaching on any street or any drain, sewer or aqueduct. Undoubtedly the kiosk is a structure. Further it is a projection into a drain. It also encroaches on the drain if it does not also overhang it. Therefore the act complained of clearly fails within the scope of section 187 (1).

In other words, section 185 deals with erection or re-erection of buildings on private lands whereas section 187 deals with the construction of projections or structures overhanging, projecting into or encroaching on any street, any drain or aqueduct. The two provisions deal with different situations. One has nothing to do with the other. Obviously the Legislature does not want the Cantonment Board to demolish buildings erected on private lands after the period mentioned in section 185 (1) but public interest requires that no such limitation should be placed on the Cantonment Board while acting under section 187 (1). Otherwise our streets and roads may soon disappear. The High Court missed the distinction between section 185 (1) and section 187 (1). Quite clearly the present case falls within section 187 (1).

Judicial opinion is divided on the question whether local Boards can take action under provisions similar to section 187 even after the period of limitation for filing suits by those bodies for possession of public street or roads or parts thereof or on which they have discontinued their possession expires. It is not necessary to go into that controversy in the present case. The period of limitation prescribed for a suit of the type referred to earlier is 30 years. In the present case action under section 187 (1) had been commenced within 18 years from the date of the encroachment.

For the reasons mentioned above this appeal is allowed and decree of the High Court is set aside and that of the first appellate Court restored.

Now coming to the question of costs, at the time of granting Special Leave this Court had directed that the appellant shall pay the costs of the respondent in any event. We incorporate that order as a part of this judgment.

R.M.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND K. S. HEDGE, JJ.

The Sub-Divisional Officer, Sadar, Faizabad

... Appellant*

v.

Shambhoo Narain Singh

... Respondent.

U. P. Panchayat Raj Act (XXVI of 1947), section 95 (1) (g)—Pradhan elected under—Nature of office—Power of Government to suspend an elected Pradhan pending enquiry into charges against him.

Interpretation of statutes—Doctrine of incidental or ancillary power—Scope of.

A Pradhan elected under the U. P. Panchayat Raj Act is not a Government servant though he is deemed to be a public servant within the meaning of the Indian Penal Code. He is an elected representative and there is no contractual relationship between him and the Government much less the relationship of master and servant. His rights and duties are those laid in the Act and there is no question of any inherent power in the Government or its delegated authority under section 96-A of the Act, to suspend a Pradhan on the analogy of master and servant.

No specific power is conferred on the State Government under the Act to suspend a Pradhan pending enquiry into charges levelled against him. The power to suspend or remove an office-bearer under section 95 (1) (g) is only as a punishment and not a power to suspend pending enquiry.

It is no doubt true that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution. But before implying the existence of such a power the Court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power.

The power to place an officer under suspension is not absolutely essential for the proper exercise of the power conferred under section 95 (1) (g) of the U. P. Panchayat Raj Act, 1947.

Appeal by Special Leave from the Judgment and Order dated the 9th December, 1964 of the Allahabad High Court, Lucknow Bench in Special Appeal No. 93 of 1963.

C. B. Agarwala, Senior Advocate (*O. P. Rana*, Advocate, with him), for Appellant

S. C. Agarwal, *R. K. Garg* and *D. P. Singh*, Advocates of M/s. Ramamurthi and Co., and *Miss S. Chakravarty*, Advocate, for Respondent.

The Judgment of the Court was delivered by

Hegde, J.—In this appeal by Special Leave, the scope of section 95 (1) (g) of the U. P. Panchayat Raj Act, 1947 (to be hereinafter referred to as the Act) arises for decision.

The facts material for the purpose of deciding this appeal are these : The respondent was the elected Pradhan of the Goan Sabha of Asapur District Faizabad. The Sub-Divisional Officer, Sadar, Faizabad placed him under suspension as per his order of 18th September, 1963. The order in question reads as follows :

“Sri Shambhoo Narain Singh, Pradhan of Gram Sabha and Chairman, Land Management Committee of village Asapur is placed under suspension with effect from the immediate date. He is further directed to hand over the charge to the Up-Pradhan of Gram Sabha, Asapur. The Up-Pradhan will function as Pradhan till further orders. The charge sheet against Sri Shambhoo Narain Singh will follow.

31st March, 1969.

(Sd.) S. M. Abbas, P. C. S.

Sub-Divisional Officer, Sadar, Faizabad."

The validity of this order is being challenged in these proceedings. It is the common case of both the parties that the suspension ordered thereunder is merely a suspension pending enquiry and is not a punishment imposed under section 95 (1) (g). The question for decision is whether the appellant had the competence to place the respondent under suspension pending enquiry into the charges levelled against the respondent. The impugned order was challenged before a single Judge of the Allahabad High Court by means of a petition under Article 226 of the Constitution. The learned single Judge dismissed that petition but in appeal the Appellate Bench up-held the contention of the respondent and quashed the same holding that section 95 (1) (g) did not empower the appellant to pass the impugned order. It is the correctness of that conclusion that is in issue in this appeal.

To repeat the respondent is an elected Pradhan. His rights and duties are regulated by the Act. He is not a Government servant though he has to be deemed as a public servant within the meaning of section 21 of the Indian Penal Code in view of section 28 of the Act. He is not a subordinate of the Sub-Divisional Officer or even of the Government. It is true that the Act has conferred on the State Government certain powers of control and supervision over the Gaon Sabhas and its office-bearers. These powers are enumerated in section 95. Under section 95 (1) (g) power is conferred on the Government to suspend or remove a member of a Gaon Panchayat or joint committee (or Bhumi Prabandhak Samiti) an office bearer of a Gaon Sabha or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if the conditions mentioned therein are satisfied. But that power is admittedly a power to punish. No specific power to suspend a Pradhan pending enquiry into the charges levelled against him has been conferred on the State Government. This much is conceded. In view of section 96-A the power conferred on the Government under section 95 can be delegated to any officer or authority subordinate to it subject to such conditions and restrictions as the Government may deem fit to impose. The State Government's power under section 95 (1) (g) has been delegated to Sub-Divisional Officers. Therefore if the State Government is held to have power to suspend an office-bearer of a Gaon Sabha pending enquiry into the charges levelled against him that power must be held to have been delegated to the Sub-Divisional Officers. Therefore the essential question is whether the State Government has power to make the impugned order.

A faint attempt was made to show that the relationship between the State Government and the Pradhans is that of master and servants and that being so the State Government has competence to require Pradhans not to discharge their functions as Pradhans during the pendency of an enquiry into the charges made against them. It was urged that if the Court is pleased to hold that the relationship between the State Government and the Pradhans is that of a master and the servants then the appellant could call into aid the rule laid down by this Court in *Management of Hotel Imperial, New Delhi v. Hotel Workers Union*¹, *T. Caje v. U. Jormanik Siem*², *R. P. Kapur v. Union of India*³, and *Balwant Rai Ratilal Patel v. State of Maharashtra*⁴. This is a wholly untenable contention. A Pradhan cannot be considered as a servant of the Government. He is an elected representative. There is no contractual relationship between him and the Government much less the relationship of master and servant. As mentioned earlier his rights and duties are those laid down in the Act. Therefore the rule laid down in the above cited decisions is wholly inapplicable to the facts of this case. In this case there is no question of suspending a servant from performing the duties of his office even though the contract of service is subsisting. In the case of a master and his servant it is a well established right of the master to give directions to his servant relating to his duties. That power includes within itself the right to direct the servant to refrain from performing his duties but

1. (1960) S.C.J. 317 : (1960) M.L.J. (Cr.) 207 : (1960) 1 S.C.R. 476.

2. (1961) 1 S.C.R. 750.

3. (1964) 5 S.C.R. 431.

4. (1968) 2 S.C.J. 540 : (1968) 2 S.C.R. 577.

that does not absolve the liability of the master to pay the remuneration contracted to be paid to the servant unless otherwise provided in the contract, even during the period the servant is required not to perform his duties.

The Gaon Sabha is the creature of a statute. Its power and duties as well as the powers and duties of its officers are all regulated by the Act. Hence no question of any inherent power arises for consideration—See *Sm. Hira Devi and Others v. District Board, Shahjahanpur*¹.

The only other contention advanced is that power claimed should be held to be an essential power for the proper discharge of the conferred power. It was urged that without such a power, charges framed against any office-bearer cannot be properly inquired into as he may utilise his office to interfere with the course of enquiry and the possibility of his continuing to misuse his office during the pendency of the enquiry cannot be ruled out.

It is well recognised that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are essentially necessary to its execution. But before implying the existence of such a power the Court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power. We are not satisfied that the power to place under suspension an officer is absolutely essential for the proper exercise of the power conferred under section 95 (1) (g). It cannot be said that the power in question cannot be properly exercised without the power to suspend pending enquiry. The mere possibility of interference with the course of enquiry or of further misuse of powers are not sufficient to enlarge the scope of a statutory power. If it is otherwise the mere power to punish an offender would have been held sufficient to arrest and detain him pending enquiry and trial. There would have been no need to confer specific power to arrest and detain persons charged with offences before their conviction.

The unsustainability of the contention of the appellant would become obvious on an examination of the various provisions of the Act. Under the impugned order, the appellant had directed the Up-Pradhan to officiate as Pradhan during the suspension of the respondent. Our attention has not been invited to any provision either in the Act or in the rules framed thereunder under which the appellant could have made such an order. If he could not have made that order, as in our opinion he could not have, then the question arises as to who could discharge the functions of a Pradhan when he is placed under suspension, pending enquiry of the charges levelled against him. Absence of a provision providing for such a contingency is a clear indication of the absence of the power contended for.

For the reasons mentioned above, we agree with the Appellate Bench of the High Court that the impugned order was made without the authority of law. That is also the view taken by the Allahabad High Court in *Babu Nandan v. Sub-Divisional Officer, Salempur*². We accordingly dismiss this appeal with costs.

Appeal dismissed.

R.M.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, J. M. SHELAT, V. BHARGAVA, K. S. HEGDE AND A. N. GROVER, JJ.

Prithvi Cotton Mills Ltd., etc.

... *Appellants* *

v.

The Broach Borough Municipality and others

... *Respondents*.

Bombay Principal Boroughs Act (XVIII of 1925), section 73—Gujarat Municipalities Act (XXXIV of 1964), section 99 and Gujarat Imposition of Taxes by Municipalities (Validation) Act (II of 1964), section 3—Validation of assessments made by Municipalities on the capital value of land and buildings—Scope and effect—Power of Municipality to levy a tax on lands and buildings.

Words and Phrases—Rate—Meaning of.

Interpretation of statutes—Validating Acts—Scope of generally.

The word 'rate' as used in Municipal Acts has acquired a special meaning in legislative practice and it means a tax for local purposes imposed by local authorities. The basis of such tax was the annual letting value of the land or buildings which is arrived at either on the basis of the actual rent fetched by the land or building or on a notional rent which it could fetch if let. The rate based on a percentage of the capital value was held *ultra vires* of the Bombay Municipal Boroughs Act.

Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad, (1964) 2 S.C.R. 608 : (1965) 1 S.C.J. 15, Ref.

It is to validate such levies that the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963 was passed. Sections 3 of the Act in express terms validated all such levies based on a percentage of the capital value of land and buildings. The Legislature has the power to validate statutes and to pass retrospective laws.

Generally speaking, before a Legislature seeks to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause of the ineffectiveness or invalidity must be removed before validation can be said to take place. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for if does not, the action must ever remain ineffective and illegal. The validity of a validating law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject matter and whether in making the validation it removes the defect which the Court had found in the existing law and makes adequate provision in the validating law for a valid imposition of the tax.

(Modes of validation and effect on decisions of Court, explained),

Section 99 of the Gujarat Municipalities Act, as now enacted, has clearly authorised the levy of a tax by the Municipality based on the percentage of the capital value. A tax on lands and buildings is fully within the competence of the State Legislature ; (Entry 49 of List II of Schedule VII to the Constitution) and it is open to the Legislature to authorise the Municipality to levy the same tax indicating the mode of levy. This the Legislature has done in section 99 by indicating the different modes of levy, one such mode being a percentage of the capital value.

Sudhir Chandra Nawn v. Wealth-tax Officer, Calcutta, (1968) 2 I.T.J. 724 : (1968) 2 S.C.J. 790 : A.I.R. 1969 S.C. 59, Referred to.

By section 3 of the Validation Act the Legislature has retrospectively imposed the tax on lands and buildings based on their capital value and has also given

a new meaning to the expression 'rate'. Hence the effect of the decision in *Patel Gordhanda, Hargovindas v. Municipal Commissioner, Ahmedabad*, (1964) 2 S.C.R. 608: (1965) 1 S.C.J. 15 invalidating such levy under the earlier Act has been neutralised and put out of action.

Appeals from the Judgment and Decree dated the 10th September, 1966 of the Gujarat High Court in Special Civil Application Nos. 846 of 1963 and 765 of 1964.

A. K. Sen, Senior Advocate, (A. K. Verma and B. Datta, Advocates, and Ravinder Narain, Advocate of M/s. J. B. Dadachanji & Co., with him), for Appellants (In both the Appeals).

M. C. Chagla, Senior Advocate, (I. N. Shroff, Advocate, with him), for Respondent Nos. 1 and 2 (In both the Appeals).

B. Sen, Senior Advocate, (S. P. Nayar, Advocate, with him), for Respondent No. 3. (In both Appeals).

The Judgment of the Court was delivered by

Hidayatullah, C. J.—These matters arise under Article 226 of the Constitution and are appeals by certificate granted by the High Court of Gujarat against its judgment and order, 10th September, 1966. The appellant No. 1 is a Company which has spinning and weaving mills at Broach and manufactures and sells cotton yarn and cloth. Respondent No. 1 is the Broach Borough Municipality constituted under section 8 of the Bombay Municipal Boroughs Act, 1925. In the assessments years 1961-62, 1962-63 and 1963-64 the Municipality purporting to act under section 73 of the Bombay Municipal Boroughs Act, 1925 and the Rules made thereunder imposed a purported rate on lands and buildings belonging to the respondent at a certain percentage of the capital value. Section 73 of the Act allows the Municipality to levy 'a rate on buildings or lands or both situate within the municipal borough.' The Rules under the Act applied the rates on the basis of the percentage on the capital value of lands and buildings. The assessment lists were published and tax was imposed according to the rates calculated on the basis of the capital value of the property of the appellant and bills in respect of the tax were served. The writ petitions were filed to question the assessment and to get the assessment cancelled.

During the pendency of the writ petitions the Legislature of Gujarat passed the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963. As a result the writ petitions were amended and the Validation Act was also questioned. The appellant also filed a second writ petition questioning the validity of the Validation Act under Articles 19 (1) (f), (g) and 265 of the Constitution. By the order under appeal here both the writ petitions were dismissed although a certificate of fitness was granted.

The Validation Act was presumably passed because of the decision of this Court reported in *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*¹. In that case the validity of the Rules framed by the Municipal Corporation under section 73 were called in question, particularly Rule 350-A for rating open lands which provides that the rate on the area of open lands shall be levied at 1 per centum on the valuation based upon capital value. Dealing with the word 'rate' as used in these statutes, it was held by this Court that the word 'rate' had acquired a special meaning in English legislative history and practice and also in Indian legislation and it meant a tax for local purposes imposed by local authorities. The basis of such tax was the annual value of the lands or buildings. It was discussed in the case that there were three methods by which the rates could be imposed; the first was to take into account the actual rent fetched by the land or building where it was actually let; the second was, where it was not let, to take rent based on hypothetical tenancy, particularly in the case of buildings; and the third was where neither of these two modes was available, by valuation based on capital value from which annual value had to be found by applying suitable percentage which might not be the same for lands and buildings. It was held that in section 73 the word 'rate' as used must have been used in the special sense in which the word was understood

1. (1964) 1 S.C.J. 15 : (1964) 2 S.C.R. 608.

in the legislative practice of India before that date. Rule 350-A which laid the rate on land at a percentage of the valuation based upon capital was therefore declared *ultra vires* the Act itself. In short, the word 'rate' was given a specialised meaning and was held to mean a kind of impost on the annual letting value of property, if actually let out, and on a notional letting value if the property was not let out. The Legislature of Gujarat then passed the Validation Act seeking to validate the imposition of the tax as well as to avoid any future interpretation of the Act on the lines on which Rule 350-A was construed. The Act came into force on 29th January, 1964.

After defining the expression used in the Act and providing for its application, the Act enacted section 3 which concerned validation of impositions and collections of taxes or rates by Municipalities in certain cases. That section reads as follows :

"3. Validation of imposition and collection of taxes or rates by municipalities in certain cases.

Notwithstanding anything contained in any judgment, decree or order of a Court or Tribunal or any other authority, no tax or rate assessed or purporting to have been assessed by a municipality under the relevant municipal law or any rules made thereunder on the basis of the capital value of a building or land, as the case may be, or on the basis of a percentage of such capital value, and imposed, or collected or recovered by the municipality at any time before the commencement of this Act shall be deemed to have been invalidly assessed, imposed, collected or recovered by reason of the assessment being based on the capital value or the percentage of the capital value, and not being based on the annual letting value, of the building or land, as the case may be, and the imposition, collection and recovery of the tax or rate so assessed and the provisions of the rules made under the relevant municipal law under which the tax or rate was so assessed shall be valid and shall be deemed always to have been valid and shall not be called in question merely on the ground that the assessment of the tax or rate on the basis of the capital value of the building or land, as the case may be, or on the basis of a percentage of such capital value was not authorised by law; and accordingly any tax or rate, so assessed before the commencement of this Act and leviable for a period prior to such commencement but not collected or recovered before such commencement, may be collected and recovered in accordance with the relevant municipal law, and the rules made thereunder."

If this section is valid that the imposition cannot be questioned and the short question which arises in this case is as to the validity of this section. It is not denied that a Legislature does possess the power to validate statutes and to pass retrospective laws. It is, however, contended that the Validation Act is ineffective in carrying out its avowed object. This is the only point which falls for consideration in these appeals.

Before we examine section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid, or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction

had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon Courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the Legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the Validating law for a valid imposition of the tax.

The inquiry in this case may begin by asking whether the Legislature possesses competence to pass a law imposing a tax on lands and buildings on the basis of a percentage of their capital value. If the Legislature possesses that power then it can authorise the Municipality to levy that tax. To test the proposition we may consider section 99 which has now been enacted in the Gujarat Municipalities Act. It reads :

“ 99. *Taxes which may be imposed.*

(1) Subject to any general special orders which the State Government may make in this behalf and to the provisions of sections 101 and 102, a municipality may impose for the purposes of this Act any of the following taxes, namely :—

(i) a tax on building or lands situate within the municipal borough to be based on the annual letting value or the capital value or a percentage of capital value of the buildings or lands or both :

*	*	*	*	*	*
*	*	*	*	*	”

Learned Counsel for the appellants did not contend that this section was outside the powers of the Legislature. In fact, he could not, in view of Entry 49 of List II of the Seventh Schedule to the Constitution. That entry reads : “ Taxes on lands and buildings ” and a tax on lands and buildings based upon capital value falls squarely within the entry. The doubt which is created by Entry 86 of List I “ Taxes on the capital value of assets, no longer exists after the decision of this Court in *Sudhir Chandra Nawan v. Wealth-tax Officer, Calcutta*¹. In that case the respective ambits of the two entries are explained. It is pointed out that unlike the tax contemplated by Entry 49, List II the tax under entry 86 (List I) is not a direct tax on lands and buildings but on net assets the components of which may be lands and buildings and other times of assets excluding such liabilities as may exist. The incidence of the tax is not on lands and buildings as units of taxation but on the net assets of which lands and buildings are only some of the components. This is not the case under entry 49 (List II, where the tax can be laid directly on lands and buildings as units of taxation. Therefore, a tax on lands and buildings is fully within the competence of the Legislature and it is open to it to authorise the municipality to levy the same tax indicating the mode of levy. This the Legislature has done by indicating the different modes which may be adopted in making the levy, one such mode being a percentage of the capital value.

The Legislature in section 73 had not authorised the levy of a tax in this manner but had authorised the levy of a rate. That led to the discussion whether a rule putting the tax on capital value of buildings answered the description of the impost

in the Act, namely, 'a rate on buildings or lands or both situate within the Municipal borough.' It was held by this Court that it did not, because the word 'rate' had acquired a special meaning in legislative practice. Faced with this situation the Legislature exercised its undoubted powers of redefining 'rate' so as to equate it to a tax on capital value and convert the tax purported to be collected as a 'rate' into a tax on lands and buildings. The Legislature in the Validation Act, therefore, provided for the following matters. First, it stated that no tax or rate by whichever name called and laid on the capital value of lands and buildings must be deemed to be invalidly, assessed, imposed, collected or recovered simply on the ground that a rate is based on the annual letting value. Next it provided that the tax must be deemed to be validly assessed, imposed, collected or recovered and the imposition must be deemed to be always so authorised. The Legislature by this enactment retrospectively imposed the tax on lands and buildings based on their capital value and as the tax was already imposed, levied and collected on that basis, made the imposition, levy, collection and recovery of the tax valid, notwithstanding the declaration by the Court that as 'rate', the levy was incompetent. The Legislature not only equated the tax collected to a tax on lands and buildings, which it had the power to levy, but also to a rate giving a new meaning to the expression 'rate', and while doing so it put out of action the effect of the decisions of the Courts to the contrary. The exercise of power by the Legislature was valid because the Legislature does possess the power to levy a tax on lands and buildings based on capital value thereof and in validating the levy on that basis, the implication of the use of the word 'rate' could be effectively removed and the tax on lands and buildings imposed instead. The tax, therefore, can no longer be questioned on the ground that section 73 spoke of a rate and the imposition was not a rate as properly understood but a tax on capital value. In this view of the matter it is hardly necessary to invoke the 14th clause of section 73 which contains a residuary power to impose any other tax not expressly mentioned.

In our judgment these appeals possess no merit after the passing of the Validation Act and must be dismissed but in the circumstances without any order about costs.

R.M.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. Hidayatullah, *Chief Justice*, J. C. SHAH, V. RAMASWAMI, G. K. MITTER AND A.N. GROVER, JJ.

Venkatrao Esajirao Limbekar and others

*... Appellants**

v.

State of Bombay and others

... Respondents.

Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further amendments) Act, 1961—Validity of.

The Provisions of the Maharashtra Act as also of the Hyderabad Act XXI of 1950 together with the amending Act are immune from any challenge on the ground of contravention of Articles 19 and 31 of the Constitution. By the Constitution (Seventeenth Amendment) Act 1964, after Entry 20, Entries 21 to 66 were inserted in the Ninth Schedule to the Constitution. Entries 35 and 36 relate to the Maharashtra Act and Hyderabad Act XXI of 1950 respectively, Article 31 (b) gives full protection to an Act and its provisions in the Schedule against any challenge on the ground of inconsistency with or abridging of any of the rights conferred by Part III of the Constitution. This would be so notwithstanding any Judgment decree or order of any Court or Tribunal to the contrary. The amending Laws and, in particular, Hyderabad Act III of 1954 which circumscribed section 38 (e) would also be covered by the same protection because the Parent Act, namely, the Hyderabad Act XXI of 1950 was included in the Ninth Schedule in the year 1964 which was long after the enactment of the amending Act.

If the assent of the President had been accorded to the amending Acts, it would be difficult to hold that the President had never assented to the Parent Act, namely, Hyderabad Act XXI of 1950. Even if such assent has not been accorded earlier it must be taken to have been granted when Amending Act III of 1954 was assented to.

Appeal by Special Leave from the Judgment and Order dated the 25th March, 1964 of the Bombay High Court in Special Civil Application No. 1882 of 1962.

A.K. Sen, Senior Advocate (*K.P. Gupta*, Advocate, with him), for Appellants.

M.S.K. Sastri and *R.H. Dhebar*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the Bombay High Court dismissing a petition under Article 226 of the Constitution which had been filed by the appellants. The validity of the Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further amendment) Act, 1961, hereinafter called the “Maharashtra Act”, was challenged. It was also sought to restrain the respondents from proceeding with the enquiry under section 38 (e) of the Hyderabad Tenancy and Agricultural Lands Act (XXI of 1950) as amended by the Hyderabad Tenancy and Agricultural Lands (Amendment) Act (III of 1954), read with the relevant rules.

The appellants are land owners in Pathri Taluka of Parbhani District. This district was originally a part of the erstwhile State of Hyderabad and the provisions of the Hyderabad Act XXI of 1950 were applicable there. By amending Act III of 1954 which received the assent of the President on 31st January, 1954 a number of amendments were made. Section 38-E was inserted. By that section the Government could declare by notification that ownership of all lands held by protected tenants which they were entitled to purchase from their land-holders under the provisions of chapter IV were to stand transferred to such tenants.

The district of Parbhani became a part of the erstwhile Bombay State on the enactment of the States Re-Organisation Act, 1956. By means of Bombay (Hyderabad Areas) Adoption of Laws (State and Concurrent Subjects) Order 1956, the State of Bombay adopted and modified Hyderabad Act XXI of 1950. A notification was issued on 21st May, 1957 by the Government of Bombay making a declaration under section 38-E of Hyderabad Act XXI of 1950 in the district of Parbhani. The Agricultural Lands Tribunal and the Special Tehsildar, Parbhani District as also the Secretary, The Agricultural Lands Tribunal Pathri Taluka of the same District started an inquiry under rule 54 of the Hyderabad Transfer of Ownership Rules and published a provisional list of those who were declared to be land owners which included some of the tenants of the appellants. The appellants filed objections which were dismissed.

The Bombay Legislature passed Act XXXII of 1958 which was first published in the Bombay Government Gazette on 10th April, 1958 after having received the assent of the President. By this Act further amendments were made in Hyderabad Act XXI of 1950. In July, 1959 the appellants filed a writ petition in the High Court of Bombay assailing the *vires* of the provisions of section 38-E of Hyderabad Act XXI of 1950. The grounds of attack, *inter alia*, were that Articles 19 (f) and 31 of the Constitution had been contravened and that the aforesaid Act had not been reserved for and had not received the assent of the President. The validity of the notification issued in May 1957 was also attacked. This petition was dismissed by the High Court in March, 1960. In January, 1961 this Court granted Special Leave to appeal against that judgment. In March, 1961 during the pendency of the appeal the Andhra Pradesh High Court in *Inamdars of Sulhanagar and others v. Government of Andhra Pradesh and another*¹, struck down Hyderabad Act XXI of 1950 as amended by Act III of 1954 on the sole ground that it had not received the assent of the President as required by Article 31 (3) of the Constitution. In February, 1961, the Maharashtra Act was enacted after the assent of the President had been obtained. It repealed

and re-enacted the Hyderabad Act XXI of 1950 and declared that it shall be deemed to have come into force on 10th day of June, 1950 as re-enacted. It also repealed the amending laws and re-enacted them and declared that as re-enacted they shall be deemed to have come into force on the day specified against each of them in the table given therein. It made certain further amendments. Thereupon the appeal pending in this Court was withdrawn by the appellants with liberty to challenge the constitutionality of the Maharashtra Act. In November, 1962 the appellants filed a petition under Article 226 of the Constitution in the Bombay High Court challenging the Maharashtra Act. This petition was dismissed by the High Court in March, 1964.

It appears that only two points were urged before the High Court. The first was that the State Legislature had no power to re-enact the provisions of the Hyderabad Acts (the parent Act and the amending Acts) with retrospective effect. This argument was repelled by a brief observation that the State Legislature was competent to give retrospective effect to the provisions enacted by it. The second point raised was that section 38 (E) which provided that protected tenants would be deemed to have become owners of the land held by them subject to certain conditions with effect from the date notified by the Government was *ultra vires* Articles 19 and 31 of the Constitution. The High Court referred to its earlier decision in Special Civil Application No. 1128 of 1959 in which the same contention had been pressed but had not been accepted. The High Court also relied on a decision of this Court in *Sri Ram Narain v. State of Bombay*¹ in which the constitutional validity of similar provisions in section 32 of the Bombay Tenancy and Agricultural Lands Act had been upheld.

The present appeal must fail. The provisions of the Maharashtra Act as also of the Hyderabad Act XXI of 1950 together with the amending Act are immune from any challenge on the ground of contravention of Articles 19 and 31 of the Constitution. By the Constitution (Seventeenth Amendment) Act, 1964, after 20, entries 21 to 66 were inserted in the Ninth Schedule to the Constitution. 35 and 36 relate to the Maharashtra Act and Hyderabad Act XXI of 1950 respectively. Article 31 (b) gives full protection to an Act and its provisions in the Schedule against any challenge on the ground of inconsistency with or abridging of any of the rights conferred by Part III of the Constitution. This would be so notwithstanding any judgment, decree or order of any Court or Tribunal to the contrary. The amending laws and, in particular, Hyderabad Act III of 1954 which inserted section 38-E would also be covered by the same protection because the parent Act, namely the Hyderabad Act XXI of 1950 was included in the Ninth Schedule in the year 1964 which was long after the enactment of the amending Act.

In the above view of the matter no attempt was made on behalf of the appellants to raise the second question about the competency of the Legislature of the Maharashtra State to enact the Maharashtra Act with retrospective effect in respect of Parbhani District which became a part of the erstwhile Bombay State only after the enactment of the Bombay States Reorganisation Act, 1956. The reason apparently is that even on the assumption that the Maharashtra Legislature could not have validly enacted retrospective legislation with regard to Parbhani District, the Hyderabad Act XXI of 1950 as amended by Act III of 1954 was in force at the time when the notification was made in May, 1957 pursuant to which proceedings were taken which were challenged by the appellants. As regards the decision of the Andhra Pradesh High Court in *Inamdars of Sulkanagar and others v. Government of Andhra Pradesh and others*,² by which the Hyderabad Act XXI of 1950 was struck down as not having received the assent of the President under Article 31 (3) the position taken up in the writ petition was that such assent had been given to it on 3rd April, 1958 and till then the said Act was not valid and operative. According to the judgment of the Andhra Pradesh High Court, Hyderabad Act XXI of 1950

1. (1959) 61 Bom L.R. 811 : (1959) S.C.J. 679 : (1959) 1 S.C.R. 489 : (1959) 1 M.L.J. (S.C.) 1 : (1959) 1 An. W.R. (S.C.) 1. 2. (1961) 2 An. W.R. 60 : A.I.R. 1961 A.P. 523.

had never been assented to by the President although it had received the assent of the Rajpramukh of the erstwhile Hyderabad State. Now the question of lack of assent of the President was never pressed before the High Court, nor have we been invited to examine it. We would, however, like to observe that, as noticed before, when Hyderabad Amending Act III of 1954 was enacted the assent of the President was duly obtained. Similarly when Bombay Act XXXII of 1958 which was meant for amending Hyderabad Act XXI of 1950 was enacted the assent of the President had been given. If the assent of the President had been accorded to the amending Acts, it would be difficult to hold that the President had never assented to the parent Act, namely, Hyderabad Act XXI of 1950. Even if such assent had not been accorded earlier it must be taken to have been granted when Amending Act II of 1954 was assented to.

For the above reasons this appeal is dismissed, there will be no order as to costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C.A. VAIDIALINGAM, JJ.

The Co-operative Central Bank Ltd., and others, etc. .. Appellants*

v.

The Additional Industrial Tribunal, Andhra Pradesh,
Hyderabad and others, etc. .. Respondents.

The Andhra Pradesh Co-operative Societies Act (VII of 1964), sections 16 (5), 61 and 62—Industrial Disputes Act (XIV of 1947), section 10 (1) (d)—Dispute between Co-operative Central Bank and their workmen relating to number of service conditions viz., Salary and allowances etc.—Jurisdiction of Registrar to decide under section 61—Reference to Industrial Tribunal by the Government—Validity of.

The Andhra Pradesh Co-operative Societies Act (VII of 1964) and Industrial Disputes Act (XIV of 1947)—Service conditions subject matter of bye-laws—Bye-laws, whether law or have the force of law—Scope of Bye-laws—Competency of Industrial Tribunal to alter or vary, bye-law in granting relief.

The interpretation already placed by this Court, in Civil Appeal No. 358 of 1967, on the provisions of section 91 (1) of the Maharashtra Act XXXII of 1961 is fully applicable to the provisions of section 61 of the Andhra Pradesh Co-operatives Societies Act VII of 1964. In deciding these appeals, one must proceed on the basis that section 61 of the Act requires reference of a dispute to the Registrar only if the dispute is capable of being resolved by the Registrar or his nominee and further, the dispute between the co-operative society and the employee touches the business of the society in the sense explained by this Court in that case.

Held, the dispute covered by the first issue referred to the, Industrial Tribunal could not possibly be referred for decision to the Registrar under section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an industrial tribunal dealing with an industrial dispute. The Registrar could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employee of a registered society; but the meaning given to the expressions "touching the business of the society" makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual

trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. The position is clarified by the provisions of sub-section (4) of section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under section 61; by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the rules and bye-laws. The provisions of the Act, the rules and the bye laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. In respect of the dispute relating to the alteration of various conditions of service, the Registrar or other person dealing with it under section 62 of the Act is not competent to grant the relief claimed by the workmen at all. This dispute is not a dispute covered by the provisions of section 61 of the Act. Such a dispute is not contemplated to be dealt with under section 62 of the Act and must be held to be outside the scope of section 61.

The bye-laws of a co-operative society framed in pursuance of the provisions of the Act cannot be held to be law or to have force of law. It has no doubt been held that, if a statute gives power to a Government or other authority to make rules the rules so framed have the force of statute and are deemed to be incorporated as a part of the statute. That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business or administration of a society. They may be binding between the persons affected by them, but they do not have the force of a statute. In respect of bye-laws laying down conditions of service of the employees of the society, the bye-laws would be binding between the society and the employees just in the same manner as conditions of service laid down by contract between the parties. After such bye-laws laying down the conditions of service are made and any person enters the employment of a society those conditions of service will have to be treated as conditions accepted by the employees when entering the service and will thus bind him like conditions of service specially forming part of the contract of service. The bye-laws that can be framed by a society under the Act are similar in nature to the Articles of Association of a company incorporated under the Companies Act and such articles of association have never been held to have the force of law. The jurisdiction which is granted to industrial tribunals by the Industrial Disputes Act is not the jurisdiction of merely administering the existing laws and enforcing existing contracts. Industrial tribunals have the right even to vary contracts of service between the employer and the employees which jurisdiction can never be exercised by a civil Court or a Registrar acting under the Co-operative Societies Act, so that the circumstance that, in granting relief on the various service conditions the Tribunal will have to vary the special bye-laws framed by the Co-operative Bank does not lead to the inference that the tribunal would be incompetent to grant the reliefs sought in this reference. The reliefs could only be granted by the Industrial Tribunal and could not fall within the scope of the powers of the Registrar dealing with a dispute under section 61 of the Act.

The provisions of section 16 (5) of the Act is irrelevant when considering the scope of the jurisdiction of the Registrar under section 61 of the Act. The Registrar could not have granted relief under section 16 (5) of the Act.

Appeals from the Judgment and Order dated the 5th August, 1968 of the Andhra Pradesh High Court in Writ Petitions Nos. 2339 and 2742 of 1968.

G. B. Agarwala, Senior Advocate (K. Srinivasa Murthy, B. P. Singh and Naunit Lal, Advocates, with him, for the Appellants (In both).

A. S. R. Chari and M. K. Ramamurthi, Senior Advocates (*Mrs. S. Pappu, Madan Mohan J. Ramamurthi, Vineet Kumar, P. S. Khera and Miss Bindra Thakur*, Advocates, with them), for Respondent No. 2 (in both).

The Judgment of the Court was delivered by

Bhargava, J.—An industrial dispute arose between 25 Co-operative Central Banks in the State of Andhra Pradesh and their workmen represented by the Andhra Pradesh Bank Employees Federation, Hyderabad, which was referred by the Government of Andhra Pradesh to the Industrial Tribunal, Hyderabad, under section 10 (1) (d) of the Industrial Disputes Act No. XIV of 1947. The subject-matter of the dispute was divided into three issues. The first issue comprised a number of service conditions, *viz.*, (1) Salary Scale and Adjustments (2) Dearness Allowance (3) Special Allowances (4) other Allowances (5) Uniforms and Washing Allowances for subordinate staff (6) Conveyance Charges (7) Provident Fund and Gratuity (8) Leave Rules (9) Joining Time on transfer, (10) Rules relating to departmental enquiry against employees for misconduct (11) Probationary Period and Confirmation (12) Working Hours and Overtime Allowance. (13) Age of Retirement, (14) Security, (15) Common Good Fund, (16) Service Conditions and (17) Promotions. The second and the third issues both related to the question whether the transfers of some employees of two of the Banks, The Vijayawada Co-operative Central Bank Ltd., Vijayawada, and The Vizianagaram Co-operative Central Bank Ltd., Vizianagaram, were justified and, if not to what reliefs were the employees entitled. Before the Industrial Tribunal, one of the grounds raised on behalf of the banks was that the reference of the disputes to the Tribunal was invalid, because such disputes were required to be referred for decision to the Registrar of the Co-operative Societies under section 61 of the Andhra Pradesh Co-operative Societies Act No. VII of 1964 (hereinafter referred to as "the Act") and the effect of the provisions of the Act was to exclude the jurisdiction of the Industrial Tribunals to deal with the same disputes under the Industrial Disputes Act. Various other pleas were also taken by the banks in resisting the claims of the workmen, but in these appeals, we are not concerned with them, because the Tribunal dealt with the point, mentioned by us above, as a preliminary issue and rejected the contention of the banks. Twenty-four of the banks thereupon challenged the preliminary decision of the Tribunal on this question, treating it as a preliminary award, by filing two Writ Petitions Nos. 2339 and 2742 of 1968 under Article 226 of the Constitution in the High Court of Andhra Pradesh. The High Court also rejected the plea of the Banks. These two appeals have been brought up before us by certificate against the orders of the High Court dismissing the two writ petitions. In Civil Appeal No. 2093 of 1968, the appellants are 10 banks who were petitioners before the High Court in Writ Petition No. 2339 of 1968, while 2 of the petitioner-banks in that writ petition have been impleaded as respondents. In Civil Appeal No. 2094 of 1968, the appellants are also 10 banks who had joined in filing the other Writ Petition No. 2742 of 1968 in the High Court, while one of the petitioner-banks in that writ petition has been impleaded as respondent, and another has not joined the appeal as a party. In these appeals, therefore we are only concerned with one single question as to whether the jurisdiction of the Industrial Tribunal to adjudicate on the industrial dispute referred to it under section 10 (1) (d) of the Industrial Disputes Act was barred by the provisions of section 61 of the Act.

The Tribunal, and the High Court in rejecting the plea taken on behalf of the banks, expressed the view that the disputes actually referred to the Tribunal were, not capable of being decided by the Registrar of the Co-operative Societies under section 61 of the Act and, consequently, the reference to the Industrial Tribunal under the Industrial Disputes Act was competent. Learned Counsel appearing on behalf of the banks took us through the provisions of the Act to indicate that, besides being a local and special Act, it is a self contained Act enacted for the purpose of successful working of co-operative societies, including co-operative banks, and there are provisions in the Act which clearly exclude the applicability of other laws if they happen to be in conflict with the provisions of the Act. It is no doubt true

that the Act is an enactment passed by State Legislature which received the assent of the President, so that, if any provision of a Central Act, including the Industrial Disputes Act, is repugnant to any provision of the Act, the provision of the Act will prevail and not the provision of the Central Industrial Disputes Act. The general proposition urged that the jurisdiction of the Industrial Tribunal under the Industrial Disputes Act will be barred if the disputes in question can be competently decided by the Registrar under section 61 of the Act is, therefore, correct and has to be accepted. The question, however, that has to be examined is whether the industrial dispute referred to the Tribunal in the present cases was such as was required to be referred to the Registrar and to be decided by him under section 61 of the Act.

In order to properly appreciate the submissions which have been made on behalf of the banks, by their Counsel, it is necessary to set out the provisions of sections 16, 61, 62 and 133 of the Act which are as follows :—

“ 16. *Amendment of bye-laws of a society* :—(1) No amendment of any bye-law of a society shall be valid unless such amendment has been registered under this Act. Where such an amendment is not expressed to come into operation on a particular day, then, it shall come into force on the day on which it is registered.

(2) Every proposal for such amendment shall be forwarded to the Registrar who shall, if he is satisfied that the proposed amendment fulfils the conditions specified in sub-section (1) of section 7, register the amendment within a period of sixty days from the date of receipt of such proposals :

Provided that the Government may, for sufficient cause which shall be recorded in writing, extend the said period for a further period of sixty days.

(3) The Registrar shall forward to the society a copy of the registered amendment together with a certificate signed and sealed by him, and such certificate shall be conclusive evidence that the amendment has been duly registered.

(4) Where the Registrar is not so satisfied, he shall communicate by registered post the order of refusal together with the reasons therefor, to the society within the period specified in sub-section (2).

(5) If in the opinion of the Registrar, an amendment of the bye-laws of a society is necessary or desirable in the interest of such society or of the co-operative movement, he may, in the manner prescribed, call upon the society, to make any amendment within such time as he may specify. If the society fails to make such an amendment within the time so specified the Registrar may, after giving the society an opportunity of making its representation, register such amendment and forward to the society by registered post a copy of the amendment together with a certificate signed by him ; such a certificate shall be conclusive evidence that the amendment has been duly registered ; and such an amendment shall have the same effect as an amendment of any bye-law made by the society.

* * * * *

* * * * *

61. *Disputes which may be referred to the Registrar* :—

(1) Notwithstanding anything in any law for the time being in force, if any dispute touching the constitution, management or the business of a society, other than a dispute regarding disciplinary action taken by the society or its committee against a paid employee of the society, arises—

(a) among members, past members and persons claiming through member, past members and deceased members ; or

(b) between a member, past member or person claiming through a member past member or deceased member and the society, its committee or any officer, agent or employee of the society ; or

(c) between the society or its committee and any past committee, any officer agent or employee, or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent, or deceased employee of the society ; or

(d) between the society and any other society ;

such dispute shall be referred to the Registrar for decision.

Explanation. :—For the purposes of this sub-section a dispute shall include—

(i) a claim by a society for any debt or other amount due to it from a member past member or the nominee, heir or legal representative of a deceased member, whether such debt or other amount be admitted or not ;

(ii) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or other amount due to it from the principal debtor as a result of the default of the principal debtor whether such debt or other amount due be admitted or not ;

(iii) a claim by a society against a member, past member or the nominee, heir or legal representative of a deceased member for the delivery of possession to the society of land or other immovable property resumed by it for breach of the conditions of assignment or allotment of such land or other immovable property.

(2) If any question arises whether a dispute referred to the Registrar under this section is a dispute touching the constitution, management or the business of a society, such question shall be decided by the Registrar.

(3) (a) Every dispute relating to, or in connection with, any election to a committee of a society referred to in clause (a) of sub-section (3) of section 31, shall be referred for decision to a Subordinate Judge or where there is no Subordinate Judge, to the District Judge having jurisdiction over the place where the main office of the society is situated, whose decision thereon shall be final.

(b) Every dispute relating to or in connection with any election to a committee of such class of societies as may, by notification in the Andhra Pradesh Gazette, be specified by the Government in this behalf and referred to in clause (b) of sub-section (3) of section 31, shall be referred for decision to a District Munsif having jurisdiction over the place where the main office of the society is situated, and his decision thereon shall be final.

(4) Every dispute relating to, or in connection with, any election to a committee shall be referred under sub-section (1) of sub-section (3) only after the date of declaration of the result of such election.

62. *Action to be taken by the Registrar on such reference :—*

(1) The Registrar may, on receipt of the reference of a dispute under section 61,—

(a) elect to decide the dispute himself ; or

(b) transfer it for disposal to any person who has been invested by the Government with powers in that behalf ; or

(c) refer it for disposal to an arbitrator.

(2) Where the reference relates to any dispute involving immovable property, the Registrar or such person or arbitrator, may order that any person be joined as a party who has acquired any interest in such property subsequent to the acquisition of interest therein by a party to the reference and any decision that may be passed on the reference by the Registrar, or the person or the arbitrator aforesaid, shall be binding on the party so joined as if he were an original party to the reference.

(3) The Registrar may, by order for reasons to be recorded therein, withdraw any reference transferred under clause (b) of sub-section (1) or referred under clause

(c) of that sub-section and may elect to decide the dispute himself or transfer it to any other person under clause (b) of sub-section (1) or refer it to any other arbitrator under clause (c) of that sub-section.

(4) The Registrar, such person or arbitrator shall decide the dispute in accordance with the provisions of this Act and the rules and bye-laws and such decision shall, subject to the provisions of section 76, be final. Pending final decision on the dispute, the Registrar, such person or arbitrator, as the case may be, may make such interlocutory orders as he may deem necessary in the interests of justice.

133. *Act to override other laws*:—"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law."

Reliance was placed on the non-obstante clause "Notwithstanding anything in any law for the time being in force" occurring in section 61 of the Act which has the effect that a dispute covered by this section must necessarily be referred to the Registrar for decision, so that it cannot be referred to any other authority under any other law. Further strength is sought in support of this proposition from the provisions of section 133 of the Act which clearly lays down that the provisions of the Act have overriding effect if there be any provision in any other law inconsistent with the provisions of the Act. Then, it was argued that the language of section 61 of the Act is wide enough to cover the disputes referred to the Tribunal in these cases, because the disputes are between co-operative societies and their employees and they touch the business of the co-operative societies. In support of this submission, learned Counsel referred us to a number of decisions of various High Courts in which the scope of the provisions contained in section 61 of the Act or of similar provisions in other local enactments was considered. Most of those decisions were concerned with laying down the meaning of the expression "touching the business of the society" so as to include within its scope disputes of different nature between the co-operative societies and their employees. The cases which have been brought to our notice are:

(1) a decision of a learned single Judge of the Bombay High Court in *G.I.P. Railway Employees Co-operative Bank Ltd. v. Bhikhaji Merwanji Karanjia—Employee*¹. In which a similar provision contained in section 54 of the Bombay Co-operative Societies Act VII of 1925 was interpreted;

(2) a decision in *Sagar Motor Transport Karamchari Union, Sagar v. Amar Kamgar Passenger Transport Company Co-operative Society, Sagar and another*², where the Madhya Pradesh High Court interpreted section 55 (2) of the Madhya Pradesh Co-operative Societies Act, 1960 which required a dispute regarding terms of employment, working conditions and disciplinary action taken by a society, arising between a society and its employees, to be decided by the Registrar or any officer appointed by him;

(3) a decision of a Full Bench of the Madras High Court in *M.S. Madhava Rao and others v. D.V. K. Surya Rao, Member of the Pithapuram Co-operative Bank, Pithapuram and others*³, in which section 51 of the Madras Co-operative Societies Act VI of 1932, which was very similar to section 61 of the Act, was interpreted; and

(4) a decision of a Full Bench of the Bombay High Court in *Farkhw deli Nannhay v. Potdar (F.B.)*⁴, in which also section 54 of the Bombay Co-operative Societies Act VII of 1925 came up for interpretation.

Learned Counsel for the appellants also brought to our notice a decision of a single Judge of the Calcutta High Court in *Co-operative Milk Societies Union, Ltd. v. State of West Bengal and others*⁵, where a dispute as to wages, wage-scales and dearness allowance was held not to be a dispute within the meaning of that word as defined

1. A.I.R. 1943 Bom. 341.

2. (1969) 18 Indian Factories and Labour Reports 27.

3. I.L.R. (1953) Mad. 1047 : (1953) 2 M.L.J.

340 : A.I.R. 1954 Mad. 103.

4. (1962) 1 L.L.J. 51.

5. (1958) 2 L.L.J. 61.

in the Bengal Co-operative Societies Act, 1940, and sought to distinguish it on the ground that the decision in that case turned on the meaning specially given in that Act to the word "dispute".

It appears to us that it is not necessary to examine in detail the reasons given by the High Courts in the above-cited cases for the interpretation placed by them on provisions similar to section 61 of the Act in view of a very recent decision of this Court in *The Deccan Merchants Co-operative Bank Ltd. v. Messrs. Dalchand Jugraj Jain and others*¹. In that case, this Court had to interpret section 91 of the Maharashtra Co-operative Societies Act, 1960 (Maharashtra Act XXXII of 1961), the relevant provision of which is reproduced below :—

"91 (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the office bearers, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if both the parties thereto are one or other of the following :—

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society ;

* * * * *
* * * * *"

One of the questions which the Court formulated as requiring an answer was : what is the meaning of the expression "touching the business of the society"? In order to decide this question, the Court analysed the provisions of section 91 (1) and held:

"Five kinds of disputes are mentioned in sub-section (1); first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly, disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws".

In that case, this Court was concerned with the question whether a dispute touching the assets of a society was a dispute touching the business of the society, and it was in that context that the interpretation mentioned above was given by this Court. In considering the full scope of section 91 (1) of the Maharashtra Act XXXII of 1961, the Court further proceeded to hold :—

"While we agree that the nature of business which a society does can be ascertained from the objects of the society, it is difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects can be said to be part of its business. We, however, agree that the word "touching" is very wide and would include any matter which relates to or concerns the business of a society, but we are doubtful whether the word "affects" should also be used in defining the scope of the word "touching".

This comment was made when taking notice of the decision of the Full Bench of the Bombay High Court in *Farkhundi v. Potdar*¹. The Court also held :—

“ One other limitation on the word “ dispute ” may also be placed and that is that the word “ dispute ” covers only those disputes which are capable of being resolved by the Registrar or his nominee.”

Considering the similarity between section 61 of the Act and section 91 (1) of the Maharashtra Act XXXII of 1961, we are of the opinion that the interpretation already placed by this Court on the provisions of section 91 (1) of the Maharashtra Act XXXII of 1961 is fully applicable to the provisions of section 61 of the Act with which we are concerned. Consequently, in deciding these appeals, we must proceed on the basis that section 61 of the Act requires reference of a dispute to the Registrar only if the dispute is capable of being resolved by the Registrar or his nominee, and further, the dispute between the co-operative society and the employee touches the business of the society in the sense explained by this Court in that case.

Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society ; but the meaning given to the expression “ touching the business of the society ”, in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word “ business ” is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. Further, the position is clarified by the provisions of sub-section (4) of section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under section 61 ; by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the Rules and bye-laws. On the face of it, the provisions of the Act, the rules and the bye-laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. For the purpose of bringing facts to our notice in the present appeals, the Rules framed by the Andhra Pradesh Government under the Act, and the bye-laws of one of the appellant-banks have been placed on the Paper-books of the appeals before us. It appears from them that the conditions of service of the employees of the Bank have all been laid down by framing special bye-laws. Most of the conditions of service, which the workmen want to be altered to their benefit, have thus been laid down by the bye-laws, so that any alteration in those conditions of service will necessarily require a change in the bye-laws. Such a change could not possibly be directed by the Registrar when, under section 62 (4) of the Act he is specifically required to decide the dispute referred to him in accordance with the provisions of the bye-laws. It may also be noticed that a dispute referred to the Registrar under section 61 of the Act can even be transferred for disposal to a person who may have been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator by the Registrar. Such person or arbitrator, when deciding the dispute, will also be governed by the mandate in section 62 (4) of the Act.

so that he will also be bound to reject the claim of the workmen which is nothing else than a request for alteration of conditions of service contained in the bye-laws. It is thus clear that, in respect of the dispute relating to alteration of various conditions of service, the Registrar or other person dealing with it under section 62 of the Act is not competent to grant the relief claimed by the workmen at all. On the principle laid down by this Court in the case of *The Deccan Merchants Co-operative Bank Ltd.*¹, therefore, it must be held that this dispute is not a dispute covered by the provisions of section 61 of the Act. Such a dispute is not contemplated to be dealt with under section 62 of the Act and must, therefore, be held to be outside the scope of section 61.

In this connections, we may take notice of the view expressed by a learned single Judge of the Madras High Court in *South Arcot Co-operative Motor Transport Society, Ltd. (for ex-servicemen) v. Syed Batcha and others*², where dealing with an industrial claim, the learned Judge held :—

“Therefore, in regard to an industrial claim, like the retrenchment compensation, the remedy for the worker would be only to enforce it by the machinery created by the Industrial Disputes Act, namely, by section 10 and 33 C (2). The Madras Co-operative Societies Act being itself a special statute, the authority, acting under it, would have no jurisdiction beyond what the enactment itself conferred on him. He could not, therefore, have jurisdiction to decide a dispute under the Industrial Disputes Act.”

That decision also related to section 51 of the Madras Co-operative Societies Act, 1932, which was similar in terms to section 61 of the Act.

Learned Counsel appearing on behalf of the appellant-banks, however, urged a new point to challenge the jurisdiction of the Industrial Tribunal to deal with the dispute relating to conditions of service to the effect that the conditions of service having been made the subject matter of bye-laws, an Industrial Tribunal will not be competent to alter them, because even an Industrial Tribunal has no jurisdiction to make orders contrary to law. For this purpose, he referred us to a number of decisions of this Court in *Dalmia Cement (Bharat) Ltd., New Delhi v. Their Workmen and another*³; *The Management of Marina Hotel v. The Workmen*⁴; *Cinema Theatres v. Their Workmen*⁵; and *The Hindustan Times Ltd., New Delhi v. Their Workmen and vice versa*⁶. In all these cases, it was held that an Industrial Tribunal acted illegally in prescribing leave in excess of the number of days laid down by the Delhi Shops and Establishments Act, 1954. In section 22 of that Act there was a specific prohibition that leave for sickness or casual leave with full wages shall not exceed 12 days; and it was held that a direction made by the Tribunal granting to the workmen more than 12 days' sickness or casual leave was illegal. The principle of the decisions in these cases does not, however, appear to us to be applicable to the cases before us, because, in the present case, there is no prohibition contained in the Act that the conditions of service prescribed are not to be altered. The argument on behalf of the banks, however, was that the bye-laws, which contained the conditions of service, are themselves law, so that any direction made by an Industrial Tribunal altering a condition of service contained in a bye-law would be an order contrary to law and, hence, illegal.

We are unable to accept the submission that the bye-laws of a co-operative society framed in pursuance of the provisions of the Act can be held to be law or to have the force of law. It has no doubt been held that, if a statute gives power to a Government or other authority to make rules, the rules so framed have the force of statute and are to be deemed to be incorporated as a part of the statute. That

1. A.I.R. 1969 S.C. 1320.

2. (1960) 2 M.L.J. 573 : I.L.R. (1961) Mad. 483 : (1960) 2 L.L.J. 693.

3. (1961) 2 L.L.J. 130.

4. (1962) 3 S.C.R. 1 : (1963) 1 S.C.J. 394.

5. (1964) 2 L.L.J. 128.

6. (1964) 1 S.C.R. 234 : (1964) 2 S.C.J. 1.

principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business or administration of a society. They may be binding between the persons affected by them, but they do not have the force of a statute. In respect of bye-laws laying down conditions of service of the employees of a society, the bye-laws would be binding between the society and the employees just in the same manner as conditions of service laid down by contract between the parties. In fact, after such bye-laws laying down the conditions of service are made and any person enters the employment of a society those conditions of service will have to be treated as conditions accepted by the employee when entering the service and will thus bind him like conditions of service specifically forming part of the contract of service. The bye-laws that can be framed by a society under the Act are similar in nature to the Articles of Association of a Company incorporated under the Companies Act and such Articles of Association have never been held to have the force of law. In a number of cases, conditions of service for industries are laid down by Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1964 and it has been held that, though such Standing Orders are binding between the employers and the employees of the industry governed by these Standing Orders, they do not have such force of law as to be binding on Industrial Tribunal adjudicating an industrial dispute. The jurisdiction which is granted to Industrial Tribunal by the Industrial Disputes Act is not the jurisdiction of merely administering the existing laws and enforcing existing contracts. Industrial Tribunals have the right even to vary contracts of service between the employer and the employees which jurisdiction can never be exercised by a civil Court or a Registrar acting under the Co-operative Societies Act, so that the circumstance that, in granting relief on issue No. 1, the Tribunal will have to vary the special bye-laws framed by the Co-operative Bank does not lead to the inference that the Tribunal would be incompetent to grant the reliefs sought in this reference. In fact, the reliefs could only be granted by the Industrial Tribunal and could not fall within the scope of the powers of the Registrar dealing with a dispute under section 61 of the Act.

We may also, in this connection, take notice of the submission made by learned Counsel that the Registrar could have granted relief under section 16 (5) of the Act if he thought that it was advisable to grant that relief to the workmen. In our opinion, this submission must be rejected for two reasons. The first reason is that action taken by the Registrar under section 16 (5) of the Act will not be a decision on a dispute referred to him under section 61 of the Act. When dealing with the dispute under section 61 of the Act, the Registrar is bound to decide the dispute in accordance with the existing bye-laws, so that, if the dispute relates to alteration of conditions of service laid down in the bye-laws, he will be incompetent to grant the relief claimed. It is also to be noticed that a dispute referred to a Registrar under section 6 of the Act may be transferred for disposal to a person who has been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator. On the face of it, such person or arbitrator cannot possibly exercise the powers of the Registrar under section 16 (5) of the Act. The second reason is that, under section 16 (5) of the Act, the power given to the Registrar to propose amendments in the bye-laws and to enforce them if the proposal is not accepted by a society is to be exercised only when the Registrar is of the opinion that it is necessary or desirable to do so in the interests of such society or of the co-operative movement. Amendments in bye laws under section 16 (5) of the Act are not contemplated in the interests of the workmen or for the purpose of resolving industrial disputes. The provisions of section 16 (5) of the Act thus appear to us to be irrelevant when considering the scope of the jurisdiction of the Registrar under section 16 of the Act. Consequently, the decision of the High Court holding that the Tribunal had jurisdiction to deal with the industrial dispute referred to it must be upheld.

We may also take notice of an argument advanced at the last stage by learned Counsel appearing on behalf of the banks that, in any case matters covered by issues Nos. 2 and 3 referred to the Tribunal could have been competently decided by the Registrar, and the reference in respect of those two issues at least should be held to be incompetent. We do not think that at this stage there is any need for us to decide this question, because such a point was not raised at all in the petitions filed under Article 226 of the Constitution before the High Court. In those petitions, the competence of the reference to the Industrial Tribunal as a whole was challenged on the ground that it was barred because of the jurisdiction of the Registrar to deal with the dispute under section 61 of the Act. Consequently, we need not deal with the question whether a particular issue forming part of the reference has been competently referred or not.

The appeals fail and are dismissed with costs. One hearing fee.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. Hidayatullah, *Chief Justice*, J.M. Shelat, V. Bhargava, K. S. Hegde and A. N. Grover, JJ.

Indu Bhusan Bose

.. *Appellant**

v.

Rama Sundari Debi and another

.. *Respondents.*

Attorney-General for India (By notice).

Constitution of India (1950), Article 246, Schedule VII, List I, Entry 3, List II, Entry 18, and List III, Entries 6, 7 and 13 and West Bengal Premises Tenancy Act (XII of 1956)—Cantonment area—Extension of State Act to cantonment area by State Government—Whether ultra vires—Power of Parliament to legislate in respect of house accommodation in cantonment area—Whether limited to military purposes alone—Extension of power of Parliament to regulate the relationship between landlord and tenant—Scope of.

Words and Phrases—"regulation".

In the entry, where power is granted to Parliament to make laws for the regulation of house accommodation in cantonment areas, there are no qualifying words to indicate that the house accommodation must be accommodation required for military purposes, or must be accommodation that has already been acquired, requisitioned or allotted to the military. If a legislation in respect of any cantonment was to be undertaken by Parliament for the first time under this entry, there would be, at the time of that legislation, no house in the cantonment already acquired, requisitioned or allotted for military purposes, and, if the interpretation sought to be put on behalf of the appellant were accepted, the power to pass laws cannot be exercised by Parliament at all. In the entry, various items, which can be the subject matter of legislation by Parliament are mentioned separately and in none of these clauses there is any specification that the legislation is to be confined to areas or accommodation required for military purposes. When legislating in respect of local self Government in cantonment areas, it is obvious that Parliament will have to legislate for the entire cantonment area including portions of it which may be in possession of civilians and not military authorities, or military officers. Similarly, the powers of the cantonment authorities which could be granted by legislation by Parliament, cannot be confined to those areas or buildings which are in actual possession of military authorities or officers and must be in respect of the entire cantonment area including those buildings and

* C.A. No. 882 of 1968.

lands which may be in actual ownership as well as occupation of civilians. There is no reason to narrow down the scope of legislation or regulation of house accommodation and confine it to houses which are required or are actually in possession of military authorities or military officers. The power to regulate house accommodation by law must extend to all house accommodation in the cantonment area irrespective of its being owned by or in the possession of, civilians. If a law were to be made for the first time under this entry, all houses would be either vacant or occupied by owners or occupied by tenants of owners under private agreements and the law, when first made, will have to govern such houses. The scope of the expression "regulation of house accommodation" in this entry, cannot, therefore be confined as urged on behalf of the appellant.

The word "regulation" cannot be so narrowly interpreted as to be confined to allotment only and not to other incidents, such as termination of existing tenancies and eviction of persons in possession of the house accommodation. This entry gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. This power to direct or control will include within it all aspects as to who is to make the constructions under what conditions the constructions can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised. All these are ingredients of regulation of house accommodation and there is no reason to hold that the word "regulation" has not been used in this wide sense in the entry. Parliament was given the exclusive power to legislate in respect of house accommodation in cantonment areas for regulating the accommodation in all its aspects.

Whenever any legislation is passed relating to control of rents, that legislation can be effective and can serve its purpose only if it also regulates eviction of tenants. Consequently, when in Entry 3 of List I, the power is granted to Parliament specifically to legislate as control of rents, that power cannot be effectively exercised unless it is held that Parliament also has the power to regulate eviction of tenants whose rents are to be controlled. Such power must be necessarily read in the expression "regulation of house accommodation". It has to be remembered that this power reserved for Parliament is to be exercised in respect of house accommodation situated in cantonment areas only and not other areas the legislative power in respect of which is governed by entries either in List II or in List III. This view is also borne out by the historical background provided by the legislation relating to cantonments and house accommodation in cantonments in India.

The relationship of landlord and tenant in respect of house accommodation situated in cantonment areas is clearly covered by the entries in List I of the Constitution. The effect of Entry 3 of List I is that Parliament has exclusive power to make laws with respect to the matters contained in that Entry, notwithstanding the fact that a similar power may also be found in any Entry in List II or List III. Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislative or the exclusive power of the State Legislative in Lists II and III respectively. The general power legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant in so far as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures. No anomaly arises in holding that the exclusive power of Parliament for regulation of house accommodation including control of rents in cantonment areas has the

effect of making the legislative powers conferred by Lists II and III subject to this power of Parliament.

A. G. Patel v. Vishwanath Chada, I.L.R. (1954) Bom. 434 ; Overruled.

Nawal Mal v. Nathulal (1961) I.L.R. 11 Raj. 421, Affirmed.

Appeal by Special Leave from the Judgment and Order dated the 11th July, 1966 of the Calcutta High Court in Civil Reference No. 20 of 1963.

D. N. Mukherjee and *Sunil Kumar Ghosh*, Advocates, for Appellant.

A. K. Sen, Senior Advocate (*Sukumar Ghose* and *Miss Krishna Sen*, Advocates, with him), for Respondent No. 1.

B. Sen, Senior Advocate (*Sukumar Basu* and *P. K. Chakravarti*, Advocates, with him), for Respondent No. 2.

Niren De, Attorney-General for India and *V. A. Syid Muhammad*, Senior Advocate (*R. H. Dhebar* and *S. P. Nayyar*, Advocates, with them), for the Attorney-General for India.

The Judgment of the Court was delivered by

Bhargava, J.—Rama Sundari Debi, the first respondent in this appeal by Special Leave, instituted a suit for the ejectment of Indu Bhusan Bose appellant who was a tenant in premises No. 18, Riverside Road, owned by respondent No. 1, situated within the cantonment area of Barrackpore. The agreed rent was Rs. 250 per mensem ; but there was a dispute as to whether the owner or the tenant was liable to pay rates and taxes. On an application presented by the appellant, the Rent Controller fixed fair rent under section 60 of the West Bengal Premises Tenancy Act No. XII of 1956 (hereinafter referred to as “the Act”) at Rs. 170 per month inclusive of all cantonment taxes, and, in appeal, the amount was enhanced to Rs. 188 per month inclusive of all cantonment taxes. Respondent No. 1, in December, 1960, served a notice on the appellant to quit and, on failing to get vacant possession, filed a suit in the Court of the Munsif. In the plaint, respondent No. 1 claimed that, regulation of house accommodation including control of rents, being a subject in Entry No. 3 of List I of the Seventh Schedule to the Constitution, the State Legislature could not competently enact a law on the same subject for cantonment areas, so that the appellant was not entitled to protection under the Act which had been extended to that area by the State Government. It was urged that the extension of that State Act to the cantonment area was *ultra vires* and void. The Munsif, thereupon, made a reference under section 113 of the Code of Civil Procedure to the High Court of Calcutta for decision of this constitutional question raised in the suit before him. The High Court decided the reference by making a declaration that the notification, whereby the State Government had extended the provisions of the Act to the Barrackpore cantonment area, was *ultra vires* and void. This is the decision of the High Court that has been challenged in this appeal.

It has been contended on behalf of the appellant that the High Court is not correct in holding that the filed of Legislation covered by the Act, which is primarily concerned with control of rents and eviction of tenants, is included within the expression “regulation of house accommodation in cantonment areas” used in entry No. 3 of List I. That entry is as follows :—

“3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.”

The submission made is that regulation of house accommodation will not include within it laws or rules on the subject of relationship of landlord and tenant of buildings situated in the cantonment areas. On the other hand, according to the appellant, legislation on this subject can be made either under Entry No. 18 of List II,

or Entries Nos. 6, 7 and 13 of List III, so that a State Legislature is competent to legislate and regulate relationship between landlord and tenant even in cantonment areas. These relevant entries are reproduced below :—

“ List II

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents ; transfer and alienation of agricultural land ; land improvement and agricultural loans ; colonization”.

“ List III

6. Transfer of property other than agricultural land ; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

13. Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.”

On the scope of Entry 3 of List I, the argument advanced is that Parliament is empowered to legislate in respect of house accommodation situated in cantonment areas only to the extent that that house accommodation is needed for military purposes and laws are required for requisitioning or otherwise obtaining possession of that accommodation for such purposes. In the alternative, the submission made is that regulation of house accommodation by parliamentary law should be confined to houses acquired, requisitioned or allotted for military purposes. This Entry 3, according to the appellant, should not be read as giving Parliament the power to legislate on the relationship of landlord and tenant in respect of houses situated in cantonment areas if such houses are let out privately by a private owner to his tenant and have nothing at all to do with the requirements of the military. We are unable to accept this submission. The language of the entry itself does not justify any such interpretation. In the entry when power is granted to Parliament to make laws for the regulation of house accommodation in cantonment areas, there are no qualifying words to indicate that the house accommodation, which is to be subject to such legislation, must be accommodation required for military purposes, or must be accommodation that has already been acquired, requisitioned or allotted to the military. In fact, if a legislation in respect of any cantonment was to be undertaken by Parliament for the first time under this entry, there would be, at the time of that legislation, no house in the cantonment already acquired, requisitioned or allotted for military purposes ; and, if the interpretation sought to be put on behalf of the appellant were accepted, the power of Parliament to pass laws cannot be exercised by Parliament at all. It is also significant that, in the entry, various items, which can be the subject-matter of legislation by Parliament, are mentioned separately, and these are :—

- (i) Delimitation of cantonment areas ;
 - (ii) local self-government in such areas ;
 - (iii) the constitution and powers within such areas of cantonment authorities;
- and
- (iv) the regulation of house accommodation (including the control of rents) in such areas.

In none of these clauses there is any specification that the legislation is to be confined to areas or accommodation required for military purposes. When legislating in respect of local self-government in cantonment areas, it is obvious that parliament will have to legislate for the entire cantonment area including portions of it which may be in possession of civilians and not military authorities or military officers. Similarly, the powers of the cantonment authorities, which could be

granted by legislation by Parliament, cannot be confined to those areas or buildings which are in actual possession of military authorities or officers and must be in respect of the entire cantonment area including those buildings and lands which may be in actual ownership as well as occupation of civilians. In these circumstances, there is no reason to narrow down the scope of legislation on regulation of house accommodation and confine it to houses which are required or are actually in possession of military authorities or military officers. The power to regulate house accommodation by law must extend to all house accommodation in the cantonment area irrespective of its being owned by, or in the possession of, civilians. In fact, if a law were to be made for the first time under this entry, all the houses would be either vacant or occupied by owners or occupied by tenants of owners under private agreements and the law, when first made, will have to govern such houses. The scope of the expression "regulation of house accommodation" in this entry cannot, therefore, be confined as urged on behalf of the appellant.

It is, in the alternative, contended that, even if the expression "regulation of house accommodation" in this entry includes regulation of houses in private occupation, it should not be interpreted as giving Parliament the power even to legislate for eviction of tenants who may have occupied the houses under private arrangement with the owners. It should be confined to legislation for the purpose of obtaining possession and allotment of such accommodation to military authorities or military officers. We cannot accept that the word "regulation" can be so narrowly interpreted as to be confined to allotment only and not to other incidents such as termination of existing tenancies and eviction of persons in possession of the house accommodation. The dictionary meaning of the word "regulation" in the Shorter Oxford Dictionary is "the act of regulating" and the word "regulate" is given the meaning "to control, govern or direct by rule or regulation". This entry, thus, gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or control will include within it all aspects as to who is to make the constructions under what conditions the constructions can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised. All these are ingredients of regulation of house accommodation and we see no reason to hold that this word "regulation" has not been used in this wide sense in this entry.

It appears that, in the Government of India Act, 1935, the corresponding Entry No. 2 in List I of the Seventh Schedule to that Act was similar to this Entry No. 3 of List I of the Seventh Schedule to the Constitution, but the expression "including control of rents" which is now in Entry No. 3 of List I within brackets did not exist. An argument was sought to be built on it that regulation of house accommodation was not intended to cover control of rents when that expression was used in the corresponding entry in the Government of India Act, and that this expression used in the Constitution should also be interpreted to cover the same field, so that, but for the addition made within brackets, Parliament could not have legislated for control of rents of house accommodation within cantonment areas. It is further urged that, if the expression "regulation of house accommodation" is interpreted as not including within it regulation or control of rents, it should also be held that it will not include regulation of eviction of private tenants. This argument is based on the premise that the words "including control of rents" was introduced in Entry 3 of List I of the Seventh Schedule to the Constitution for the purpose of enlarging the scope of the legislative authority of Parliament and making it wider than that of the Federal Legislature under the Government of India Act. Such an assumption is not necessarily justified. It may be that the words "including the control of rents" were introduced by way of abundant caution or to clarify that the regulation of house accommodation is wide enough to include control of rents. The addition may have been made so as to concentrate attention on the fact that legislation was needed for control of rents in the situation that existed at the time when the Consti-

tution was passed by the Constituent Assembly. It has to be remembered that cantonments are intended to be and are, in fact, military enclaves and regulation of occupation of house accommodation in the cantonment areas by Parliamentary law is necessary from the point of view of security of military installations in cantonments and requirements of military authorities and personnel for accommodation in such areas. Such a purpose could only be served by ensuring that Parliament could legislate in respect of house accommodation in cantonment areas in all its aspects, including regulation of grant of leases, ejectment of lessees, and ensuring that the accommodation is available on proper terms as to rents. On an interpretation of the contents of the entry itself, therefore, we are led to the conclusion that Parliament was given the exclusive power to legislate in respect of house accommodation in cantonment areas for regulating the accommodation in all its aspects.

In this connection, we may refer to three decisions which explain the object of legislation on the subject of rent control. In *Prout v. Hunter*¹, Scrutton, L.J., dealing with the legislation during the war in England, held :—

“Great public feeling was aroused by the exorbitant demands for rent that were made and the ejections for non-payment of it, with the result that Parliament passed the Rent Restriction Acts with the two-fold object, (1) of preventing the rent from being raised above the pre-war standard, and (2) of preventing tenants from being turned out of their houses even if the term for which they had originally taken them had expired.”

In *Property Holding Company Limited v. Clark*², it was held :—

“There are certain fundamental features of all the rent restriction legislation or at any rate of the legislation from 1920 to 1939. The two most important objects of policy expressed in it are (1) to protect the tenant from eviction from the house where he is living, except for defined reasons and on defined conditions ; (2) to protect him from having to pay more than fair rent. The latter object is achieved by the provisions for standard rent with (a) only permitted increases, (b) the provisions about furniture and attendance, and (c) the provisions about transfers of burdens and liabilities from the landlord to the tenant which would undermine or nullify the standard rent provisions. The result has been held to be that the Acts operate *in rem* upon the house and confer on the house itself the quality of ensuring to the tenant a status of irremovability. In this description of the distinguishing characteristics conferred by statute upon the house, the most salient is the tenant's security of tenure—his protection against eviction ; although the scope of the statutory policy about a fair rent must also be borne in mind, especially in connection with the provisions relating to furniture, attendance, services and board.”

In *Curl v. Angelo and another*³, Lord Greene, M.R. dealing with Rent Restrictions Act, held :—

“The Courts have had to consider what the over-riding purpose and intention of the Acts are, and I cannot put it in a more clear or authoritative way than by using the words of Scrutton, L.J. in *Skinner v. Geary*⁴, that the object was to protect the person residing in a dwelling-house from being turned out of his home.”

All these three cases clearly show that wherever any legislation is passed relating to control of rents, that legislation can be effective and can serve its purpose only if it also regulates eviction of tenants. Consequently, when in Entry 3 of List I the power is granted to Parliament specifically to legislate on control of rents, that power cannot be effectively exercised unless it is held that Parliament also has the power to regulate eviction of tenants whose rents are to be controlled. Such power must therefore, be necessarily read in the expression “regulation of house accommodation”. Of course, it has to be remembered that this power reserved for Parliament is to be exercised in respect of house accommodation situated in cantonment areas.

1. L.R. (1924) 2 K.B. 736.

2. L.R. (1948) 1 K.B. 630.

3. (1948) 2 A.E.R. 189.

4. L.R. (1931) 2 K.B. 456, 560.

only and not other areas the legislative power in respect of which is governed by entries either in List II or in List III.

This view that we are taking is also borne out by the historical background provided by the legislation relating to cantonments and house accommodation in cantonments in India. Carnduff in his book on "Military and Cantonment Law in India" has indicated how the need for legislating with the object of overcoming difficulties experienced by military officers in obtaining suitable accommodation in cantonments came under consideration, and has stated :

"In the early days of the British dominion in India, the camps, stations, and posts of the field army gradually developed into cantonments, where troops were regularly garrisoned. The areas so occupied were at first set apart exclusively for the military and intended for occupation by them only ; but, by degrees, non-military persons were admitted, land was taken possession of by them, and houses were built under conditions laid down by the Government from time to time. These conditions were undoubtedly framed with the main object of rendering accommodation always primarily available for the military officers whose duties necessitated their residence within cantonment limits." (p. clxii).

He goes on to relate that a Bill which ultimately became the Cantonments Act, 1889, originally contained a set of provisions on the subject, insisting on the prior claim of military officers to occupy houses in cantonments and proposing that disputes as to the rent to be paid and the repairs to be executed should be referred to, and settled by, committees of arbitration. That part of the Bill was, however, omitted as it evoked considerable opposition and a separate measure was, consequently, taken up, but not till after many years of discussion. The new Bill was introduced in the Governor-General's Council in 1898, and was passed into law as the Cantonments (House Accommodation) Act II of 1902. The main provision in this Act was that, on the Act being applied to any cantonment, every house situated therein became liable to appropriation at any time for occupation by a military officer. It recognised the paramount claim of the military authorities to insist upon houses in cantonments being, where necessary, made primarily available for occupation by the military officers stationed therein. In addition, a provision was made in section 10 that no house in any cantonment or part of a cantonment was to be occupied for the purposes of a hospital, bank, hotel, shop or school, or by a railway administration, without the previous sanction of the General Officer of the Command, given with the concurrence of the Local Government. This provision, thus clearly regulated the letting out of houses in a cantonment even for some of the civilian purposes, such as hospital, bank, etc. The reason obviously was that it was considered inappropriate that a house occupied for such a purpose should be required to be vacated in order to make the house available for military officers. Keeping the primary object of facilitating availability of house accommodation for military officers in view, even private letting out was, thus, regulated at that earliest stage. Subsequently came the Cantonments (House-Accommodation) Act VI of 1923 which was in force when the Government of India Act was enacted, as well as at the time when the Constitution came into force. This Act also contained similar provisions which permitted military authorities to direct an owner to lease out a house to the Central Government, to require the existing occupier to vacate the house and to refrain from letting out any house for purposes of a hospital, school, school hostel, bank, hotel, or shop, or by a railway administration, a company or firm engaged in trade or business or a club, without the previous sanction of the Officer Commanding the District given with the concurrence of the Commissioner or, in a Province where there are no Commissioners, of the Collector. This Act also, thus, interfered with and regulated letting out of house accommodation by owners for civilian purposes even though, at the time of letting, the house was not required for any military purpose. It was in the background of this legislative history that provision was made in the Government of India Act in Entry 2 of List I of the Seventh Schedule reserving for the Federal Legislature the power to legislate so as to regulate house accommodation in cantonment areas, and the same power with further clarification was reserved for Parliament in Entry 3 of List I of the Seventh Schedule to the

Constitution. Obviously, it could not be intended that Parliament should not be able to pass a law containing provisions similar to the provisions in these earlier Acts which did interfere with private letting out of house accommodation in cantonment areas by owners for certain purposes.

Another aspect that strengthens our view is that if we were to accept the interpretation sought to be put on behalf of the appellant that the power of Parliament is confined to legislation for the purpose of obtaining house accommodation in cantonment areas for military purposes and excludes legislation in respect of house accommodation not immediately required for military purposes, all that Parliament will be able to do will be to make provision for acquisition or requisition of house accommodation. On the house accommodation being acquired or requisitioned, it will be available for use by military authorities. Such power, obviously, could not be intended to be conferred by Entry 3 in List I when the same power is specifically granted concurrently to both Parliament and the State Legislatures under Entry 42 of List III of the Seventh Schedule to the Constitution.

On behalf of the appellant, reliance was placed on some decisions of some of the High Courts in support of the proposition that the power of Parliament under Entry 3 of List I does not extend to regulating the relationship between landlord and tenant which power vests in the State Legislature under Entry 18 of List II. The first of these cases is *A. C. Patel v. Vishwanath Ghada*¹ where the Bombay High Court was dealing with Entry 2 of List I of the Seventh Schedule to the Government of India Act, 1935 and Entry 21 of List II of that Act. The Court was concerned with the applicability of the Bombay Rent Restriction Act No. LVII of 1947 to cantonment areas. Opinion was first expressed that the Rent Restriction Act had been passed by the Provincial Legislature under Entry 21 of List II and reliance was placed on the English interpretation Act to hold that land in that entry would include buildings so as to confer jurisdiction on the Provincial Legislature to legislate in respect of house accommodation. Then, in considering the effect of Act LVII of 1947, the Court said:—

“As the preamble of the Act sets out, the Act was passed with a view to the control of rents and repairs of certain premises, of rates of hotels and lodging house and of evictions. Therefore, the pith and substance of Act LVII of 1947 is to regulate the relation between landlord and tenant by controlling rents which the tenant has got to pay to the landlord and by controlling the right of the landlord to evict his tenant. Can it be said that when the Provincial Legislature was dealing with these relations between landlord and tenant, it was regulating house accommodation in cantonment areas? In our opinion, the regulation contemplated by Entry 2 in List I is regulation by the State or by Government. Requisitioning of property, acquiring of property, allocation of property, all that would be regulation of house accommodation, but when the Legislature merely deals with relations of landlord and tenant, it is not in any way legislating with regard to house accommodation. The house accommodation remains the same, but the tenant is protected *qua* his landlord.”

We have felt considerable doubt whether the power of legislating on relationship between landlord and tenant in respect of house accommodation or buildings would appropriately fall in Entry 21 of List II of the Seventh Schedule to the Government of India Act, or in the corresponding Entry 18 of List II of the Seventh Schedule to the Constitution. These Entries permit legislation in respect of land and explain the scope by equating it with rights in or over land, land tenures, including, the relation of landlord and tenant, and the collection of rents. It is to be noted that the relation of landlord and tenant is mentioned as being included in land tenures and the expression “land tenures” would not, in our opinion, appropriately cover tenancy of buildings or of house accommodation. That expression is only used with reference to relationship between landlord and tenant in respect of vacant lands. In fact, leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and would much more appropriately fall within the

scope of Entry 8 of List III in the Seventh Schedule to the Government of India Act read with Entry 10 in the same List, or within the scope of Entry 6 of List III in the Seventh Schedule to the Constitution read with Entry 7 in the same List. Leases and all rights governed by leases, including the termination of leases and eviction from property leased, would be covered by the field of transfer of property and contracts relating thereto. However, it is not necessary for us to express any definite opinion in this case on this point because of our view that the relationship of landlord and tenant in respect of house accommodation situated in cantonment areas is clearly covered by the Entries in List I. In the Constitution, the effect of Entry 3 of List I is that Parliament has exclusive power to make laws with respect to the matters contained in that Entry, notwithstanding the fact that a similar power may also be found in any Entry in List II or List III. Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislature, or the exclusive power of the State Legislature in Lists III and II respectively. The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant insofar as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures. The submission made that this interpretation will lead to a conflict between the powers conferred on the various Legislatures in Lists I, II and III has also no force, because the reservation of power for Parliament for the limited purposes of legislating in respect of cantonment areas only amounts to exclusion of this part of the legislative power from the general powers conferred on State Legislatures in the other two Lists. This kind of exclusion is not confined only to legislation in respect of house accommodation in cantonment areas. The same Entry gives Parliament jurisdiction to make provision by legislation for local self-government in cantonment areas which is clearly a curtailment of the general power of the State Legislatures to make provision for local self-government in all areas of the State under Entry 5 of List II. That entry 5 does not specifically exclude cantonment areas and, but for Entry 3 of List I, the State Legislature would be competent to make provision for local government even in cantonment areas. Similarly, power of the State Legislature to legislate in respect of : (i) education, including universities, under Entry 11 of List II is made subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III ; (ii) regulation of mines and mineral development in Entry 23 of List II is made subject to the provisions of List I with respect to regulation and development under the control of the Union ; (iii) industries in Entry 24 of List II is made subject to the provisions of Entries 7 and 52 of List I ; (iv) trade and commerce within the State in Entry 26 of List II is made subject to the provisions of Entry 33 of List III ; (v) production, supply and distribution of goods under Entry 27 of List II is made subject to the provisions of Entry 33 of List III ; and (vi) theatres and dramatic performances ; cinemas in Entry 33 of List II is made subject to the provisions of Entry 60 of List I. Thus the Constitution itself has specifically put down entries in List II in which the power is expressed in general terms but is made subject to the provisions of entries in either List I or List III. In these circumstances, no anomaly arises in holding that the exclusive power of Parliament for regulation of house accommodation including control of rents in cantonment areas has the effect of making the legislative powers conferred by Lists II and III subject to this power of Parliament. In this view, we are unable to affirm the decision of the Bombay High Court in *A.C. Patel's case*¹, which is based on the interpretation that Entry 2 in List I of the Seventh Schedule to the Government of India Act only permitted laws to be made for requisitioning of property, acquiring of property and allocation of property only. The same High Court, in a subsequent case in *F. E. Darukhanawalla v. Khemchand Lalchand*,² placed

1. I.L.R. (1954) Bom. 434.

2. I.L.R. (1954) Bom. 544.

the same interpretation on Entry 3 of List I of the Seventh Schedule to the Constitution. That decision was also based on the same interpretation of the scope of regulation of house accommodation as was accepted by that Court in the earlier case.

The Nagpur High Court in *Kewalchand v. Dashrathlal*¹ proceeded on the assumption that the decision in the case of *A. G. Patel v. Vishwanath Chada*² correctly defined the scope of Entry 2 in List I of the Seventh Schedule to the Government of India Act, and considered the narrow question whether the relationship of landlord and tenant specifically mentioned in Entry 21 in List II of that Act which covered the requirement of permission to serve a notice for eviction in regulating the relation of landlord and tenant and fell within the scope of Entry 21 in List II or in Entry 2 in List I of that Act. The Court held that it substantially fell in Entry 21 in List II and not in Entry 2 in List I. That Court did not consider it necessary to express any opinion on the question whether the expression "regulating of house accommodation" included something besides what Chagla, C.J., had said was its ambit in the case of *A. G. Patel v. Vishwanath Chada*², but expressed the opinion that the expression could not be stretched to include the aspect of the relation of landlord and tenant involved in that particular case. It is clear that, in that case also, a narrow interpretation of the expression "regulation of house accommodation" was accepted because it appears that there was no detailed discussion of the full scope of that expression. Similar is the decision of the Patna High Court in *Babu Jagatanand v. Sri Satyanarayanji and Lakshmi Through the Shebait and Manager Jamuna Das*³. In fact, this last case merely followed the decision of the Bombay High Court in the case of *F. E. Darukhanawalla v. Khemchand Lalchand*⁴. On the other hand, the Rajasthan High Court in *Nawal Mal v. Nathu Lal*⁵ held that the power of the State Legislature to legislate in respect of landlord and tenant of buildings is to be found in Entries 6, 7 and 13 of List III of the Seventh Schedule to the Constitution and not in Entry 18 of List II, and that that power was circumscribed by the exclusive power of Parliament to legislate on the same subject under Entry 3 of List I. That is also the view which the Calcutta High Court has taken in the judgment in appeal before us. We think that the decision given by the Calcutta High Court is correct and must be upheld.

The appeal fails and is dismissed with costs payable to plaintiff Respondent only.
S.V.J. Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND G. K. MITTER, JJ.

The Management of M/s. Ghaziabad Engineering Co., Private Ltd... *Appellant**

v.

Its workmen

.. *Respondents.*

Constitution of India (1950), Article 136 and Industrial Disputes Act (XIV of 1947)—Appeal by Special Leave—Industrial Tribunal relying upon newspaper reports—Conclusion based upon several other circumstances also—Interference with the finding of the Tribunal, not justified.

Industrial Disputes Act (XIV of 1947), gratuity Scheme—Normal rule is quantum of gratuity is related to basic wage—Departure from the normal rule, when can be made.

In relying upon newspaper reports the Tribunal may have erred. But the conclusion of the Tribunal is founded upon a review of several other circumstances. The Tribunal has on appreciation of evidence come to the conclusion that the financial position of the Company was sound and assuming that the Tribunal is governed by the strict rules prescribed by Evidence Act, sitting in appeal with Special

1. I.L.R. (1956) Nag. 618 : A.I.R. 1956 Nag. 268.

2. I.L.R. (1954) Bom. 434.

* C.A. No. 1408 of 1966.

3. (1961) I.L.R. 40 Pat. 625.

4. I.L.R. (1954) Bom. 544.

5. (1961) I.L.R. 11 Raj. 421.

Leave this Court will not be justified in interfering with the finding of the Tribunal even if it be open to the criticism that a part of the evidence relied upon is not in law relevant.

On facts gratuity payable to a workman on termination of employment is to be computed on the total wage packet of the workman including dearness allowance which he has last drawn. This order makes a departure from the normal rule which is adopted in industrial awards. A departure may be made from the normal rule, if there be some strong evidence or precedent in the industry, or conduct of the employer or other exceptional circumstances to justify that course. In the absence of such evidence, the gratuity should be related to the basic wage and not to the consolidated wage-packet. In the present case it is found that the financial position of the company is sound but there is no evidence that the company is 'making abnormally high profits' nor is there any evidence that in its sister concerns or in other engineering concerns in the region there is a practice of awarding gratuity related to consolidated wages. On facts held, 'wages' in the scheme shall mean basic salary or emoluments excluding dearness allowance and other allowances and benefits payable to the workman.

Appeal by Special Leave from the Award, dated the 19th May, 1965/23rd February, 1966 of the Additional Industrial Tribunal, Delhi in Industrial Dispute No. 109 of 1965.

H. R. Gokhale, Senior Advocate (*M/s. G. L. Sanghi and K. P. Gupta*, Advocates. with him), for the Appellant.

Mrs. Urmila Kapur and Miss Bhajan Ramrakhiani, Advocates, for the Respondents.

The Judgment of the Court was delivered by

Shah, J.—By order dated 24th February, 1965 the Chief Commissioner of Delhi referred for adjudication, industrial disputes between the appellant company and its workmen relating to dearness allowance and introduction of a scheme of gratuity for the benefit of the workmen. The Industrial Tribunal, Delhi framed the following "gratuity scheme":

- | | |
|---|---|
| <p>"(1) On death or retirement on attaining the age of superannuation or on becoming mentally or physically unfit. for further service.</p> | <p>One month's wages for each year of service or part thereof in excess of six months subject to a maximum of 15 months' wages. In case of death of employee the gratuity shall be payable to his nominee or if there is no nominee to his legal heirs.</p> |
| <p>(2) On termination after five years' service for any cause whatsoever except by way of retrenchment or resignation.</p> | <p>15 days wages for each year of service or part thereof in excess of six months subject to a maximum of 15 months wages.</p> |
| <p>(3) On resignation after 10 years of service.</p> | <p>15 days wages for each year of service or part thereof in excess of six months subject to a maximum of 15 months wages.</p> |

Provided that if termination is for any misconduct causing financial loss. to the company, the amount of loss shall be deducted from the gratuity payable. The word 'wages' in this Scheme shall mean the total pay packet of the workman including dearness which he was last drawing."

The Tribunal also directed that "all workmen who were appointed in 1960 or earlier should get dearness allowance at Rs. 3 for every ten point rise in the cost of Consumer Price Index base 1960 over and above their existing wages with effect from 1st January, 1965. In case of workmen appointed after 1960, the consumer price index base 1960 on the date of his appointment shall be found out and he

shall be given Rs. 3 as dearness for every ten point rise in cost of consumer Price Index base 1960 above it with effect from 1st January, 1965 or such later date on which the limit of 10 point rise in cost of Consumer Price Index base is crossed". The Tribunal also directed that dearness allowance will not be enhanced till the limit of ten points be "crossed", and that dearness allowance once granted will not be reduced till the Consumer Price Index falls by more than 10 points. The Company has appealed to this Court with Special Leave.

In the view of the Tribunal, the financial position of the company "is very sound" and that it has "financial capacity and stability to bear the additional burden of dearness allowance and of the gratuity scheme." In reaching that conclusion the Tribunal relied upon a news item published in the newspapers that 2000 Russian Tractors were being immediately imported by the company even though the agency of the Company was being terminated. In relying upon newspaper reports the Tribunal may have erred. But the conclusion of the Tribunal is founded upon a review of several other circumstances. It is true that one of the primary lines of business of the company was of selling tractors as agents of Russian manufacturers. That agency was in danger of being terminated because the State Trading Corporation had arranged to take over the agency. But the balance sheets of the company show that the agency was only one of the many lines of business and the closure of the agency of the tractor manufacturers was not likely to affect the financial structure of the Company seriously. The Tribunal has on appreciation of evidence come to the conclusion that the financial position of the company was sound and assuming that the Tribunal is governed by the strict rules prescribed by the Evidence Act, sitting in appeal with Special Leave we will not be justified in interfering with the finding of the Tribunal even if it be open to the criticism that a part of the evidence relied upon is not in law relevant.

The Company had on its roll 244 workmen out of whom 118 entered employment after 1960. The Company has been paying to its workmen wages consisting of two components—basic wages and 50 per cent. of the basic wages as dearness allowance. Payment of wages is made in this form to all workmen whether their employment commenced before the year 1960 or thereafter. It is true that before 1960 the company used to make a consolidated payment without specifying any amount of basic salary or dearness allowance. Since 1960 in every appointment letter it was expressly recited that the employee will get a consolidated salary consisting of 2/3rd of the consolidated salary as basic wages and the balance as dearness allowance. The company has produced before the Tribunal 118 such letters of appointment in respect of all employees employed after the year 1960. In respect of the employees appointed prior to the year 1960 in the salary register basic salary and dearness allowance was separately entered though at the time of appointment of employees there was no allocation as basic wages and dearness allowance.

There is no dispute that since the year 1960 there has been a rise in the cost of living. The Consumer Price Index for Industrial Workers which was 100 in 1960, had risen to more than 130 in 1965. The management of the company granted dearness allowance to employees in other concerns under its management even though those other concerns were not financially very sound. No serious argument has been advanced before us that the rise in dearness allowance is not justified. The only ground of complaint is that by relating the dearness allowance to the total wage packet the workmen are given a rise both in the dearness allowance and the basic wage.

The Tribunal has awarded dearness allowance at the flat rate of Rs. 3 for every 10 point rise in the cost of Consumer Price Index. The rise is not related to the quantum of basic wage or consolidated wage. It is a flat uniform rate applicable to every workman. The Tribunal was of the view that the allocation between the basic wage and the dearness allowance was "not fair", but for the purpose of the present reference, the question is academic because dearness allowance is not related to the quantum of salary that the workmen receive. The argument that the rise

will operate to give to the workmen besides the additional dearness allowance, a percentage increase in dearness allowance already paid as part of the consolidated wage cannot be accepted. We do not therefore see any reason to interfere with the order passed by the Tribunal with regard to the dearness allowance "at the rate of Rs. 3 for every 10 point rise in the Consumer Price Index."

Gratuity payable to a workman on termination of employment is to be computed on the total wage packet of the workman including dearness allowance which he has last drawn. This order makes a departure from the normal rule which is adopted in industrial awards. In *M/s. British Paints (India) Ltd. v. Its Workmen*¹, this Court while introducing a gratuity scheme for the first time in the concern directed that the amount of gratuity shall be related to the basic wage or salary and not to the consolidated wage including dearness allowance. A similar order was made in *May and Baker (India) Ltd. v. Their Workmen*². It is true that in *British Indian Corporation v. The Workmen*³, an award made by the Tribunal fixing the quantum of gratuity on gross salary *i.e.*, basic wage plus dearness allowance was upheld by this Court. The Court affirmed that the usual pattern in fixing the gratuity is to relate it to the basic wage, but refused to interfere with the order *because the practice in that concern was to fix gratuity on the consolidated wage.*

Similarly, in *Hindustan Antibiotics Ltd. v. Their Workmen*⁴, the Tribunal directed the employer to pay gratuity at the rate of one half of wages for each month including dearness allowance but excluding house rent and all other allowances for each completed year of service subject to a maximum of wages for ten months. In rejecting the claim of the employers for relating gratuity to the basic wage, this Court observed :

"If the industry is a flourishing one, we do not see any reason why the labour shall not have the benefit of both the schemes *i.e.*, the employees provident fund and the gratuity scheme. Gratuity is an additional form of relief for the workmen to fall back upon. If the industry can bear the burden, there is no reason why he shall not be entitled to both the retirement benefits. The Tribunal considered all the relevant circumstances : the stability of the concern, the profits made by it in the past, its future prospects and its capacity and came to the conclusion that, in the concern in question, the labour should be provided with a gratuity scheme in addition to that of a provident fund scheme. There was no justification to disturb this conclusion."

In *The Remington Rand of India Ltd. v. The Workmen*⁵, this Court declined to interfere with the order of the Tribunal awarding gratuity related to the consolidated wage including dearness allowance "in view of the flourishing nature of the concern, the enormous profits it was making, the reserves it had built up as also in view of the fact that it was paying gratuity to executives on the basis of consolidated wages." In *The Delhi Cloth & General Mills Co., Ltd. v. The Workmen and others*⁶, this Court had to consider whether gratuity payable to workmen in the textile industry in the Delhi region should be related to the consolidated wage. After referring to the decisions which were brought to the notice of the Court, it was observed that :

"It is not easy to extract any principle from these cases : as precedents they are conflicting The Tribunal has failed to take into account the prevailing pattern in the textile industry all over the country It is a countrywide industry : and in that industry, except in one case to be presently noticed, gratuity has never been granted on the basis of consolidated wages."

1. (1967) 1 S.C.J. 789 : (1966) 2 S.C.R. 523.

2. (1961) 2 L.L.J. 94.

3. (1965) 10 F.L.R. 244.

4. (1967) 1 L.L.J. 114 : (1967) 1 S.C.R. 652.

(1968) 1 S.C.J. 12.

5. (1968) 1 S.C.J. 681.

6. C.A. No. 2168 of 1967 decided on 27th September, 1968.

The Court after referring to the schemes framed in respect of the industries in Bombay and Ahmedabad and other industries concluded that "determination of gratuity is not based on any definite rules. In each case it must depend upon the prosperity of the concern, needs of the workmen and the prevailing economic conditions examined in the light of the auxiliary benefits which the workman may get on determination of employment."

There is no clear evidence on the record, and no precedents have been brought to our notice, to justify a departure from the normal rule that the quantum of gratuity is related not to the consolidated wage packet but to the basic wage. A departure may be made from the normal rule, if there be some strong evidence or precedent in the industry, or conduct of the employer or other exceptional circumstances to justify that course. In the absence of such evidence, we are of the view that gratuity should be related to the basic wage and not to the consolidated wage packet. In the present case it is found that the financial position of the Company is sound but there is no evidence that the company is "making abnormally high profits" nor is there any evidence that in its sister concerns or in other engineering concerns in the region there is a practice of awarding gratuity related to consolidated wages.

It was urged on behalf of the company that even though the workmen had, in the claim made by them, demanded a scheme of gratuity benefit at the rate of 15 days wages for each year of service in case of death or retirement on attaining the age of superannuation or on becoming mentally or physically unfit for further service, the Tribunal had awarded gratuity at the rate of one month's wages for each year of service subject to a maximum of 15 months' wages. But the claim was made on the footing that the wages were to include dearness allowance. When that claim is not accepted, we cannot hold the workmen bound by the multipliers.

We make no modification in clause (1) of the scheme. We modify the scheme in so far as it relates to the dearness allowance and direct that for the last sentence of the gratuity scheme the following shall be substituted :

"The word 'wages' in the scheme shall mean basic salary or emoluments excluding dearness allowance and other allowances and benefits payable to the workman which he had last drawn."

Subject to the above modification, the appeal fails and is dismissed. There will be no order as to costs in the appeal.

S.V.J.

*Award modified ;
appeal otherwise dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.

M/s. Hindustan Steel Ltd. (In all the Appeals)

.. *Appellant **

v.

The State of Orissa (In all the Appeals)

.. *Respondent.*

Orissa Sales Tax Act (XIV of 1947), section 2 (g), 91 (1) and 25 (1) (a)—Sale—Failure to register as dealer—Levy of Penalty—Justification for.

The Company supplied building materials to the Contractor at agreed rates. There was concurrence of the four elements which constituted a sale, (1) the parties were competent to contract ; (2) they had mutually assented to the terms of contract ; (3) absolute property in building materials was agreed to be transferred to the contractors ; and (4) price was agreed to be adjusted against the dues under the contract.

Under the Act penalty may be imposed for failure to register as a dealer. (Section 9 (1) read with section 25 (1) (a) of the Act. But the liability to pay

penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statutes. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

A person to be a dealer within the meaning of the Act must carry on the business of selling or supplying goods in Orissa. If the company agreed to charge affixed percentage above the cost price, for storage, insurance and rental charges, it may be reasonably inferred that the company did not carry on business of supplying materials as a part of business activity with a view to making profit.

Appeals by Special Leave from the Judgment and Order, dated the 3rd December, 1964 of the Orissa High Court in Special Jurisdiction Cases Nos. 44 to 53 of 1963.

G. K. Daphtary, Senior Advocate (*D. N. Mukherjee*, Advocate, with him), for the Appellant (In all the Appeals).

D. Narasaraaju, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for the Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Shah, Acting C. J.—M/s. Hindustan Steel Ltd., a Company incorporated under the Indian Companies Act, 1913 is a Government of India undertaking in the public sector. The Company is registered as a dealer under the Orissa Sales Tax Act XIV of 1947, from the last quarter ending March, 1959.

Between 1954 and 1959 Company was erecting factory buildings for the steel plant, residential buildings for its employees and ancillary works such as roads, water supply, drainage. Some constructions were done departmentally and the rest through contractors. The Company supplied to the contractors for use in construction, bricks, coal, cement, steel, etc., for consideration and adjusted the value of the goods supplied at the rates specified in the tender.

In proceedings for assessment of tax under the Orissa Sales Tax Act, 1947, the Sales Tax Officer held that the Company was a dealer in building materials, and had sold the material to contractors and was on that account liable to pay tax at the appropriate rates under the Orissa Sales Tax Act. The Sales Tax Officer directed the Company to pay tax due for ten quarters ending 31st December, 1958, and penalty in addition to the tax for failure to register itself as a dealer. The Appellate Assistant Commissioner confirmed the order of the Sales Tax Officer. In second appeal the Tribunal agreed with the tax authorities and held that the Company was liable to pay tax on its turnover from bricks, cement and steel supplied to the contractors. The Tribunal however substantially reduced the penalty imposed upon the Company.

At the instance of the Company the Tribunal referred six questions to the High Court of Orissa under section 24 (1) of the Orissa Sales Tax Act, 1947. The questions were :

"A. Whether in the facts and circumstances of the case Messrs. Hindustan Steel Ltd., can be held to be a 'dealer' within the meaning of section 2 (c) of the Orissa Sales Tax Act?

B. Whether the sale of materials by the Company to different contractors working for the company for which sales tax is sought to be assessed amounts to 'sale' within the meaning of section 2 (g) of the Act?

C. Whether the accrual of some profit in the absence of any motive to make such profit can make the assessee a 'dealer' under the Act and whether in the circumstances of the case, the Tribunal was justified in coming to a finding that there was profit making motive on the part of the Company?

D. Whether in view of the definition contained in section 2, clause (h) as it stood prior to the amendment of the provisions by Act XVIII of 1959, the supplies of materials can be treated as 'sale price' in the hands of the assessee?

E. Whether in the facts and circumstances of the case, the amount received by the assessee in respect of tender forms can be said to be "sale price"?

F. Whether the Tribunal is right in holding that penalties under section 12 (5) of the Act had been rightly levied and whether in view of the serious dispute of liability it cannot be said that there was sufficient cause for not applying for registration?"

The High Court answered the questions A, B, C, D and F in the affirmative and question E in the negative.

In these appeals filed with Special Leave substantially three matters fall to be determined:

1. Whether the Company sold building material to the contractors during the quarters in question?
2. Whether the Company was a dealer in respect of building materials within the meaning of the Orissa Sales Tax Act?
3. Whether imposition of penalties for failure to register as a dealer was justified?

Solution of the first and third matters does not present much difficulty. At the relevant time 'sale' was defined by section 2 (g) of the Orissa Sales Tax Act as follows:—

" 'Sale' means, with all its grammatical variations and cognate expressions any transfer of property in goods for cash or deferred payment or other valuation consideration, including a transfer of property in goods involved in the execution of contract, but does not include a mortgage, hypothecation, charge or pledge:

* * * * *

The Company supplied building material to the contractors at agreed rates. There was concurrence of the four elements which constitute a sale (1) the parties were competent to contract; (2) they had mutually assented to the terms of contract; (3) absolute property in building materials was agreed to be transferred to the contractors; and (4) price was agreed to be adjusted against the dues under the contract. No serious argument was advanced before us that the supply of building material belonging to the Company for an agreed price did not constitute a sale.

Under the Act penalty may be imposed for failure to register as a dealer: section 9 (1) read with section 25 (1) (a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct

Constitution of India (1950), Article 246, Schedule VII, List I, Entry 3, List II, Entry 18 and List III, Entries 6, 7 and 13 and West Bengal Premises Tenancy Act (XII of 1956)—Cantonment area—Extension of State Act to cantonment area by State Government—Whether <i>ultra vires</i> —Power of Parliament to legislate in respect of house accommodation in cantonment area—Whether limited to military purposes alone—Extension of power of Parliament to regulate the relationship between landlord and tenant—Scope of	305
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SANCTION TO PROSECUTE UNDER THE PREVENTION OF CORRUPTION ACT, 1947*

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The need for sanction in regard to criminal prosecution has been expressly stipulated in several enactments, as a limitation upon the general rule that a criminal prosecution can be initiated by or at the instance of any person whether or not he is directly injured or affected by the offence alleged. Section 6 of the Prevention of Corruption Act, 1947 (hereinafter referred to as the Act) specifically provides for such sanction. The essential purpose of the section is to reconcile two different principles. The first of them is, that a public servant, however important the position he may hold, should be easily amenable to the jurisdiction of the Courts of the country for any offence for which he may be responsible, as any ordinary citizen. The second principle is, that an allegation made against such a public servant amounts, as a matter of fact, to an attack on his honesty and integrity, which indirectly casts a reflection on the State itself of whose machinery, the public servant forms a part. Thus, the object of such stipulation on the requirement of sanction in relation to the prosecution of the public servant is to discourage frivolous, doubtful and impolitic prosecutions sought to be initiated against public servants exercising their duties. In view of the difficulties involved in a precise demarcation between claims made *bona fide* and claims made fraudulently, such stipulation seek to shut out a *mala fide* and vexatious attempt to institute criminal proceedings against a public servant, by a discretion to grant or not to grant sanction for such prosecution..

Thus, the previous sanction of certain specified authorities is, as mentioned above, a *sine qua non* for the prosecution of a public servant under the provisions of the Act. Section 6 reads as follows:

"6. (1) No Court shall take cognizance of an offence punishable under section 161 or 164 or section 165 of the Indian Penal Code or under sub-section (2) of section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction.

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office, save by or with the sanction of the Central Government or some higher authority (of the) Central Government..

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from the office, save with the sanction of the State Government or some higher authority (of the) State Government..

(c) in the case of any other person, of the authority competent to remove him from his service.

(2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or State Government or any other authority, such sanction shall be given by the Government or the authority which would have been competent to remove the

* The views expressed herein are those of the author,

public servant from his office at the time when the offence was alleged to have been committed."

Section 6 of the Act, as has been emphasized by the Supreme Court¹ differs materially from section 197 of the Criminal Procedure Code, which constituted in general the fundamental law relating to sanction for prosecution of a public servant for criminal offences. The two major changes effected are:

(1) that while under section 197 the sanction of the Governor-General or the Provincial Government, as the case may be, was only necessary for the prosecution of public servants who were not removable from their offices save with the sanction of the Central Government or the Provincial Government, respectively, no such qualification is contained in section 6 in which the words used are "committed by public servants". Thus, under the Criminal Procedure Code no sanction was required to prosecute public servants removable by a lesser authority than the Provincial or Central Government, whereas now the sanction of the appropriate authority is necessary for prosecution of a public servant however subordinate, if he is alleged to have committed an offence under sections 161 and 165 of the Indian Penal Code or under section 5 of the Act.

(2) that in section 6 of the Act, the words appearing in section 197 of the Criminal Procedure Code, namely, "while acting or purporting to act in the discharge of his official duty" have been omitted. This omission appears to have been made in consequence of the decisions of the various High Courts and the Federal Court to the effect that an officer who had accepted a bribe or embezzled Government property was neither acting nor purporting to act in the discharge of his official duty, and therefore no sanction for his prosecution was necessary. The sanction of the appropriate authority is therefore now necessary for the prosecution of any public servant under the Act.

The provisions of the Act indicate that it was the intention of the Legislature to treat more severely than hitherto corruption on the part of a public servant and not to condone it in any manner whatsoever.

The question of sanction under section 6 of the Act can best be studied under the following heads:

I. In what cases sanction is necessary.

II. Defects in sanction:

(1) Want of competency:

(a) whether the sanction should be given by the same authority who appointed the public servant or an authority of the same rank as the appointing authority or of higher rank than the appointing authority.

(b) whether such equal or superior authority should be expressly delegated with the power to issue such sanction,

(c) whether such sanction could be issued in the name of the President or the Governor and signed by subordinate officers,

(d) who is the authority to issue the sanction in case of Government servants whose services are lent by a State Government to the Central Government.

(2) Defective consideration.

(3) Defect in expression of sanction.

1. *S.A. Vasudevan v. The State*, (1958) S.C.J. 594 : (1958) S.C.R. 1037 : (1958) 2 An. W.R. (S.C.) 45 : (1958) 2 M.L.J. (S.C.) 45 : (1958) M.L.J. (Cri.) 473 : A.I.R. 1958 S.C. 107.

(4) Sanction granted after the institution of suit.

III. Effect of defective sanction and of subsequent proper sanction.

IV. Stage of objection to defect in sanction.

I. IN WHAT CASES SANCTION IS NECESSARY.

On examining the provisions of section 6 of the Act it is manifest that two conditions must be fulfilled before its provisions become applicable. One is that the offence mentioned therein must be committed by a public servant, and the other is that the person is employed in connection with the affairs of the Union or a State and is not removable from his office save by or with the sanction of the Central Government or State Government or is a public servant who is removable from his office by any other competent authority. Both these conditions must be present to prevent the Court from taking cognizance of an offence mentioned in the sanction.^{1-a} An offender cannot invoke the protection of section 6 unless two conditions are fulfilled, namely,—

(1) he was a public servant when the offence charged against him was committed, and

(2) on the date when he is prosecuted there is some authority who could remove him from his office.

Section 6 of the Act offers protection only to those public servants who were in office both on the date of the commission of the offence charged and the date when a Court is asked to take cognizance.² Once he ceases to be public servant, the Court can take cognizance of the offence without any sanction. Section 6 of the Act certainly does prohibit the taking of cognizance of his offence without a previous sanction while he continues to be a public servant; but that prohibition does not continue after he ceased to be a public servant, *i. e.* who is no longer a public servant³. So, if either of the two conditions is lacking, the Court does not need a sanction for taking cognizance of the offence. The verb 'is' in section 6 (1) (a) of the Act refers to the date on which the Court is called upon to take cognizance⁴.

II. DEFECT IN SANCTION.

(1) *Want of competency:*

(a) whether the sanction shall be given by the same authority who appointed the public servant or an authority of the same rank as the appointing authority or of higher rank than the appointing authority.

Section 6 (1) (c) of the Act stipulates that the prosecution should have the sanction of the authority 'competent to remove the appellant from his service'. The authority contemplated therein is the authority competent to remove the particular public servant from his office and not any public servant holding the office held by the accused. In this connection Article 311 (1) of the Constitution becomes relevant. Article 311 (1) reads:

"No person who is a member of a civil service of the Union or an All India Service or a civil service of a State or holds a civil post under the Union, or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed."

1-a. *S.A. Venkataratnam v. The State*, (1958) S.C.J. 594; (1958) 2 M.L.J. (S.C.) 45; (1958) 2 A.L.W.R. (S.C.) 45; (1958) S.C.R. 1037; (1958) M.L.J. (Cr.) 473; A.I.R. 1958 S.C. 107.

2. *V.D. Jhingan v. State*, A.I.R. 1955 All. 531.

3. *State of Bombay v. Vishwakant Shrikant*, A.I.R. 1954 Bcm. 109.

4. *Ram Dhyani Singh v. State*, A.I.R. 1953 All. 470.

5. *Bairnath Prasad v. State*, A.I.R. 1956 Bhopal 36.

Section 6 (1) (c) of the Act has to be interpreted in the light of the provisions of the Article 311 (1), under which the authority to dismiss or remove should not be subordinate to the appointing authority. This does not, however, mean that the removal must be by the very same authority or by any of his direct superiors. It is enough if the removing authority is of the same rank or grade as the appointing authority.⁶

Where any doubt arises as to the authority who has to give the sanction as required under section 6 (1), section 6 (2) of the Act becomes relevant.

Sub-section (2) reads:

"Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or State Government or any other authority, such sanction shall be given by the Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed."

Section 6 (2) of the Act would thus become applicable as such only to such cases where it cannot be ascertained with reasonable certainty as to who has actually appointed the accused person⁷ or where by change of rule the authority who had appointed him was no longer competent to remove him from his office.⁸ In *State v. Madhewan*⁹ the Kerala High Court held that where the accused, who was appointed by the Government of Cochin, was prosecuted for offences under section 5 (1) (d) and 5 (2) of the Act, read with section 161 of the Indian Penal Code, and sanction under section 6 for prosecution was granted by the Director, Health Services, Government of Kerala, the Director, Health Services was not a competent authority. Only the successor Government of Kerala can, under Article 311 of the Constitution, dismiss or remove the accused from his service, and hence, by virtue of section 6 of the Act, the Kerala Government is the only competent authority to sanction the prosecution. So the sanction need not be by the same authority who appointed the accused; it may be given by any other authority of the same rank or higher rank than the appointing authority, but in no case can the sanction be given by an authority subordinate to the appointing authority.⁶ The Supreme Court held that sanction for prosecution given by an authority who was of a rank or grade higher than the authority who appointed the accused was a valid sanction.⁶ Article 311 does not preclude an authority which is superior to that which made the appointment, from dismissing or removing a person so appointed.^{9, 12} This prohibition is in case of authorities who are subordinate to the appointing authority. The provision regarding this prohibition cannot be qualified or taken away by statutory rules.

II (1) (b): whether such equal or superior authority should be expressly delegated with the power to issue such sanction:

In *Vinovak Roshi v. The State*¹³ the appellant who was an employee of the Northern Railway, was charged under section 5 (1) (d) of the Act and the

6. See *Mahesh Prasad v. State of U.P.*, (1955) S.C.I. 153 : (1955) 1 M.L.J. (S.C.) 83 : A.I.R. 1955 S.C. 70. See also *Perrishwar Deyal v. State*, A.I.R. 1963 Raj. 126.

7. A.I.R. 1962 Ker. 50.

8. See *Bajjnath Prasad v. State*, A.I.R. 1956 Bhopal 36.

9-12. *Karamjit Singh v. State of Bihar*, A.I.R. 1955 Pat. 223. See also *K.C. Chandrasekharan v. State of Kerala*, A.I.R. 1964 Ker. 87.

13. A.I.R. 1968 Punj. 120.

sanction for prosecution was given under section 6 (1) (c) of the Act by the Divisional Medical Superintendent of the Northern Railway, who was of the same rank as the Divisional Personnel Officer who had under the power delegated to him by the General Manager, Northern Railway, appointed the appellant. The Punjab High Court held, that the General Manager not having delegated powers to the Divisional Medical Superintendent, as he had done in the case of the Divisional Personnel Officer, the sanction given by the former was not valid. The Rajasthan High Court also held that the sanction by an equal authority without delegation of powers was invalid. In this case¹⁴ the accused petitioner was originally an employee of the Bikaner State Railway; on integration of the Bikaner State Railway with the Northern Railway he was absorbed in the services of the Northern Railway. The Court referred to the Disciplinary and Appeal Rules for Non-Gazetted Railway servants, which made it clear that the appointing authority with regard to the Bikaner State Railway will be the authority of the Northern Railway who was then competent to make similar appointments, and therefore held that for the purposes of the present case the question as to who initially appointed the petitioner was wholly irrelevant and immaterial. The crucial question was as to which authority of the Northern Railway was competent to appoint the petitioner. Under rule 34 of the Railway Establishment Code the primary appointing authority of such employee is the General Manager, although he can delegate powers to lower authorities. There having been no delegation of authority by the General Manager to any lower authority at that time, it was held that the sanction given by an authority subordinate in rank to the General Manager was not valid. In the case of authority of equal rank or grade to that of the appointing authority, the express delegation of power to issue such sanction is necessary but such is not the case with the authority superior to the appointing authority.¹⁵ Sanction for prosecution given by the authority higher in rank or grade than the appointing authority is valid.¹⁶ So it has been held that delegation of power to issue the sanction for prosecution under section 6 of the Act to an authority of equal rank or grade must always be done expressly. And in case of the authority superior in rank or of higher grade than the appointing authority, the express delegation is not necessary at all.

II (1) (c): whether such sanction could be issued in the name of President or Governor and signed by subordinate officer:

In *G. V. Nair v Government of India*¹⁷ the question arose whether sanction issued in the name of the Governor and signed by subordinate officers under the Rules of Business is valid for purpose of section 6 of the Act. The Kerala High Court held that if such an order is in compliance with the requirements of Article 166 of the Constitution, it would give immunity to the order. It cannot therefore be challenged in a Court of law as not an order made by the Governor. However, the immunity is available only in so far as the above ground goes and not any further. Thus, the sanction does not enjoy immunity from attack on any other ground—as for example that the sanctioning authority has not applied its mind to the facts of the case before according the sanction. In like manner, Article 77 of the Constitution contains the immunity with regard to the Union. A sanction issued in the name of the President and signed by subordinate officers under the Rules of Business is valid for the purposes of section 6 of the Act, and cannot

14. *Perashwar Dayal v. State*, A.I.R. 1963 Raj. 126. See also *Mathan Lal v. State*, A.I.R. 1959 Raj. 214.

15. See *Mesh Prasad v. State of U.P.*, (1955) S.C.J. 153 : (1955) 1 M.L.J. (S.C.) 83.

16. See also *State v. Lesh Pal*, A.I.R. 1957 Punj. 91.

17. 1963 (1) Cr.L.J. 675 (Kerala). See also *Major E.S. Barsey v. State of Bombay*, (1962) 1 S.C.J. 231 : (1962) M.L.J. (Cr.) 153 : (1962) 2 S.C.R. 195 : A.I.R. 1961 S.C. 1762.

be challenged in a Court of law as not an order made by the President. A subordinate officer can sign the sanction issued in the name of the President or a Governor if he is authorised under the Rules of Business framed under Articles 77 and 166 of the Constitution respectively. Such a sanction is valid in law, and this cannot be made a ground of attack in a Court of law, *i. e.*, that the sanction is not signed by the President or the Governor as the case may be.

II (1) (d): who is the authority to issue sanction in case of Government servants whose services are lent by a State Government to the Central Government:

In *R. R. Chari v. State of U.P.*¹⁸ the accused, a permanent Gazetted Government servant of the Assam Government, whose services were lent to the Government of India, was alleged to have committed offences under sections 161, 165 and 467 of the Indian Penal Code in the year 1946 while in service under the Government of India. Sanction for his prosecution was granted by the Governor-General under section 6 of the Act. The Supreme Court held, that the case of a public servant whose services are loaned by one Government to another does not fall under clause (a) and (b) of the Act, but falls under clause (c) of the Act. If the services of a public servant permanently employed by a State Government are loaned to the Central Government the authority to remove such public servant from his office would not be the borrowing Government, but the loaning Government, which is the State Government. The sanction by the Governor-General was therefore invalid. It was only the State Government, *i. e.*, the Assam Government, which could give a valid sanction.

II. (2) Defective consideration.

Section 6 of the Act, which deals with sanction, implies first, a full knowledge of the facts upon which it is sought to prosecute him, and, secondly, a deliberate decision of the sanctioning authority that he may be prosecuted. Thus, it is necessary that the sanction should be given after all the facts have been collected against the accused so that the sanctioning authority has before it the material upon which the prosecution is to be launched. The sanction should not be granted as a matter of routine, merely on the request of the prosecuting authority. It can hardly be imagined that the duty of granting proper sanction would be properly discharged by merely putting one's signature on a ready-made sanction provided.¹⁹ The authority granting the sanction should realise that it is his duty to take a deliberate decision, after applying his mind to the facts of the case.²⁰ The sanctioning authority is placed somewhat in the position of a sentinel at the door of criminal Courts, in order that no irresponsible or malicious prosecution can pass the portals of the Court of Justice. It is, therefore, essential that persons charged with the responsible duty of granting sanction, which is a duty of deciding whether or not that credit and reputation of another citizen should be put in peril by means of a criminal prosecution, should bring to the discharge of their duty a sense of responsibility and the industry requires to examine the relevant materials.¹⁹ However, one does not and cannot expect a departmental head to be an expert in criminal law and to determine with certainty as to which label will appropriately cover the offence committed by an offender.²¹⁻²² It is not necessary that the sanctioning authority need call all the records, if the papers placed before the authority give him the

18. (1963) 1 S.C.R. 121 : A.I.R. 1962 S.C. 1573.

19. *Indu Bhawan Chatterjee v. State*, A.I.R. 1955 Cal. 430.

20. *Budh Sagar v. State*, A.I.R. 1939 All. 358.

21-22. *L.E. Jacobs v. Union of India*, A.I.R. 1958 All. 481.

necessary material upon which he decides that it was necessary in the ends of justice to accord his sanction.²³ But where sanction for the prosecution was issued by the Collector after considering only the statement of the investigating authority and before receiving the statement of witnesses recorded during the investigation, the sanction was held to be vitiated because there was the possibility that the sanctioning authority might take a different decision on considering the statement of the witnesses.²⁴ However, where it is alleged that there is material difference between the facts placed before that sanctioning authority and those sought to be proved at the trial, it has been held that, if the variations are not substantial as might reasonably be taken to affect the judgment of the sanctioning authority, the order of sanction is not vitiated.²⁵

II. (3) *Defect in expression of sanction.*

It is not necessary for the sanction under the Act to be in any particular form, or in writing, or for it to set out the facts in respect of which it is given.¹ When the facts are not set out in the sanction, the prosecution has to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority².

Where the sanction under section 6 of the Act related to a specific allegation in respect of the illegal gratification of a certain sum, and the sanctioning authority has sanctioned the prosecution of the accused in respect of this sum, the Saurashtra High Court held that the sanction could by no stretch of reasoning be extended to facts constituting another distinct offence in relation to another sum³.

In a Bombay case, the investigation was originally wrongfully carried out by an authority lesser than the proper authority entitled to do so, and sanction was given to prosecute the offender under section 161 of the Indian Penal Code; the Court ordered re-investigation by the proper authority, and after re-investigation the prosecution was launched on the old sanction, no new sanction on re-investigation having been issued. It was held that the original sanction would be sufficient. What is required is that the sanctioning authority should apply his mind to the facts before him and accord sanction. Sanction already accorded does not lapse on re-investigation (fresh investigation) although given on illegal investigation.⁴

The case may also arise wherein, on the same facts, altered or additional charges may be sought to be made by the prosecution. In such cases the jurisdiction of the Court to try the charge would depend on whether the sanction originally granted would suffice or whether a new sanction would be necessary.⁵ Where the facts remain the same, the Court could proceed with the altered or added charge, provided the altered or added charge is based on the same facts which have already been considered by the sanctioning authority. The stress is clearly on the facts, and not on the penal section applicable to these facts.⁶

23. *Indu Bhushan Chatterjee v. State of West Bengal*, (1958) S.C.J. 581 : (1958) S.C.R. 999 : (1958) M.L.J. (Cr.) 448 : A.I.R. 1958 S.C. 148.

24. *Mithan Lal v. State of Rajasthan*, (1968) Cr. L.N. 431.

25. *K.N.N. Ayyangar v. State*, A.I.R. 1954 M.B. 101.

1. *Biswabushan Naik v. State of U.P.*, (1954) S.C.J. 537 : (1955) 1 S.C.R. 92 : (1954) 2 M.L.J. 79 : A.I.R. 1954 S.C. 359. See also *Nishan Singh Harnam Singh v. State*, A.I.R. 1955 Patj. 65.

2. See *Biswabushan Naik v. State of U.P.*, (1954) S.C.J. 537 ; *Madan Mehan v. State of U.P.*, A.I.R. 1954 S.C. 637 ; *Nil Mathab Patnaik v. State*, A.I.R. 1955 Pat. 317.

3. *Godhir B. Vallabdas v. State*, A.I.R. 1954 Saur. 132. See also *Jaswal Singh v. State of Punjab*, (1958) S.C.J. 355 : (1958) S.C.R. 762 : (1958) M.L.J. (Cr.) 316 : A.I.R. 1958 S.C. 124.

4. See *Peremath Pande v. State of Bombay*, A.I.R. 1962 Bom. 205.

5. See *L.E. Jacobs v. Union of India*, A.I.R. 1958 All. 481.

II. (4) Sanction given after the institution of suit.

The rule requiring sanction before a Court can take cognizance of an offence is a rule of procedure, which applies retrospectively to all complaints whatever the date of the commission of the offence to which they relate. The procedure to be followed is the procedure that prevails on the date of the complaint.⁶ Where the Magistrate took cognizance of the offences and the sanction was thereafter given, it was held that the cognizance was without necessary sanction and therefore the commitment of the petitioners bad in law.⁷ In *Akki Veeraiah v. State*⁸ the Andhra High Court held that the previous sanction of the superior officer is a condition precedent for the filing of a complaint once it is established that an offence under the Act has been committed. Lapse of time does not effect the valid sanction, and it does not cease to be in force owing to the lapse of time.⁹

III. EFFECT OF THE DEFECTIVE SANCTION AND OF SUBSEQUENT PROPER SANCTION.

Where there is a defect in the accord of the sanction, its effect would be to vitiate the sanction, and no Court can take cognizance of the offence with respect to which such sanction has been accorded. The question would, therefore, arise whether such an illegality could be cured by a subsequent sanction or under section 537 of the Criminal Procedure Code. The Saurashtra High Court held, that the illegality arising out of a defective sanction cannot be cured under section 537 of the Criminal Procedure Code.¹⁰ The trial would be *ab initio* void as one without jurisdiction. Only a fresh trial after getting the proper sanction and submission of a fresh chargesheet would be possible.¹¹

This would also involve the question as to whether in cases where a trial is vitiated by the absence of a proper sanction, a subsequent trial after a fresh proper sanction would not be a violation of article 20 (2) of the Constitution and section 403 of the Criminal Procedure Code. In *Baij Nath Prasad Tripathi v. State of Bhopal*¹² the Supreme Court held that Article 20 (2) of the Constitution has no application in the case. The petitioners are not being prosecuted and punished for the same offence more than once, the earlier proceedings having been held to be null and void. The Court also stated: "With regard to section 403 of the Criminal Procedure Code, it is enough to state that the petitioners were not tried in earlier proceedings by a Court of competent jurisdiction nor is there any conviction or acquittal inforce within the meaning of section 403 (1) of the Code, to stand as a bar against their trial for the same offence."

IV. STAGE OF OBJECTION TO THE DEFECT IN SANCTION.

The question would necessarily arise as to at what stage of a proceeding the objection to a sanction should be taken. It is true that the Court, before taking cognizance of the particular offence with regard to which sanction is necessary, has to satisfy itself as to whether a proper sanction has been granted to prosecute the accused for the offence. But at the same time, it has also to be remembered that it is inherent in the nature of the sanction itself that it is a safeguard afforded to the accused. It would therefore be unjust if the Court decided the question at the time of

6. *Karim Bux v. Rex*, A.I.R. 1950 All. 494.

7. *Shernoran Jeinwal v. State*, A.I.R. 1953 Pat. 225.

8. A.I.R. 1957 A.P. 663 : (1956) An. W.R. 73.

9. *Public Prosecutor v. Shaiik Sheriff*, A.I.R. 1965 A.P. 372 : (1965) 2 An. W.R. 44.

10. *Godhir B. Vallabdas v. State*, A.I.R. 1954 Saur. 132.

11. See *Baijnath Prasad v. State*, A.I.R. 1956 Bhopal 36, also *Gouri Shankar Ghose v. State* A.I.R. 1955 N.U.C. (Patna) 3258.

12. A.I.R. 1957 S.C. 494 : (1957) S.C.J. 405 : (1957) S.C.R. 600 : (1957) M.L.J. (Cr.) 362.

taking cognizance and thereby shut out any agitation of the matter at a subsequent stage. Firstly, it is difficult for the Court at the stage of taking cognizance to find out whether the sanction is valid in all respects; and secondly, if the accused is to be barred from raising the question when he appears in Court in obedience to its summons great injustice would be done to him.¹² The matter came up for discussion in *Ram Pakar Singh v. State*¹⁴. The Allahabad High Court held that the sanction was required for the purpose of taking cognizance of the offence. Once it was done, its utility was exhausted, and it was no longer needed either during the enquiry into the guilt of the accused or for purposes of convicting him. In fact, what the Court was emphasising was the absence of any necessity on the part of prosecution to prove the validity of the sanction. As the Court pointed out in a later part of the decision, the presumption regarding the validity of the sanction could be rebutted by the accused, which meant, therefore, that the question regarding sanction would necessarily be considered by the Court, at whatever time during the trial the accused may choose to raise the objection. In the above case, the Court held that not only did the accused not lead any evidence to prove that the signature on the sanction was not that of the authority concerned but also he did not question the genuineness of the signature. In the absence of any controversy at all, the Court added, there was no need for the prosecution to have proved, before the Magistrate, the validity of the sanction by producing evidence to prove the signature. The question came up in another form, again, before the Allahabad High Court in *Budh Sagar Ram Udit v. State*¹⁵. In this case the Advocate for the accused, in the first stage of the trial, made a statement withdrawing the objection as regards the validity of the sanction and stated that it was valid. But later, at the time of defence, the validity was again questioned. The Special Judge who tried the case held that the second objection could not be taken and the question of sanction could be raised only at the time of cognizance. The High Court, allowing the appeal against the above ruling of the Special Judge, held that the case of *Ram Pakar Singh v. State*¹⁴ on which the Special Judge had somehow relied, clearly envisaged the possibility that at a subsequent stage after the cognizance had been taken, the accused could challenge the validity of the sanction and then the Court was bound to enquire into that question. The High Court also pointed out that the same inference followed from a perusal of *Bhagwan Sahai v. State of Punjab*¹⁶⁻¹⁷ wherein the Supreme Court went into the question of the validity of the sanction. If it was the law that the question cannot be raised once cognizance had been taken by the trial Judge, the Supreme Court would have said so, and not considered the question at all.¹⁸ This the Supreme Court did not do.

The question may best be summarized in the words of Nigam J.:

"It could never have been the intention of the Legislature that the question as regards the validity or sufficiency of the sanction should be decided against the accused in his absence without giving him an opportunity to press the contention on the point. Further, the question of validity of the sanction raises a question of jurisdiction and we are inclined to the view that the question as regards the

13. See *Mathan Lal v. State*, A.I.R. 1959 Raj. 214.

14. A.I.R. 1954 All. 223.

15. A.I.R. 1961 All. 368.

16-17. A.I.R. 1960 S.C. 487.

18. See for example *Muralal v. State of U.P.*, (1964) 3 S.C.R. 88 : (1964) 2 S.C.J. 307 : (1964) M.L.J. (Cri.) 491 : A.I.R. 1964 S.C. 28 ; *R.R. Chari v. State of U.P.*, (1963) 1 S.C.R. 121 ; *R. S. Pandit v. State of Bihar*, (1963) 2 S.C.R. (Supp.) 633 ; *Madan Mohan Singh v. State of U.P.*, A.I.R. 1954 S.C. 637.

jurisdiction of a Court to take cognizance of the particular matter, may be raised at any stage before the trial closes."¹⁹

Conclusion:—1. In conclusion, it may therefore be stated that section 6 of the Act differs materially from section 197 of the Criminal Procedure Code, first, in that sanction is now required not only for public servants removable only with the sanction of the Central Government or the Provincial Government, but also for *any* public servant accused of an offence under sections 161 and 165 of the Indian Penal Code or section 5 of the Act. Secondly, it is not necessary under the Act that the public servant should be 'acting or purporting to act in the discharge of his official duty' as it is, under section 197 of the Criminal Procedure Code.

2. Section 6 protects only those public servants who were in office both on the date of the commission of the offence charged and the date when a Court is asked to take cognizance.

3. Further, the authority to grant the sanction would be the authority competent to remove him from service, and this aspect has to follow the principle laid down in Article 311 (1) of the Constitution of India. If such authority is not the same as, but is of equal rank as, the authority which appointed the public servant concerned, express delegation of such power to sanction is necessary. But where the authority granting the sanction is superior to that by which such sanction is normally to be given, no such delegation is necessary.

4. A subordinate officer, authorised under the Rules of Business framed under Articles 77 and 166 of the Constitution, can sign the sanction issued in the name of the President of India or the Governor of a State, and its validity cannot be attacked in a Court of law.

5. Where the services of a public servant permanently employed by a State Government are loaned to the Central Government, the authority to remove such public servant would be the State Government and not the Central Government.

6. The sanction issued under section 6 of the Act should be issued only after all the facts have been collected, and only after the sanctioning authority has fully applied its mind to the question of whether the public servant should be prosecuted or not. The grant of such sanction need not, however, be in any particular form.

7. Where additional charges are levelled against an accused public servant, a new sanction may be required only when such additional charges were based on facts not considered by the authority granting the sanction when the original sanction was granted.

8. Sanction in every case is a condition precedent to the filing of the complaint.

9. It follows that where the sanction accorded is defective, the proceedings become *ab initio* void, and a new sanction is necessary. The fresh proceedings would not attract 'the rule of double jeopardy, contained in Article 20 (2) of the Constitution of India.

10. It also follows that the question of the validity of a sanction can be raised at any stage of the proceedings, and as it goes to the root of the jurisdiction an objection based on want of sanction can be raised later even though waived earlier.

19. A.I.R. 1954 All. 223.

[S. C. N. C. 31.]

S. M. Sikri,
V. Bhargava and
I. D. Dua, JJ.
 20-1-1970.

G. K. Samal v.
R. N. Rao.
 C.A. No. 1540 of 1969.

Representation of the People Act (XLIII of 1951), section 80—Election petition—Burden of proof.

The Supreme Court has held in a number of cases that in an election petition the burden is on the petitioner to prove that the result of the election has been materially affected by (1) the improper reception, refusal or rejection of any vote or the reception of any vote which is void or (2) by any non-compliance with the provisions of the Act.

On the material on record in the present case, the High Court was right in concluding that it has not been shown that the result of the election had been materially affected by the casting of votes by persons whose names were added to the electoral roll after the expiry of the last date fixed for making nominations or by the alleged non-voting of electors whose names had been deleted after that date. The election petition only contains vague allegations in this regard.

V.K.

Appeal dismissed.

[S. C. N. C. 32]

J. C. Shah and
K. S. Hegde, JJ.
 20-1-1970.

Jamnadas Harakhchand v.
Narayanlal Bansilal.
 C. A. Nos. 1872 and
 1873 of 1968.

Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947), section 20—Scope.

In *Maganlal Chhotabhai Desai v. Chandrakant Motilal*, (1969) 1 S.C.J. 100 : A.I.R. 1969 S.C. 37, it was held that section 20 of the Bombay Rents, Hotel and Lodging House Rates Control Act gives the tenant a general right of recovery of the overpaid rent within six months of the date of payment. Without prejudice to any other mode of recovery, the tenant may deduct the over-payment from any rent payable by him to the landlord. The deduction provided is one mode of recovery. If the amount is incapable of recovery because of the bar of limitation, it cannot be recovered by deduction. In other words the right of recovery by deduction is barred at the same time as the right of recovery by suit. If the tenant seeks recovery of the overpaid amount he must bring the suit or make deduction within six months.

The Court observed that the above decision was binding on it and that it did not feel called upon to refer the question to a larger Bench for reconsideration.

V. K.

Appeals dismissed.

[S. C. N. C. 33]

S. M. Sikri,
V. Bhargava and
I. D. Dua, JJ.
 23-1-1970.

Becker Gray & Co., Ltd. v.
Union of India.

C.A. Nos. 1178 to 1180 of 1967.

Foreign Exchange Regulation Act (VII of 1947), sections 12 (1), 23 and 23-A—Under valuation in a declaration under section 12 (1) or a declaration in contravention of the rules or the forms prescribed—If punishable under section 167 (8) of Sea Customs Act (VIII of 1878).

Under-valuation in a declaration under section 12 (1) of the Foreign Exchange Regulation Act does not amount to contravention of the restrictions imposed by that provision.

S—NRC

Union of India v. M/s. Rai Bahadur Shreeram Durga Prasad (P.), Ltd., (1969) 1 S.C. C. 91, followed. Contention that this decision should be reconsidered by a larger Bench was rejected.

A declaration which is in contravention of the Rules or the Forms prescribed under the Foreign Exchange Regulation Act, may be penalised under section 23 of that Act, but such contravention will not attract the provisions of the Sea Customs Act. Under section 23-A of the Foreign Exchange Regulation Act, only a breach of restrictions imposed by section 12 (1) of that Act is to be deemed to be contravention of restrictions imposed by section 19 of the Sea Customs Act. An incorrect declaration in contravention of the Rules made under section 27 of the Foreign Exchange Regulation Act is not to be deemed a contravention of any restriction imposed by section 19 of the Sea Customs Act. In such a case the imposition of the penalties under section 167 (8) of the Sea Customs Act would be totally unjustified.

V.K.

Appeals allowed.

[S. C. N. C. 34]

M. Hidayatullah, C. J.

J. C. Shah,

K. S. Hegde,

A. N. Grover,

A. N. Ray and

I. D. Dua, JJ.

29-1-1970.

V. P. Gindroniya v.

State of M. P.

C.A. No. 890 of 1967.

Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules (1960)—Suspension under, of a temporary public servant pending enquiry into charges against him—Effect —Contract of service if becomes suspended—Public servant concerned thereafter putting an end to the contract by notice under rule 12 (a) —Validity—Right of Government to proceed with the enquiry—Scope of rule 12 (a).

Three kinds of suspension are known to law. A public servant may be suspended as a mode of punishment or he may be suspended during the pendency of an enquiry against him if the order appointing him or statutory provisions governing his service provide for such suspension. Lastly, he may merely be forbidden from discharging his duties during the pendency of an enquiry against him, which act is also called suspension. The right to suspend as a measure of punishment as well as the right to suspend the contract of service during the pendency of an enquiry are both regulated by the contract of employment or the provisions regulating the conditions of service. But the last category of suspension referred to earlier is the right of the master to forbid his servant from doing the work which he had to do under the terms of the contract of service or the provisions governing his conditions of service, at the same time keeping in force the master's obligation under the contract. In other words, the master may ask his servant to refrain from rendering his service but he must fulfil his part of the contract, viz., pay the remuneration.

It is now well settled that the power to suspend, in the sense of a right to forbid an employee to work, is not an implied term in an ordinary contract between master and servant. Ordinarily, therefore, the absence of such a power either as an express term in the contract or in the rules framed under some statute would mean that an employer would have no power to suspend an employee of his and even if he does so in the sense that he forbids the employee to work, he will have to pay the employee's wages during the period of suspension. Where, however, there is power to suspend the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. It is equally well settled that an order of interim suspension can be passed while an enquiry is pending, even though there is no such term in the contract but in such a case the employee would be entitled to his remuneration.

In the present case, the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules do not provide for suspension during the pendency of an enquiry. Therefore the impugned order of suspension of the appellant cannot

be considered as an order suspending the contract of service. It follows that when the appellant issued the notice terminating his services under rule 12 (a) during the pendency of the impugned order, the contract of service was in force and it was open to him to put an end to the same. It would follow that ever since the appellant's notice was received by the Government he was not in the service of the Government. Hence it was not open to the Government to proceed with the disciplinary proceedings thereafter.

There is hardly any room for dispute that the notice contemplated by the main clause (a) of rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules can be given either by the Government or its temporary servant. The rule in question specifically says so.

Held on facts, the notice of termination of contract issued by the appellant to the Government conformed to the requirements of rule 12 (a) and that the High Court was wrong in holding *contra*.

V.K.

Appeal allowed.

[S. C. N. C. 35]

M. Hidayatullah, C. J.

J. C. Shah,

K. S. Hegde,

A. N. Grover,

A. N. Ray and

I. D. Dua, JJ.

30-1-1970.

Ashoka Marketing Ltd. v.

State of Bihar.

C.A. No. 2004 of 1966.

Bihar Sales Tax Act (XIX of 1959) as amended by Act (XX of 1962), section 20-A (3), (4) (5), (7) and (8)—The sub-sections are ultra vires State Legislature—Not saved by Entry 54, List II or Entries 6, 7 and 13 of List III of the Seventh Schedule to the Constitution of India (1950).

Sub-sections (3), (4) and (5) of section 20-A of the Bihar Sales Tax Act, 1959, are *ultra vires*, the State Legislature. As a corollary thereto sub-section (7) and (8) shall be deemed invalid.

A provision which enables the dealer to pass on the liability for payment of tax is incidental to legislation for sales tax. But it cannot be held that a provision under which a dealer is called upon to pay to the State an amount which has been collected by him erroneously or deliberately on a representation, express or implied, that an equal amount is payable by him under the Sales Tax Act, is a provision incidental to the power to "levy tax on sale or purchase of goods" within the meaning of Entry 54, List II of the Seventh Schedule to the Constitution. In effect the provision is one for levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect.

Sub-section (8) of section 20-A does not alter the true nature of the demand or appropriation which can be made under sub-sections (3), (4) and (5) of section 20-A. The intention underlying sub-sections (3), (4) and (5) is to enable the State to collect from the dealer tax which the State is not entitled to levy and to appropriate it to itself except in the very rare cases in which the purchaser may approach the State and be able to satisfy that he has a claim, that the claim is in order, and that it is within limitation. Notwithstanding the addition of sub-section (8) the amount received by the State or appropriated by the State continues to have the character of a tax collected which the State is not entitled to collect.

The power to legislate in respect of sub-sections (3), (4) and (5) of section 20-A does not also fall under Entries 6, 7 and 13 of List III of the Seventh Schedule to the Constitution, expressly, nor can it be said that the power to legislate is necessarily incidental to the power contained in those Entries.

(Validity of sub-sections (1) and (2) of section 20-A was not challenged.).

V.K.

Appeal allowed.

[S.C. N.C. 36.]

*M. Hidayatullah, C. J.**J. C. Shah,**K. S. Hegde,**A. N. Grover,**A. N. Ray and**I. D. Dua, JJ.*

2-2-1970.

Ganga Ram v.
The Union of India.
W.P. No. 124 of 1967.

Constitution of India (1950), Articles 14 and 16 (1)—Guarantee of equality of opportunity in matters of public employment—Scope—Direct recruitment and promotion to post of Grade I clerk in the accounts department of the Railway establishment—Provisions for selection and fixation of seniority contained in Indian Railway Establishment Manual—If violative of Articles 14 and 16.

Article 14 of the Constitution is an injunction to both the legislative and the executive organs of the State and other subordinate authorities not to deny to any person equality before the law or the equal protection of the laws. Article 16 is only an instance of the general rule of equality laid down in Article 14. Sub-Article (1) of Article 16 guarantees to every citizen equality of opportunity in matters of public employment thereby serving to give effect to the equality before the law guaranteed by Article 14. The equality of opportunity in the matter of services undoubtedly takes within its fold all stages of service from initial appointment to its termination including promotion but it does not prohibit the prescription of reasonable rules for selection and promotion, applicable to all members of a classified group. Mere production of inequality is not enough to attract the constitutional inhibition because every classification is likely in some degree to produce some inequality. The State is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in services and the classification need not be scientifically perfect or logically complete. In applying the wide language of Articles 14 and 16 to concrete cases a doctrinaire approach should be avoided and the matter considered in a practical way, of course, without whittling down the equality clauses. The classification, in order to be outside the vice of inequality, must however, be founded on an intelligible differential which on rational grounds distinguishes persons grouped together from those left out. The differences which warrant a classification must be real and substantial and must bear a just and reasonable relation to the object sought to be achieved.

The State which encounters diverse problems arising from a variety of circumstances is entitled to lay down conditions of efficiency and other qualification for securing the best service for being eligible for promotion in its different departments. In the present case the object which is sought to be achieved by the provisions contained in paras 48 and 49, Chapter I, Section B and paras 16 and 20 (b), Chapter II of the Indian Railways Establishment Manual, is the requisite efficiency in the accounts department of the Railway establishment. The departmental authority is the proper judge of its requirements. The direct recruits and the promotees to the post of Grade I clerks clearly constitute different classes and this classification is sustainable on intelligible differential which has a reasonable connection with the object of efficiency ought to be achieved. Promotion to Grade I is guided by the consideration of seniority *cum*-merit. It is, therefore, difficult to find fault with the provision which places in one group all those Grade II clerks who have qualified by passing the prescribed examination. The fact that the promotees from Grade II who have officiated for some time are not given the credit of this period when a permanent vacancy arises also does not attract the prohibition contained in Articles 14 and 16. It does not constitute any hostile discrimination and is neither arbitrary nor unreasonable.

V.K.

Petition dismissed.

contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

Liability to pay sales tax is imposed by section 4 of the Act. Every dealer whose gross annual turnover exceeds Rs. 10,000, is liable to pay tax during the ten quarters in question. The expression "dealer" was defined at the relevant time as meaning :

" ' Dealer ' means any person who executes any contract or carries on the business of selling or supplying goods in Orissa whether for commission, remuneration or otherwise and includes any firm or Hindu joint family, and any society, club or association which sells or supplies goods to its members.

Explanation * * * * *

A person to be a dealer within the meaning of the Act must carry on the business of selling or supplying goods in Orissa. The expression "business" is not defined in the Act. But as observed by this Court in *State of Andhra Pradesh v. Abdul Bakhi and brothers*¹.

"The expression 'business' though extensively used is a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for support or pleasure."

The sales tax authorities and the tribunal have held that the Company was carrying on business of selling or supplying materials to the contractors and with that view the High Court agreed. The Company purchased bricks manufactured by its own contractors and sold the bricks to the building contractors at a flat 30 per cent. premium over the purchase price in the case of "second class bricks" and 25 per cent. premium in the case of "first class bricks". Steel, cement and other materials were initially supplied at 3½ per cent. premium over the purchase price paid by the Company. It was contended on behalf of the Company that merely because the price charged to the contractors exceeded the price paid by the Company for acquiring the materials, motive of the Company to carry on business in building materials for profit, cannot be inferred. The Company, it is true, maintained no separate accounts relating to the expenditure incurred by it for overhead and other charges in respect of those materials. Before the sales tax authorities Counsel for the Company also conceded that the Company had not maintained separate accounts from which it could be proved that the transactions of supply of bricks, cement, steel and other commodities resulted in no profit. The High Court observed :

"It is the Stores Department of the company as a whole which deals with the purchase, storage and sale of all the goods required both for acquisition and issue of materials to be used for the construction and operation work of the Company. * * * the Company had to construct not only the buildings but also roads railways, etc., acquire machinery and perform other multifarious activities connected with the establishment of steel plants and construction of the township.

1. (1965) 1 S.C.J. 297; (1965) 1 An.W.R. S.C.R. 664.
(S.C.) 29: (1965) 1 M.L.J. (S.C.) 29: (1964) 7

There is nothing in the statement to show that the Company had at any time even contemplated the allocation of the total expenditure incurred for the maintenance of its Stores Department between the expenditure incurred in respect of the goods namely bricks, cement, steel, etc., and other goods. If such allocation was not even contemplated, it will be unreasonable to say that when these goods were sold to the building contractors at the prices mentioned above, the intention of the Company was merely to utilise the difference in price to meet the overhead charges in respect of these articles and that there was no profit-making motive."

It is unfortunate that in submitting the statement of case the Tribunal stated no facts at all, and merely submitted the question which was submitted by the Company and the question which, in the view of the Tribunal, arose out of the order. Even in the order deciding the appeal, the facts found on which the conclusion was based were not clearly set out. The Tribunal observed that though the primary object of the Company was to establish a steel plant, the Memorandum authorised the Company to carry on "any trade or business" that it thought would be conducive to its interest, observed the Tribunal:

"Judged in this light one cannot find anything wrong if in the initial stages when construction works were going on, the Company thought it prudent that instead of keeping its employees idle and bearing the cost of maintenance without any return, utilised them in some subsidiary business which would promote the interest of the Company and bring some return. With that end in view the company could as well have brought contractors to manufacture bricks in its lands, purchased the same from them, purchased cement, coal and other materials from dealers, opened a stores department and kept those materials so procured in its stores and thereafter effected sales of the materials to outsiders including its contractors. The Company knew that for speedy construction of its buildings and factory the contractors would require these materials and so the Company would not lose if it entered into such business. Rather that business would be in the interest of the Company. If the Company had no idea to enter into any business, there was no reason why it should have brought contractors to manufacture bricks, purchased the entire stock from them, stocked the same and thereafter sell the same to its building contractors."

But in so observing a very important piece of evidence appears to have been ignored by the Tribunal. Annexed to the form of the tender submitted by the contractors there are certain "general rules and directions for the guidance of contractors." Paragraphs 8 stated:

"The memorandum of work tendered for, and the schedule of materials to be supplied by the H.S. Ltd., and their issue rates, shall be filled in and completed in the office of the Divisional Officer before the tender form is issued. If a form is issued to an intending tenderer without having been so filled in as completed he shall request the office to have this done before he completes and delivers his tender."

Then following the conditions of contract of which condition No. 10 is material; it states—

"If the specification or estimates of the work provides for the use of any special description of materials to be supplied from the Engineer-in-Charge's store, or if it is required that the contractor shall use certain stores to be provided by the Engineer-in-Charge (such materials or stores, and the prices to be charged therefor as hereinafter mentioned being so far as practicable for the convenience of the contractor, but not so as in any way to control the meaning or effect of this contract specified in the schedule or memorandum hereto annexed), the contractor shall be supplied with such materials and stores as required from time to time to be used by him for the purpose of the contract only, and the value of the full quantity of materials and stores so supplied at the rates specified in the said

schedule or memorandum may be set-off or deducted from any sums then due, or thereafter to become due to the contractor under the contract, or otherwise or against or from the security deposit. All materials supplied to the contractor shall remain the absolute property of the Company, and shall not on any account be removed from the site of the work, and shall at all times be open to inspection by the Engineer-in-Charge. Any such materials unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in-Charge's store, if by a notice in writing under his hand he shall so require ; * * *

Attached to the tender form is the schedule which recites :

“ Recovery of rates of materials to be supplied by H.S.Ltd., for the work of :

(1) Construction of brick masonry compound wall around plant area. Northern section Length 2.4 miles.

(2) Construction of brick masonry compound wall around plant area. Southern section Length 2.30 miles.

(3) Construction of brick masonry compound wall around plant area. Marshalling yard section Length 4.15 miles.”

It is followed by a table which sets out the Serial No. of the articles to be supplied, description of materials unit, rate and place of delivery.

It is clear from the terms of the tender and the schedule annexed thereto that the Company was to charge certain rates for the materials to be supplied by it. One of the contracts which has been produced before this Court states under the head “ Rate ”: Rs. 5.94 + 3½ per cent. storage charges against “ cement in bags ”, Rs. 800.00 + 3½ per cent. storage charges against “ structural steel and M.S. rods ” and “ Rs. 41.25 for 1000 bricks ” against “ first class bricks ”. Apparently 3½ per cent. over the specified rate was agreed to be paid by the contractors as storage charges in respect of cement and structural steel and M.S. rods. No specific percentage was set out in respect of the bricks and an inclusive price was made chargeable.

Relying upon the terms of the schedule, Counsel for the Company contends that the contractors and the Company expressly agreed that 3½ per cent. over the agreed price of the goods was chargeable as storage charges. It is common ground that the rate mentioned against cement and structural steel is the price at which the goods were purchased by the Company. If the Company was charging a fixed percentage on the price paid by it for procuring such goods for storage and other incidental charges, it would be difficult to resist the conclusion that the Company was not carrying on the business of selling cement and structural steel. There is of course no statement in the schedule that the price charged by the Company in excess of the price paid by the Company to its contractors for bricks was in respect of storage charges.

But neither the Tribunal nor the High Court has referred to this important piece of evidence and we are unable to decide these appeals unless we have an additional statement of facts in the light of the relevant evidence as to whether the excess charged over and above the price which the Company paid for procuring Cement and Steel (expressly called storage charge) and bricks was intended to be profit. If the Company agreed to charge a fixed percentage above the cost price, for storage, insurance and rental charges, it may be reasonably inferred that the Company did not carry on business of supplying materials as a part of business activity with a view to making profit.

The Tribunal's statement of case is held and in recording its findings the Tribunal has ignored a very important piece of evidence. To enable us to answer the questions referred, it is necessary that the Tribunal should be called upon to submit a supplementary statement of the case on the questions whether the Company charged any

profit apart from the storage charges for supplying cement and structural steel, and whether the difference between the price charged to the contractors and the price paid by the Company to its suppliers for bricks was not in respect of storage and other incidental charges. The Tribunal to submit the supplementary statement of case to this Court, within three months from the date on which the papers reach the Tribunal.

S.V.J.

Supplementary statement of case called for.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A.N. GROVER, JJ.

Hargovind

.. Appellant*

v.

Aziz Ahmad Khan and another

.. Respondents.

Administration of Evacuee Property Ordinance (XXVII of 1949), section 38 (1) and the Administration of Evacuee Property Act (XXXI of 1950), sections, 2 (d) (i) and 40 (1)—Scope—"Evacuee", meaning of—Transferor becoming an evacuee after the transfer—Custodian declining to confirm the transfer—Transfer, if has become ineffective.

Under the Administration of Evacuee Property ordinance as well as under the Act, transfer of property was ineffective unless confirmed by the Custodian even if it was made by a person who became an evacuee after the date of the transfer. It was not necessary that the property should have been declared or notified to be evacuee property before the aforesaid provisions were attracted. Under section 40 (1) of the Act, the transfer was to be ineffective in both eventualities ; (1) if the transferor became an evacuee within the meaning of section 2 after the transfer or (2) if the transferor's property had been declared or notified to be evacuee property. Aziz Ahmed Khan became an evacuee within the meaning of the definition of "evacuee". It was necessary, therefore, for the appellant to have obtained the confirmation of the custodian in respect of the transfer which had been made by Aziz Ahmed Khan in his favour of the properties in question. The Additional custodian declined to confirm the transfer and thus the condition precedent for the transfer to become effective remained unsatisfied. It was incumbent on the appellant to obtain the confirmation order before he could ask for any further steps to be taken by the Courts in the matter of execution and registration of the transfer deed. Under section 39 of the Central Ordinance XXVII of 1949, no document could be registered of the nature mentioned in section 38 unless the custodian had confirmed the transfer. Similar provisions were contained in section 40 of the Central Act XXXI of 1950. The prayer in the Execution Application that the Court might grant assistance "by execution of sale deed under the enabling para. 5 of the decree" could not be entertained or acceded to by the Executing Court.

Appeal by Special Leave from the Judgment and Decree dated the 2nd May, 1961 of the Allahabad High Court in Execution First Appeal No. 10 of 1954.

Naunit Lal, Advocate, for Appellant.

Dr. V.A. Seyid Muhammad, Senior Advocate (*S.P. Nayar*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the Allahabad High Court confirming the order of the District Judge dismissing an Execution Application filed by the appellant.

On 16th June, 1948, the appellant entered into an agreement with Aziz Ahmed Khan respondent No. 1 for the sale of certain properties comprising houses and plots in the town of Bareilly. The sale consideration of Rs. 1,45,000 was stated to have been already paid by the appellant to the vendor. Subsequently disputes arose between the vendor and the appellant regarding the completion of the sale. These disputes were referred to the arbitration of Shri R.R. Agarwal who gave an award on 30th August, 1949, which was made a rule of the Court on 30th November, 1949. A decree on the basis of the award was granted in favour of the appellant.

Sometime after 22nd November, 1949, the vendor Aziz Ahmed Khan left India for Pakistan. On 7th December, 1950, the appellant moved the Deputy Custodian (Judicial) Meerut Circle for confirmation of the transfer under section 38 of the Administration of Evacuee Property Ordinance (XXVII of 1949) or under section 40 of the Administration of Evacuee Property Act, 1950 (XXXI of 1950). On 9th May, 1951, the Deputy Custodian accorded confirmation. The Additional Custodian, however, took *suo motu* action in exercise of his revisional jurisdiction and set aside the order passed by the Deputy Custodian. On 4th April, 1952, the appellant filed an application for execution of the decree passed on the basis of the award. On 10th May, 1952, objections were filed on behalf of the Custodian to the execution. The District Judge held that the award made on 30th August, 1949, could not have the effect of transferring the properties as the approval of the Collector had not been obtained under the notification dated 29th July, 1949, which had been issued under section 26 of U.P. Administration of Evacuee Property Ordinance I of 1949 and that on the date of the decree the transfer of properties could not be effected unless confirmed by the Custodian. It was held by him that no interest by way of charge in favour of the appellant had been created on the properties in dispute. He was further of the view that section 17 (1) of the Central Act XXXI of 1950 created a bar to execution of the decree. The Execution application was consequently dismissed.

The appellant filed an appeal to the High Court which was dismissed. Then the appeal came up for hearing before this Court on 22nd February, 1968, it was considered expedient to have further findings on certain points. The following questions were therefore framed and remitted to the High Court for that purpose.

(1) the date on which Aziz Ahmed Khan migrated to Pakistan.

(2) Whether the properties of Aziz Ahmed Khan vested in the Custodian of Evacuee Property under U.P. Ordinance I of 1949 or Central Ordinance XII of 1949 as made applicable to the State of U.P. by U.P. Ordinance XX of 1949 or under the Central Ordinance XXVII of 1949 or under Central Act of 1950.

The High Court remitted these matters to the District Judge. His finding on the first question was that Aziz Ahmed Khan had migrated to Pakistan on some date after 22nd November, 1949. On the second question he found that Aziz Ahmed Khan's properties did not vest in the Custodian of Evacuee property under any of the Ordinances or under the Central Act XXXI of 1950. Certain additional evidence was produced before the High Court. The High Court expressed agreement with the conclusions of the District Judge on both the points. It may be mentioned that on certain subsidiary points the learned District Judge had also found that it had not been proved that a valid declaration under section 7 (1) of the Central Ordinance XXVII of 1949 or of the corresponding provision in the Central Act XXXI of 1950 was made for declaring Aziz Ahmed Khan an evacuee. In the opinion of the learned Judge such a declaration was necessary if his properties were to be declared evacuee properties.

In view of the findings which have been returned by the High Court on the points referred, it has been contended on behalf of the appellant that there could be no bar to the execution of the decree which was based on the award. It is pointed out that on the conclusions at which the High Court has now arrived the properties of Aziz Ahmed Khan were never declared to be evacuee properties either under the

Central Ordinance XXVII of 1949 or the Central Act XXXI of 1950, and they could not vest in the Custodian unless they had been declared after appropriate proceedings. It is urged that the decree in favour of the appellant was of the nature of a decree passed in a suit for specific performance. The Court could and should have executed a conveyance in favour of the appellant since Aziz Ahmed Khan was no longer available or was refusing to do so and the confirmation of the Custodian could be obtained before the registration was effected. According to the Counsel for the appellant the additional Custodian had declined to confirm the transfer at the previous stage because there was no deed of sale or transfer.

Counsel for the respondent has drawn attention to a decision of this Court in *Azimunissa and others v. The Deputy Custodian Evacuee Properties, District Deoria and others*¹, in which the effect of the declaration of U.P. Ordinance I of 1949 to be invalid by the Courts came up for consideration, as also of the subsequent evacuee legislation namely, Central Ordinance XXVII of 1949, Central Act XXXI of 1950 and the Administration of Evacuee Property (Amendment) Act, 1960. It appears to have been held in that case that the property which had vested under the U.P. Ordinance I of 1949 continued to vest in the Custodian notwithstanding the fact that High Court of Allahabad in *Azimunissa and others v. Assistant Custodian*², held the vesting to be invalid. This was the result of the introduction of section 3 (2-2)] in the Central Act of 1931 by the Central Amendment Act I of 1960. In the present case, however, Aziz Ahmed Khan migrated to Pakistan after 22nd November, 1949. At that point of time it was Central Ordinance XXVII of 1949 which was in force. It appears highly doubtful that the respondent could take advantage of the provisions of automatic vesting contained in U.P. Ordinance I of 1949.

There is, however, a serious hurdle in the way of the appellant even when the provisions of central Ordinance XXVII of 1949 or the Central Act XXXI of 1950 are taken into consideration. Section 38 (1) of that Ordinance provided that no transfer of any right or interest in any property after the 14th day of August, 1947 by or on behalf of an evacuee or by or on behalf of a person who had become an evacuee after the date of the transfer shall be effective so as to confer any rights or remedies on the parties to such transfer unless it was confirmed by the Custodian. The provisions of section 40 of the Central Act XXXI of 1950 were similar though there was a certain change in the language. Sub-section (1) of that section was in the following terms :

“No transfer made after the 14th day of August, 1947, but before the 7th day of May, 1954, by or on behalf of any person in any manner whatsoever of any property belonging to him shall be effective so as to confer any rights or remedies in respect of the transfer on the parties thereto or any person claiming under them or either of them, if, at any time after the transfer, the transferor becomes an evacuee within the meaning of section 2 or the property of the transferor is declared or notified to be evacuee property within the meaning of this Act, unless the transfer is confirmed by the Custodian in accordance with the provisions of this Act.”

Under both these enactments transfer of property was ineffective unless confirmed by the Custodian even if it was made by a person who became an evacuee after the date of the transfer. It was not necessary that the property should have been declared or notified to be evacuee property before the aforesaid provisions were attracted. Under section 40 (1) of the Act, the transfer was to be ineffective in both eventualities ; (1) if the transferor became an evacuee within the meaning of section 2 after the transfer or (2) if the transferor's property had been declared or notified to be evacuee property. It is abundantly clear that if Aziz Ahmed Khan became an evacuee even after the transfer, section 38 (1) of the Ordinance and section 40 (1) of the Act became applicable. One of the meanings of the word “evacuee” as given in the definition in section 2 (d) of the Ordinance and of the Act was :

1. (1962) 1 S.C.J. 324 : (1961) 2 S.C.R. 91. 2. A.I.R. 1957 All. 561.

Section 2 (d) (i) "evacuee" means any person, who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances leaves or has, on or after the 1st day of March, 1947, left any place in a Province for any place outside the territories now forming part of India."

Aziz Ahmed Khan became an evacuee within the meaning of the above definition. It was necessary, therefore, for the appellant to have obtained the confirmation of the Custodian in respect of the transfer which had been made by Aziz Ahmed Khan in his favour of the properties in question. The Additional Custodian declined to confirm the transfer and thus the condition precedent for the transfer to become effective remained unsatisfied. It is significant that even in the award which formed the basis of the decree it had been provided "the second party (Aziz Ahmed Khan) is hereby directed to execute the necessary documents in respect of the transfer by him of the properties referred to above within one month from the date of the receipt of the confirmation or approval according to law failing which the first party will, at his option, get the same executed and registered through Court on the basis of this award which would be made a rule of the Court. Therefore according to the award the confirmation or approval of the Custodian had to be obtained before the transfer documents were to be executed and completed in accordance with law. It was incumbent on the appellant to obtain the confirmation order before he could ask for any further steps to be taken by the Courts in the matter of execution and registration of the transfer deed. Under section 39 of the Central Ordinance XXVII of 1949 no document could be registered of the nature mentioned in section 38 unless the Custodian had confirmed the transfer. Similar provisions were contained in section 40 of the Central Act XXXI of 1950. The prayer in the Execution Application that the Court might grant assistance "by execution of sale deed under the enabling para 5 of the Decree" could not be entertained or acceded to by the Executing Court.

There is one matter, however, on which we would like to express no view and leave it open to the appellant to take such steps as he may be advised. Para. 6 of the award which became part of the decree was as follows :—

"The claim of the first party for this transfer and exchange consideration in Rs. 1,50,000 (one lac fifty thousand) on account of all principal money and interest and other expenses calculated to date against the second party Sri Aziz Ahmed Khan, which the second party will pay with interest at 12 per cent. per annum in case the transaction and transfer of the properties referred to above in favour of the first party Sri Sardana is not confirmed or approved in any way and for any other reasons whatsoever.

Sri Sardana will force the payments against the properties referred to above and these properties are here by charged with this claim and Sri Sardana will have his remedies to enforce the payment of the above claim against all other properties of the second party and also against his person."

The High Court in the judgment under appeal dealt with this question as if the charge was on the evacuee property. On the reasoning which has been pressed before us about the necessity of a declaration under the provisions of Central Ordinance XXVII of 1949 or Central Act XXXI of 1950 this part of the judgment does not appear to be correct. We would, however, refrain from expressing any final opinion as in fairness to both sides this question should be left for being decided, if taken, in appropriate proceedings including proceedings before the Executing Court.

With the above observations the appeal is dismissed but in view of the entire circumstances we make no order as to costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.

Chanan Singh and another

.. Appellants*

v.

Smt. Jai Kaur

.. Respondent.

Punjab Pre-emption Act (I of 1913), as amended by the Punjab Pre-emption Amendment Act, 1960 and by Punjab Act (XIII of 1964), section 15 (2)—Interpretation—“In the son or daughter of such female,” meaning of—Right of pre-emption, if would vest in the son or daughter of the husband from another wife—Retroactive intention, if could be attributed to the legislature.

A close analysis of paragraphs (First) and (Secondly) of clause (b) of sub-section (2) of section 15 of the Punjab Pre-emption Act before the amendment introduced by Punjab Act XIII of 1964 would demonstrate that the Amendment Act of 1964 was merely of a clarificatory or declaratory nature. Even in the absence of the words [“husband of the ”] which were inserted by the Amendment Act of 1964 between the words “such” and “female” in section 15 (2) (b) the only possible interpretation and meaning of the words “in the son or daughter of such female” could have reference to and cover the son or daughter of the husband of the female. The entire scheme of sub-section (2) section 15 is that the right of pre-emption has been confined to the issues of the last male holder from whom the property which has been sold came by inheritance. The predominant idea seems to be that the property must not go outside the line of the last male holder and the right has been given to his male lineal descendants. It would follow that under clausd (b) the right of pre-emption would vest firstly in the son or daughter of the husband of the female meaning. There by either her own off-spring from the husband whom she has succeeded or the son or daughter of that husband even from another wife. In view of this, there is no difficulty in attributing a retroactive intention to the legislature when the Amendment Act of 1964 was enacted.

Appeal by Special Leave from the Judgment and Decree dated the 31st August 1965 of the Punjab High Court in Letter Patent Appeal No. 91 of 1961.

Harbans Singh, Advocate, for Appellants.

Bishan Narain, Senior Advocate (*S. K. Mehta*, Advocate of *M/s. K. L. Mehta & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a Judgment of a division bench of the Punjab High Court decreeing the suit filed by the respondent for possession of certain land by pre-emption.

The facts may be shortly stated: Santa Singh was the owner of some land in village Samadh Bhai, tehsil Moga. He died leaving a widow Shrimati Sobhi. He also left a daughter Shrimati Jai Kaur from his other wife. On 3rd February, 1958, Smt. Sobhi sold 73 kanals 14 marlas of land to the appellants, the sale consideration mentioned in the sale deed being Rs. 8,000. Smt. Jai Kaur filed a suit for possession by pre-emption of the land which had been sold by Smt. Sobhi. According to her a consideration of Rs. 4,000 only had been paid by the vendee. The trial Court decreed the suit in May, 1959 granting a decree for possession on payment of Rs. 6,500 together with costs. The Second Additional Judge to whom an appeal was taken dismissed it. In the High Court the learned Single Judge took the view that Smt. Jai Kaur not being the daughter of the vendor Smt. Sobhi had no right of pre-emption under section 15 (2) of the Punjab Pre-emption Act,

1913 as amended by the Punjab Pre-emption Amendment Act, 1960. The suit was dismissed. Smt. Jai Kaur filed an appeal under clause 10 of the Letters Patent of the High Court. Relying on an amendment made by the Punjab Pre-emption Amendment Act, 1964 in the first paragraph of clause (b) of sub-section (2) of section 15 of the Punjab Pre-emption Act, hereinafter called the Act, the Division Bench reversed the judgment of the Single Judge and decreed the plaintiff's suit.

The relevant provisions of the statute may now be noticed together with the amendments made in 1960 and 1964. Section 15 of the Act was substituted by section 4 of the Amendment Act, 1960. According to the substituted section the right of pre-emption in respect of agricultural land and village immoveable property shall vest thus:

“(1)

(2) Notwithstanding anything contained in sub-section (1),—

(a) where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female, after inheritance, the right of pre-emption shall vest,—

(i) if the sale is by such female, in her brother or brother's son;

(ii) if the sale is by the son or daughter of such female, in the mothers' brother or the mother's brother's sons of the vendor or vendors;”

By the Amendment Act, 1964 in the first paragraph of section 15 (2) (b) between the words “such” and “female” the words “husband of the” were inserted. The result was that after the amendment the portion of clause (b) relevant for our purpose was to read as follows:

“FIRST, in the son or daughter of such husband of the female.”

Now if the Amendment Act of 1964 could be regarded as having retrospective operation so as to affect pending proceedings there can be no dispute that the judgment of the division bench was right and must be affirmed. The contention which has been raised on behalf of the appellants is that there is no indication in the Amendment Act of 1964 that it was to have retrospective operation and therefore the amendment made by it should be deemed to be only prospective. It may be mentioned that by section 6 of the Amendment Act of 1960 a new section 31 was inserted in the Act. That section provided;

“no Court shall pass a decree in a suit for pre-emption whether instituted before or after the commencement of the Punjab Pre-emption Amendment Act of 1960 which is inconsistent with the provisions of the said Act.”

In *Ram Sarup v. Munshi and others*¹, this Court held that the language used in section 31 was comprehensive enough so as to require an appellate Court to give effect to the substantive provisions of the Amending Act whether the appeal before it was one against a decree granting pre-emption or one refusing that relief. Although section 31 was inserted in the Act for all times the phrasology employed therein does not show that its language was meant to cover those amendments which would be made subsequent to the Amendment Act of 1960. The word “said” can have reference in the context only to the enactment of 1960 and to no other. It would not be legitimate for the Courts to give an extended effect to a provision which has retrospective operation unless the language used and words employed warranted such a course being followed. That does not appear to be the case here.

It appears to us that the Amendment Act of 1964 was merely of a clarificatory or declaratory nature. Even in the absence of the words which were inserted by the Amendment Act of 1964 in section 15 (2) (b) the only possible interpretation and meaning of the words “in the son or daughter of such female” could have reference to and cover the son or daughter of the husband of the female. The

1. (1963) 3 S.C.R. 858.

entire scheme of sub-section (2) of section 15 is that the right of pre-emption has been confined to the issues of the last male holder from whom the property which has been sold came by inheritance. Looking at clause (a) of sub-section (2) where the property which has been sold has come to the female from her father or brother by succession the right of pre-emption has been given to her brother or brother's son. As has been observed in *Mota Singh v. Prem Parkash Kaur and others*¹, the predominant idea seems to be that the property must not go outside the line of the last male holder and the right has been given to his male lineal descendants. Where the sale is by the son or the daughter of such female the right is given to the mother's brother or their sons. The principle which has been kept in view is that the person on whom the right of pre-emption is conferred must be a male lineal descendant of the last male holder of the property sold. This is so with regard to clause (a) of sub-section (2). Coming to clause (b) where the sale is by a female of land or property to which she has succeeded through her husband or through her son in case the son has inherited the same from his father the right of pre-emption is to vest firstly in the son or daughter of such female and secondly, in the husband's brother or husband's brother's son of such female. Now if the son or daughter of the female who has sold the property could refer to her son or daughter from a husband other than the one from whom the property devolved on her, it would be contrary to the scheme and purpose of sub-section (2) which essentially is to vest the right of pre-emption in the lineal descendants of the last male holder. Similarly it is unthinkable that a husband's brother or husband's brother's son should have reference to a husband to whom the property never belonged. In other words it could never be intended that if a female has had a previous husband who has either died or with whom the marriage has been dissolved and the female has remarried and succeeded to the property of her second husband the brother or the brother's son of her previous husband should be able to claim the right of pre-emption when they had nothing whatsoever to do with the property sought to be pre-empted. If would follow that under clause (b) the right of pre-emption would vest firstly in the son or daughter of the husband of the female meaning thereby either her own off-spring from the husband whom she has succeeded or the son or daughter of that husband even from another wife.

If the above discussion is kept in view there is no difficulty in attributing a retroactive intention to the legislature when the Amendment Act of 1964 was enacted. It is well settled that if a statute is curative or merely declares the previous law retroactive operation would be more rightly ascribed to it than the legislation which may prejudicially affect past rights and transactions. We are in entire agreement with the following view expressed in a recent full bench decision of the Punjab High Court in *Moti Ram v. Bakhwant Singh and others*², in which a similar point came up for consideration:

"A close analysis of paragraphs (First) and (Secondly) of clause (b) of sub-section (2) of section 15 before the amendment introduced by Punjab Act XIII of 1964 would demonstrate that a son of the husband of a female vendor though not born from her womb would be entitled to pre-empt, particularly when the husband's brother and even the son of the husband's brother of that female are accorded the right of pre-emption. To reiterate, the right of pre-emption is accorded manifestly on the principle of consanguinity, the property of the female vendor being that of her husband, and there is no reason why the step-son should be excluded and the nephew of the husband included. From this alone it must be inferred that the Legislature had intended to include a step-son and consequently retrospective operation had to be given to the amending Act as such a construction appears to be in consonance and harmony with the purpose of the Act".

The result, therefore, is that the respondent was entitled to exercise her right of pre-emption under paragraph First of clause (b) of sub-section (2) of section 15

1. I.L.R. (1961) Punj. 614, 627.

2. I.L.R. (1968) 1 Punj. 104, 120.

even before the amendment made in 1964. At any rate, whatever doubts existed they were removed by the Amendment Act of 1964 which must be given retrospective operation.

The appeal consequently fails and it is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.
Kalanka Devi Sansthan .. *Appellant**

5.

The Maharashtra Revenue Tribunal, Nagpur and others .. *Respondents.*

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (XCIX of 1958), sections 2 (12) and 2 (22)—Scope—“To cultivate personally,” meaning of—Idol, if is capable of cultivating the land personally.

Bombay Public Trusts Act (XXIX of 1959), section 2 (18)—Scope—“Trustee”—Definition of—The manager of the Sansthan (idol), if falls within the definition of “trustee.”

It is well-known that when property is given absolutely for the worship of an idol it vests in the idol itself as a jurisdic person. The question, however, is whether the idol is capable of cultivating the land personally.

It is difficult to accept the suggestion that the idol would be in the same position as a minor and therefore it can certainly cultivate the land personally within the meaning of section 2 (12). Physical or mental disability as defined by section 2 (22) lays emphasis on the words “personal labour or supervision.” The dominant idea of anything done personally or person is that the thing must be done by the person himself and not by or through some one else. In other words the intention is that the cultivation of the land concerned must be by natural persons and not by legal persons.

Held also that, In the present case, the Sansthan is a private trust and is not governed by the provisions of the Bombay Public Trusts Act. The distinction between a manager or a Shebait of an idol and a trustee where a trust has been created is well recognised. The properties of the trust in law vest in the trustee whereas in the case of an idol or a Sansthan they do not vest in the manager or the Shebait. It is the deity or the Sansthan which owns and holds the properties. It is only the possession and the management which vest in the manager. The manager or the Wahiwardar of the Shansthan cannot, therefore, fall within the definition of the word “trustee” as given in section 2 (18) of the Bombay Public Trusts Act.

Appeal by Special Leave from the Order dated the 8th April, 1965 of the Bombay High Court, Nagpur Bench in Letters Patent Appeal No. 40 of 1965.

Dr. W. S. Barlingay, Senior Advocate, (*R. Mahalingeir and Ganpat Rai*, Advocates, with him), for Appellant.

M. S. K. Sastri and S. P. Nayar, Advocates, for Respondents Nos. 2, 3 and 5.

M. Veerappa, Advocate, for Respondent No. 4.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the High Court of Bombay dismissing a petition under Article 227 of the Constitution which had been filed by appellant Sansthan.

The appellant is a private religions Trust, which is managed by Laxman Anant Mulay who is described as a Wahiwardar (Manager). The main source of income

for performing the several acts including the daily worship of the family deity (Shri Kalanka Devi is stated to be derived from endowed agricultural land. Respondent No. 4 in the tenant is held survey No. 94 with an area of 30 acres 8 gunthas in Mouza Malrajura, districts Akola. On 30th January, 1961, a notice was served on behalf of the appellant on Respondent No. 4 under the provisions of section 38 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereinafter called the Act. It was mentioned in the notice that an earlier notice under section 9 (i) of the Berar Regulation of Agricultural Leases Act had been served in the year 1955 that the Sansthan required to aforesaid field for personal cultivation and, therefore, he should give up possession. Those proceedings were pending but a notice under section 38 of the Act was given to terminate the tenancy without prejudice to the previous proceedings. As the notice was not complied with an application was filed on behalf of the appellant under section 36 of the Act for possession which was opposed by respondent No. 4. The Naib Tehsildar rejected the application on the ground that the Sansthan was not a landholder who could cultivate the land personally. His order was confirmed by the Sub-Divisional Officer and by the Maharashtra Revenue Tribunal to whom appeals were taken. The appellant ultimately filed a petition under Article 227 of the Constitution before the High Court which, as stated before, was dismissed.

The only point which has to be determined is whether the Sansthan could take advantage of the provisions contained in the Act by which possession can be claimed from the tenant on the ground that it is required for personal cultivation. Section 2 (12) of the Act defines the words "to cultivate personally" in the following manner:

"Section 2 (12) "to cultivate personally" means to cultivate on one's own account—

- (i) by one's own labour, or
- (ii) by the labour of any member of one's family, or
- (iii) under the personal supervision of one-self or of any member of one's family by hired labour or by servants on wages payable in cash or kind but not in crop share;

Explanation I.—A widow or a minor or a person who is subject to any physical or mental disability, or a serving member of the armed forces shall be deemed to cultivate the land personally if it is cultivated by her or his servants or by hired labourer;

Explanation II......"

According to section 2 (22) the "physical or mental disability" means physical or mental disability by reason of which the person subject to such disability is incapable of cultivating land by personal labour or supervision. The word "tenant" is defined by section 2 (32) as meaning a person who holds land on lease including a person who is deemed to be a tenant under sections 6, 7 or 8 and a person who is a protected lessee or occupancy tenant. It is provided that the word "landlord" shall be construed accordingly. Section 38 deals with termination of tenancy by landlord for cultivating land personally. It says that after giving notice to a tenant in writing at any time on or before 15th February, 1961, and making an application for possession under section 36 on or before 31st March, 1961, the landlord may terminate the tenancy other than an occupancy tenancy if the landlord *bona fide* requires the land for cultivating it personally. Sub-section (3) gives the conditions subject to which the tenancy can be terminated.

Now it is well-known that when property is given absolutely for the worship of an idol it vests in the idol itself as a juristic person. As pointed out in *Mukherjee's Hindu Law of Religious and Charitable Trust* at pages 142-143, this is view in accordance with the Hindu ideas and has been uniformly accepted in a long series of judicial decisions. The idol is capable of holding property in the same way as

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a natural person. "It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir." The question, however, is whether the idol is capable of cultivating the land personally. The argument raised on behalf of the appellant is that under *Explanation* I in section 2 (12) of the Act a person who is subject to any physical or mental disability shall be deemed to cultivate the land personally if it is cultivated by the servants or by hired labourer. In other words an idol or a Sansthan that would fall within the meaning of the word "person" can well be regarded to be subject to a physical or mental disability and land can be cultivated on its behalf by servants or hired labourers. It is urged that in *Explanation* I the idol would be in the same position as a minor and it can certainly cultivate the land personally within the meaning of section 2 (12). It is difficult to accept the suggestion that the case of the appellant would fall within *Explanation* I in section 2 (12). Physical or mental disability as defined by section 2 (22) lays emphasis on the words "personal labour or supervision." As has been rightly pointed out in *Shri Kesheoraj Deo Sansthan, Karanja v. Bafurao Deoba and others*¹, in which an identically similar point came up for consideration, the dominating idea of anything done personally or person is that the thing must be done by the person himself and not by or through some one else. In our opinion the following passage in that judgment at page 593 explains the whole position correctly:

"It should thus appear that the legislative intent clearly is that in order to claim a cultivation as a personal cultivation there must be established a direct nexus between the person who makes such a claim, and the agricultural processes or activities carried on the land. In other words, all the agricultural operations, though allowed to be done through hired labour or workers must be under the direct supervision, control, or management of the landlord. It is in that sense that the words "personal supervision" must be understood. In other words, the requirement of personal supervision under the third category of personal cultivation provided for in the definition does not admit of an intermediary between the landlord and the labourer, who can act as agent of the landlord for supervising the operations of the agricultural worker. If that is not possible in the case of one landlord, we do not see how it is possible in the case of another landlord merely because the landlord in the latter case is a juridic person."

In other words the intention is that the cultivation of the land concerned must be by natural persons and not by legal persons.

It has next been contended that in the provisions of the Berar Regulation of Agricultural Leases Act, 1951, public trusts of charitable nature were included among those who could claim possession from a tenant on the ground of personal cultivation. It is not possible to see how the provisions of a repealed statute which was no longer in force, after the enactment of the Act, could be of any avail to the appellant. The decision in *Ishwardas v. Maharashtra Revenue Tribunal and others*², has also been referred to by the Counsel for the appellant. In that case it was said that under section 2 (18) of the Bombay Public Trusts Act, a trustee has been defined as meaning a person in whom either alone or in association with other persons the property is vested and includes a manager. In view of this definition the properties of the trusts vest in the managing trustee and he is the landlord under clause 32 of section 2 of the Act. As he is the landlord, he can ask for a surrender from the tenant of the lands of the trust "to cultivate personally." In the present case it is common ground that the Sansthan is a private trust and is not governed by the provisions of the Bombay Public Trusts Act. The manager or the Wahiwardar of the Sansthan cannot, therefore, fall within the definition of the word "trustee" as given in section 2 (18) of that Act. It may be mentioned that in *Ishwardas case*²,

1. (1964) Mah.L.J. 589, 593.

2. (1968) 3 S.C.R. 441 : (1968) 2 S.C.J. 735.

the Court refrained from expressing any opinion on the question whether a manager or a Shebait of the properties of an idol or the manager of the Sansthan can or cannot apply for surrender by a tenant of lands for personal cultivation. The distinction between a manager or a Shebait of an idol and a trustee where a trust has been created is well recognised. The properties of the trust in law vest in the trustee whereas in the case of an idol or a Sansthan they do not vest in the manager or the Shebait. It is the deity or the Sansthan which owns and holds the properties. It is only the possession and the management which vest in the manager.

It has lastly been contended that the relevant provisions of the Act which have the effect of debaring the appellant from claiming possession for personal cultivation violate the provisions of Articles 14 and 19 (1) (f) of the Constitution. It is urged that discrimination is writ large between animate and juristic persons who fall within the definition of the word "person." Such a contention, however, cannot be entertained in view of Article 31-A of the Constitution. The Act had received the assent of the President and is rendered immune from attack or challenge on the ground of violation of Articles 14 or 19 of the Constitution. In *Shri Mahadeo Paikaji Kolhe Taxatmal v. The State of Bombay*¹, the constitutional validity of the Act itself was canvassed but the challenge failed. Similarly the validity of the Bombay Tenancy and Agricultural Lands Amendment Act, 1956, as applied to Vidarbha Region and Kutch Area was upheld in *Sri Ram Ram Narain Medhi v. The State of Bombay*².

The appeal consequently fails and it is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—J.C. SHAH, V. RAMASWAMI AND A.N. GROVER, JJ.

Digyadarsan Rajendra Ramdassji Varu

... *Appellant**

v.

State of Andhra Pradesh and another

... *Respondents.*

Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (XVII of 1966), sections 46 and 47—Whether violative of Articles 14, 19 (1) (f), 25 and 26 of the Constitution of India.

It is not possible to see how a procedural change of this nature can be regarded as contravening either Article 19 (1) (f) of Article 14 of the Constitution. The procedure which has been laid down makes all of the proceedings before the Commissioner quasi-judicial. This is particularly so where the provisions of section 104 of the Act are kept in view. Moreover if any order of removal is made that can be challenged in a Court of law and there is a further right of appeal to the High Court.

There can be little or no doubt that if a mathadhipathi is of an unsound mind or suffers from any physical or mental defect or infirmity or has ceased to profess Hindu religion or the tenets of the math or if his case falls within clauses (d) to (h) of section 46 (1), his removable would be in the interest of the general public. A mathadhipathi cannot possibly perform his duties either as a spiritual or a temporal head nor can be properly administer or manage the trust property if he falls within the categories mentioned in clauses (a) to (d) or has been guilty of breach of trust or wilful default, etc. or leads an immoral life. Even under the Civil Procedure Code, his removal could have been ordered in proceedings under section 92 for similar reasons.

1. (1961) 2 S.C.J. 589 : (1962) 1 S.C.R. 733. (S.C.) 1 : (1959) 1 M.L.J. (S.C.) 1 : (1959) 1
2. (1959) S.C.J. 679 : (1959) 1 An. W.R. S.C.R. (Supp.) 489.

* W.P. No. 347 of 1968.

26th March, 1969.

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The suspension of a mathadhipathi, during the inquiry, is a necessary and reasonable part of the procedure which has been prescribed by section 46. If he is allowed to function during the pendency of an inquiry the entire purpose of the enquiry would be defeated. The mathadhipathi, may, during the pendency of the inquiry, do away with most of the evidence or transfer with books of account or otherwise commit acts of misappropriation and defalcation in respect of the properties of the math. It is essential, therefore, in these circumstances to make a provision for suspending him till the inquiry concludes and an order is made either exonerating minor directing his removal.

(held, section 46 not violative of Article 19 (1) (f) of the Constitution).

It has nowhere been established that the petitioner has been prohibited or debarred from professing, practising and propagating his religion. A good deal of material has been placed on record to show that the entire math is being guarded by the police constables but that does not mean that the petitioner cannot be allowed to enter the math premises and exercise the fundamental right conferred by Article 25 (1) of the Constitution.

As regards the contravention of clauses (b) and (d) of Article 26 there is nothing in sections 46 and 47 which empowers the Commissioner to interfere with the autonomy of the religious denomination in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion the denomination professes or practises nor has it been shown that any such order has been made by the Commissioner or that the Assistant Commissioner who has been put in charge of the day to day affairs is interfering in such matters. Section 47 of the Act deals only with a situation where there is a temporary vacancy in the office after mathadhipathi by reason of any dispute in regard to the right of succession to the office or the reasons stated therein as also because the mathadhipathi has been suspended pending an inquiry under section 46. Its provisions do not take away the right of administration from the hands of a religious denomination altogether and vest is for all times in a person or authority who is not entitled to exercise that right under the customary rule and custom prevailing in the math.

Held, it cannot be said that section 47 would be hit by Article 26 (d) of the Constitution as the powers under it will be exercised, *inter alia* when mismanagement of property or maladministration of trust funds are involved.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

Kanak Ghosh and B. Datta, Advocates, for Appellant.

P. Ram Reddy, Senior Advocate, (A.V.V. Nair and P. Parameshwar Rao, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Grover, J.—This is a petition under Article 32 of the Constitution challenging, *inter alia*, the constitutionality of sections 46 and 47 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (XVII of 1966), hereinafter called the “Act” and for issuance of a writ in the nature of *mandamus* or other appropriate writs and directions to the Commissioner of Hindu Religious and Charitable Endowments, hereinafter called the “Commissioner” prohibiting him from exercising his powers or taking action under the aforesaid sections.

The petitioner claims to be the Mathadhipathi of Shri Swami Hathiramji Math Tripathi-Thirumalla in the State of Andhra Pradesh. It is stated that this institution was founded several centuries ago and is one of the renowned Maths in India. Hundreds of Sadhus visit the Math throughout the year and it is the duty of the Mahant as its religious head to provide the visiting Sadhus with food and shelter and for perform all religious duties with regard to the celebration of Hindu festivals, propagation of the cult of Shri Swami Hathiramji and performance of other

religious functions. It is alleged that Mahant Chettandoss, the previous incumbent died on 18th March, 1962. On 24th March, 1962 the Commissioner took charge of the Math and its properties under section 53 of the Andhra Pradesh (Andhra Areas) Hindu Religious and Charitable Endowments Act (XIX of 1951), hereinafter referred to as the "Repealed Act". The petitioner filed a suit on 26th March, 1962, in the Court of the Subordinate Judge, Chittoor for a declaration that he was the rightful successor. The Commissioner was impleaded as a party to the suit. He also filed a revisional application under section 92 of the Repealed Act to the State Government. The Government disposed of the revisional application on 5th June, 1962. It appointed the petitioner as the interim Mahant subject to certain conditions which need not be mentioned. Before this order was made the petitioner withdrew the suit filed by him in April, 1962. Devendradoss, who was another claimant but who was a minor, filed a writ petition in the High Court challenging the above order of the Government but the same was rejected by the division Bench. Devendradoss then filed certain suits for a declaration of his title. On 22nd August, 1964, the Commissioner made an order directing the petitioner to show cause why the previous order appointing him as an interim Mahant be not recalled. According to the petitioner this was done because the State Government started claiming, contrary to the rule and custom which prevailed in the Math, that the amounts received on account of *Padakanukus* (personal offerings) should be paid to the Government and not taken by the Mahant. This order was challenged by the petitioner by means of a writ petition in the High Court. The High Court issued a stay order which was later on clarified to mean that the State Government was free to take such further action under the Act as it considered necessary. On 9th September, 1965, the State Government framed charges against the petitioner and directed him to furnish his explanation. The petitioner was placed under suspension with immediate effect. It was further directed that the Assistant Commissioner, Tirupathi should take charge of the Math and its affairs. Meanwhile another claimant Bhagwandoss filed a suit on 29th September, 1965, claiming title to the *gaddi* in his own right. The writ petition which had been filed by the petitioner was allowed by the High Court on 8th November, 1966. The matter ultimately came up in appeal to this Court, the judgment being reported in *Secretary, Home (Endowments) Andhra Pradesh v. Digyadarsan Rajindra Ram Dasji*¹. The judgment of the High Court was affirmed. The High Court had held that the petitioner had succeeded to the office of the Mahant or the death of Chettandoss on 18th March, 1962, in his own right. This Court concurred in that view and observed that the mere circumstance that the Government had also passed an order appointing him as the interim Mahant could not take away his right to function as a trustee on the basis of his original right. It followed that the Government had no jurisdiction to pass an order placing him under suspension as that virtually amounted to a removal of the trustee of the Math which could only be done in the manner provided by section 52 of the Repealed Act.

The Act received the assent of the President on 6th December, 1966, and was enforced with effect from 27th January, 1967. On 30th May, 1967, the petitioner filed a petition under Article 226 of the Constitution in the High Court for declaring the present impugned provisions of the Act as *ultra vires*. The petition was dismissed *in limine* as premature. An appeal to the Letters Patent bench failed. On coming to know that certain orders were going to be passed against the petitioner whereby charges on various matters were to be preferred and an inquiry made and that the suspension of the petitioner from Mahantship was going to be ordered, the present petition was filed under Article 32 of the Constitution in October, 1968. In this petition, apart from challenging the provisions of the Act a case of *mala fide* action has been sought to be made out against the respondent. In the order which was made by the Government on 18th November, 1968, as many as 14 charges have been preferred against the petitioner and his suspension as been duly ordered. The

1. (1968) 1 S.C.J. 627 : (1968) 1 M.L.J. (S.C.) S.C.R. 891.
94 : (1968) 1 An. W.R. (S.C.) 94 : (1967) 3

Assistant Commissioner Endowments Department has been directed to attend to the day-to-day administration of the Math temporarily and its Endowments until the disposal of the inquiry.

Now the Act has been enacted to consolidate and amend the law relating to the administration and governance of charitable and Hindu religious institutions and endowments in the State of Andhra Pradesh. Chapter I contains the definitions of various expressions used in the Act including the word "Commissioner" Chapter II provides for the appointment of Commissioner Joint Commissioners, etc., and give their powers and functions. Chapter III deals with administration and management of charitable and Hindu religious institutions and endowments. Chapter IV provides for registration of such institutions and endowments. Section 42 in Chapter V defines the word "*mathadhipathi*" to mean any person whether known as Mahant or by any other name, in whom the administration of a Math or specific endowment attached to a math are vested. Sections 46 and 47 are in the following terms :

"46. (1) The Commissioner may *suo motu* or on an application of two or more persons having interest, initiate proceedings for removing a *mathadhipathi* or a trustee of a specific endowment attached to a Math, if he—

- (a) is of unsound mind ;
- (b) is suffering from any physical or mental defect or infirmity which renders him unfit to be a *mathadhipathi*, or such trustee ;
- (c) has ceased to profess the Hindu religion or the tenets of the math ;
- (d) has been sentenced for any offence involving moral turpitude, such sentence not having been reversed ;
- (e) is guilty of breach of trust or misappropriation in respect of any of the properties of the math ;
- (f) commits persistent and wilful default in the exercise of his powers or performance of his functions under this Act.
- (g) violates any of the restrictions imposed or practices enjoined by the custom, usage or the tenets of the math, in relation to his personal conduct, such as celibacy, renunciation and the like ;
- (h) leads an immoral life.

(2) The Commissioner shall frame a charge on any of the grounds specified in sub-section (1) against the *mathadhipathi* or trustee concerned and give him an opportunity of meeting such charge, of testing the evidence adduced and of adducing evidence in his favour. After considering the evidence adduced and other material before him, the Commissioner may, by order exonerate the *mathadhipathi* or trustee, or remove him. Every such order shall state the charge framed against the *mathadhipathi* or the trustee, his explanation and the finding on such charge together with the reasons therefor :

Provided that in the case of a math or specific endowment attached thereto whose annual income exceeds rupees one lakh, the order of removal passed by the Commissioner against the *mathadhipathi* or trustee shall not take effect unless it is confirmed by the Government.

(3) Pending the passing of an order under sub-section (2) the Commissioner may suspend the *mathadhipathi* or the trustee.

(4) (a) Any *mathadhipathi* or trustee aggrieved by an order passed by the Commissioner under sub-section (2) may, within ninety days from the date of receipt of such order, institute a suit in the Court against such order.

(b) An appeal shall lie to the High Court within ninety days from the date of a decree or order of the Court in such suit.

47. (1) Where a temporary vacancy occurs in the office of the *mathadhipathi* and there is dispute in regard to the right of succession to such office ; or where the *mathadhipathi* is a minor and has no guardian fit and willing to act as guardian, or where the *mathadhipathi* is under suspension under sub-section (3) of section 46, the Commissioner shall, if he is satisfied after making an inquiry in this behalf that an arrangement for the administration of the math and its endowments of the specific endowments, as the case may be, is necessary, make such arrangement as he thinks fit until the disability of the *mathadhipathi* ceases or another *mathadhipathi* succeeds to the office, as the case may be.

(2) In making any such arrangement, the Commissioner shall have due regard to the claims, if any, of the disciples of the math.

(3) * * * *

Section 83 confers powers on the Government to call for and examine the record of the Commissioner.....in respect of any proceedings not being a proceeding in respect of which a suit or any appeal or application or reference to a Court is provided by the Act, to satisfy themselves as to the regularity of such proceedings or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the Government that such decision or order should be modified, annulled, reversed or remitted for consideration they may pass orders accordingly. Under section 104 where a Commissioner.....makes an inquiry or hears an appeal under the Act, the inquiry has to be made and the appeal has to be heard as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure Code, 1908, to the trial of suits or the hearing of appeals and the provisions of the Indian Evidence Act and the Indian Oaths Act have also been made applicable.

Learned Counsel for the petitioner has assailed the constitutionality of section 46 although he has sought to read section 47 along with it so as to establish that the combined effect of the provisions contained in both the sections would be hit by Articles 14, 19 (1) (f), 25, 26 and 31 of the Constituion. Before the submissions, which have been made, are examined reference may be made to *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Math*¹ in which the constitutionality of various provisions of the repealed Act was challenged. That case related to the Shirur Math which was one of the 8 maths situate at Udupi in the district of South Kanara. The Hindu Religious Endowments Boards functioning under the Madras Hindu Religious Endowments Act, 1927 had taken action to frame a scheme for the administration of the affairs of the math. The challenge in the Courts was confined to the constitutional validity of the repealed Act. B. K. Mukherjee, J., (as he then was) dealt exhaustively with the rights of a Mahant to hold office as well as enjoy the property of the institution. The following observations as pages 1019, 1020 are noteworthy :

“As said above, the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy his character as a Mahant altogether. It is true that the beneficial interest which he enjoys is appurtenant to his duties and as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interest of the public. But the restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and superior of spiritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent of teachers who could impart religious instructions to the disciples and followers of the Math and by try to strengthen the doctrines of the particular school or order, of which they profess to

1. (1954) S C.J. 335 : (1954) 1 M.L.J. 596 : (1954) S C.R. 1005.

be adherents. This purpose cannot be served if the restrictions are such as would bring the *mathadhipathi* down to the level of a servant under the State department. It is from this standpoint that the reasonableness of the restrictions should be judged."

It was held that the Mahant was entitled to claim the protection of Article 19 (1) (f). The same Shirur Math figured in another case which came up to this Court and the decision in which is reported in *H. H. Sudhundra Thirtha Swamiar v. Commissioner for Hindu Religious and Charitable Endowments, Mysore*¹. There the constitutionality of section 52 (1) (f) of the repealed Act, as amended, was unsuccessfully assailed. The scheme of that section was similar to section 92 of the Code of Civil Procedure. The Commissioner or any two or more persons having interest or having obtained the consent in writing of the Commissioner could institute a suit in the Court to obtain a decree for removing a trustee of a math or a specific endowment attached to a math for any one or more reasons given in clauses (a) to (f) which were similar to clauses (a) to (f) of sub-section (1) of section 46 of the Act. Whereas previously the Commissioner could only institute a suit in a Court, he has now been empowered under the Act by section 46 to initiate proceedings himself for removing a *mathadhipathi* on the grounds mentioned in clauses (a) to (h). Clauses (g) and (h) are new and sub-section (2) gives the procedure for making the inquiry. If the *mathadhipathi* is aggrieved by the order made by the Commissioner, he has been given the right to institute a suit against such order in the Court by sub-section (4). The difference, in other words, is that previously the removal could be ordered only by the Court but under section 46 of the Commissioner can order the removal after following the procedure laid down and his order is final except that it can be challenged by means of a suit by the *mathadhipathi*. It also requires confirmation by the Government where the annual income of the math exceeds rupees one lakh. An additional power has been conferred on the Commissioner by sub-section (3) to suspend the *mathadhipathi* pending the passing of an order under sub-section (2).

The view which was taken in the above case was that section 52 (1) (f) of the repealed Act did not in effect seek to cut down the authority of the Mahant which was traditionally recognized and that the said provision which authorised the institution of a suit for removal of a Mahant where he was found to have wasted the property of the math or applied such funds or property for purposes wholly unconnected with the institution did not amount to an unreasonable restriction upon the exercise of the rights of the Mahant. On behalf of the petitioner a strenuous attempt has been made to show that section 46 of the Act is quite different from its counterpart contained in the repealed Act, namely, section 52 and that the powers which have been conferred are clearly violative of the fundamental right to hold the office of the Mahant as also the property of the math. In *H. H. Sudhundra Thirtha Swamiar's case*¹ it has been emphasised that the Mahant by virtue of his office is under an obligation to discharge the duties as a trustee and is answerable as such. He enjoys large powers for the benefit of the institution of which he is the head. He is to incur expenditure for the math i.e., for carrying on the religious worship for the disciples and for maintaining the dignity of his office but the property is attached to the office and the Mahant cannot incur expenditure for personal luxury or objects incongruous with his position as a Mahant. Keeping all this in view it is difficult to see how the provisions of section 46 would be violative of Article 19 (1) (f) of the Constitution. The grounds on which his removal as *mathadhipathi* can be ordered have been specifically provided and no exception has been or can be taken to them. The main attack is based on the power given to the Commissioner instead of the Court to make an inquiry into or try the allegations or charges against the Mahant and order his removal if such charges are established. It is not possible to see how a procedural change of this nature can be regarded as contravening either Article 19 (1)(f) or Article 14 of the Constitution which is the other Article which has been pressed into service. The procedure which has been laid down makes all the proceedings before

1. (1964) 2 S.C.J. 287 : (1963) 2 S.C.R. (Supp.) 302.

the Commissioner quasi-judicial. This is particularly so when the provisions of section 104 of the Act are kept in view. Moreover if any order of removal is made that can be challenged in a Court of law and there is a further right of appeal to the High Court. Learned Counsel for the petitioner had finally to build his argument on the provisions of sub-section (3) which give power to the Commissioner to suspend the *mathadhipathi* during the pendency of an inquiry and before any order in the matter of removal is made. It is pointed out that such suspension would seriously interfere with the numerous duties which a *mathadhipathi* has to perform as the head of a spiritual fraternity. The petitioner, in this manner, has been debarred from not only managing the institution but also from carrying out the essential work which according to the tenets and custom of the fraternity he is under an obligation to do. For instance he cannot look after the Sadhus and other disciple who constantly visit the math and come for religious instruction there nor can he preside over religious functions and other periodical festivities which are held in the seat of math. Thus, it is urged, that there is a clear violation of Article 19 (1) (f) which guarantees the petitioner's right to hold and enjoy the property, apart from the interference with his right to practice and propagate religion and manage the affairs of the math in matters of religion which rights are guaranteed by Articles 25 and 26 of the Constitution.

As regards Article 19 (1) (f) it has to be seen whether the restrictions which have been imposed by the impugned provisions of the Act are reasonable and are in the interest of the general public. There can be little or no doubt that if a *mathadhipathi* is of an unsound mind or suffers from any physical or mental defect or infirmity or has ceased to profess Hindu religion or the tenets of the math or if his case falls within clauses (d) to (h) of section 46 (1) his removal would be in the interest of the general public. A *mathadhipathi* cannot possibly perform his duties either as a spiritual or a temporal head nor can he properly administer or manage the trust property if he falls within the categories mentioned in clauses (a) to (d) or has been guilty of breach of trust or wilful default etc. or leads an immoral life [vide clauses (e) to (h) of section 46 (1)]. Even under the Civil Procedure Code, his removal could have been ordered in proceedings under section 92 for similar reasons.

The suspension of a *mathadhipathi*, during the inquiry, is a necessary and reasonable part of the procedure which has been prescribed by section 46. If he is allowed to function during the pendency of an inquiry the entire purpose of the enquiry might be defeated. The *mathadhipathi* may, during the pendency of the inquiry, do away with most of the evidence or tamper with the books of account or otherwise commit acts of misappropriation and defalcation in respect of the properties of the math. It is essential, therefore, in these circumstances to make a provision for suspending him till the inquiry concludes and an order is made either exonerating him or directing his removal.

On the question whether sections 46 and 47 of the Act contravene Articles 25 and 26, a good deal of reliance has been placed on the observations in the first *Shirur Math case*¹, Mukherjea, J., (as he then was) delivering the judgment of the Court had examined the scope of the language of Articles 25 and 26. It was indicated by him that freedom of religion in our constitution is not confined to religious beliefs only; it extends to religious practice as well subject to the restrictions which the Constitution itself has laid down. Under Article 26 (b) therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion and no outside authority has any jurisdiction to interfere with its decision in such matters. Moreover under Article 26 (d) it is the fundamental right of a religious denomination or its representative to administer its property in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. It was further laid down that a law which takes away the right of administration from the

hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of Article 26. Now under section 47 of the Act where a *mathadhipathi* is under suspension the Commissioner can make such arrangement as he thinks fit for the administration of the math until another *mathadhipathi* succeeds to the office and in making such arrangement has to have due regard to the claims of the disciples of the math. It is maintained on behalf of the petitioner that the appointment of Assistant Commissioner, Endowments Department, Tirupathi as the day-to-day administrator of the math and its endowment as a two fold effect. The first is that the complete autonomy which a religious denomination like the math in question enjoys in the matter of observance of rights and ceremonies essential to the tenets of the religion has been interfered with. The second is that the right of administration has been altogether taken away from the hands of the religious denomination by vesting it in the Assistant Commissioner. This clearly contravenes the provisions of clauses (b) and (d) of Article 26 within the rule laid down in the first *Shirur Math case*¹. By doing so in exercise of the powers under section 47 the Commissioner has also debarred the petitioner from practising and propagating religion freely which he is entitled to do under Article 25 (1).

The attack on the ground of violation of Article 25 (1) can be disposed of quite briefly. It has nowhere been established that the petitioner has been prohibited or debarred from professing, practising and propagating his religion. A good deal of material has been placed on the record to show that the entire math is being guarded by police constables but that does not mean that the petitioner cannot be allowed to enter the math premises and exercise the fundamental right conferred by Article 25 (1) of the Constitution. As regards the contravention of clauses (b) and (d) of Article 26 there is nothing in sections 46 and 47 which empowers the Commissioner to interfere with the autonomy of the religious denomination in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion the denomination professes or practises nor has it been shown that any such order has been made by the Commissioner or that the Assistant Commissioner who has been put in charge of the day-to-day affairs is interfering in such matters. Section 47 of the Act deals only with a situation where there is a temporary vacancy in the office of the *mathadhipathi* by reason of any dispute in regard to the right of succession to the office or the other reasons stated therein as also because the *mathadhipathi* has been suspended pending an inquiry under section 46. Its provisions do not take away the right of administration from the hands of a religious denomination altogether and vest it for all times in a person or authority who is not entitled to exercise that right under the customary rule and custom prevailing in the math. In the first *Shirur Math case*¹, section 56 of the repealed Act before its amendment by Act XII of 1954 was struck down as power had been given to the Commissioner to require the trustee to appoint a manager for the administration of the secular affairs of the institution and the Commissioner himself could also make the appointment. It was pointed out that this power could be exercised at the mere option of the Commissioner without any justifying necessity whatsoever and no pre-requisites like mismanagement of property or maladministration of trust funds were necessary to enable the trustee to exercise such drastic power. The effect of the section really was that the commissioner was at liberty, at any moment, to deprive the Mahant of his right to administer the trust property even if there was no negligence or maladministration on his part. Such a restriction was held to be opposed to the provisions of Article 26 (d) of the Constitution. Section 47 of the Act is not *in pari materia* with section 56 of the repealed Act. On the contrary section 47 indicates quite clearly the conditions and situations in which the Commissioner can appoint someone to carry on the administration of the math and its endowments. In the present case, the Assistant Commissioner has been appointed as a day-to-day administrator because of the inquiry which is pending against the petitioner and in which serious charges of misappropriation and defalcation of trust funds and leading an immoral life are being investigated. It cannot be said that section 47 would be hit by Article 26 (d) of the

1. 1954 S.C.J. 335; (1954) 1 M.L.J. 596; (1954) S.C.R. 1005.

Constitution as the powers under it will be exercised, *inter alia*, when mis-management of property or maladministration of trust funds are involved.

Counsel for the petitioner has not made any serious attempt to argue that in the view that we are inclined to take there would be any contravention of Article 31 (1) of the Constitution. He has, however, pressed for the petitioner being allowed to take the *Padakanulas* which are receivable by the Mahant of which he will keep an account as was directed by this Court when disposing of the stay petition on 13th December, 1968. Counsel for the respondent agrees to this and has also agreed to keep accounts of whatever amount is spent on feeding the sadhus and on the management of the math property. He has further given an undertaking that the inquiry which is being conducted under section 46 of the Act will be concluded within a period of three months. It may be made clear that the Assistant Commissioner who is in charge of the day-to-day administration temporarily of the math and its endowments shall be fully entitled to take necessary steps for recovery of all debts and claims which could have been recovered by the Mahant from various debtors etc.

The writ petition, however, fails and it is dismissed, but in view of the entire circumstances we make no order as to costs.

S.V.J.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH AND G.K. MITTER, JJ.

Baldevdas Shivilal and another

... *Appellants**

v.

Filmistan Distributors (India) Pvt., Ltd., and others

... *Respondents*

Civil Procedure Code (V of 1908), section 115—Scope of—‘Case’—Meaning of—Court ordering that a question may properly be put to a witness examined—Whether amounts to case decided.

Civil Procedure Code (V of 1908), section 11—Res judicata—Consent decree does not operate as res judicata.

Exercise of the power under section 115 is broadly subject to three important conditions (1) that the decision must be of a Court subordinate to the High Court; (2) that there must be a case which has been decided by the subordinate Court; and (3) that the subordinate Court must appear to have exercised jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

By ordering that a question may properly be put to a witness who was being examined, no case was decided by the Trial Court. The expression ‘case’ is not limited in its import to the entirety of the matters in dispute in an action. To interpret the expression ‘case’ as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of the powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy every order in the suit cannot be regarded as a case decided within the meaning of section 115 of the Civil Procedure Code.

A consent decree does not operate as *res judicata*, because a consent decree is merely the record of a contract between the parties to a suit, to which is super added for seal of the Court. A matters in contest in a suit may operate as *res judicata* only if there is adjudication by the Court. The terms of section 11 leave no scope for a contrary view. Again it was for the trial Court in the first instance

to decide that question and thereafter the High Court could, if the matter were brought before it by way of appeal or in exercise of its revisional jurisdiction, have decided that question (*Held on facts*). The High Court had no jurisdiction to record any finding on the issue of *res judicata* in a revision application filed against an order refusing to uphold an objection to certain question asked to a witness under examination.

Appeal by Special Leave from the Judgment and Order dated the 17th/27th April, 1967 of the Gujarat High Court in Civil Revision Application No. 328 of 1967.

S.T. Desai, Senior Advocate, (*I.N. Shroff*, Advocate, with him), for Appellants.

P.M. Amin, Senior Advocate, (*P.M. Amin, P.N. Duda*, Advocates and *J.B. Dadachanji* Advocate of *M/s. J.B. Dadachanji & Co.*, with him), for Respondent No. 1.

R.P. Kapur, Advocate, for Respondents Nos. 2 and 3.

The Judgment of the Court was delivered by

Shah, J.—By insistence upon procedural wrangling in a comparatively simple suit pending in the Court of Small Causes at Ahmedabad the parties have effectively prevented all progress in the suit during the last six years.

A building in the town of Ahmedabad used as a cinematograph theatre belonged originally to *M/s. Popatlal Punjabhai*. In proceedings in insolvency, receivers were appointed of the estate of the owners and on 19th August, 1954, the receivers granted a lease of the theatre on certain terms and conditions to two persons, *Raval* and *Faraqui*. By an agreement dated 27th November, 1954, between *Raval* and *Faraqui* on the one hand and *M/s. Filmistan Distributors (India) Private Ltd.* hereinafter called 'Filmistan'—on the other hand, right to exhibit cinematograph films was granted to the latter on certain terms and conditions. "Filmistan" instituted suit No. 149 of 1960 in the Court of the Civil Judge (Senior Division) at Ahmedabad against *Raval* and *Faraqui* and two other persons claiming a declaration that it was entitled pursuant to the agreement dated 27th November, 1954, to exhibit motion pictures in the theatre. By an order dated 1st December, 1960, the suit was disposed of as compromised. It was *inter alia* agreed that *Raval* and *Faraqui* were bound and liable to allow Filmistan to exercise its "exhibition rights" in the theatre; that *Raval* and *Faraqui*, their servants and agents were not to have any right to exhibit any picture in contravention of the terms and conditions of the agreement dated 27th November, 1954; and that *Raval* and *Faraqui* shall "execute and register" an agreement in writing incorporating the said agreement with the variation as to rental. Pursuant to this agreement, a fresh agreement was executed on 1st December, 1960. On 1st September, 1963, Filmistan filed suit No. 1465 of 1963 in the Court of Small Causes at Ahmedabad, *inter alia*, for a declaration that a sub-lessee or as lessee under law it was entitled to obtain and remain in possession of the theatre and to exhibit cinematograph films and to hold "entertainment performances" etc., in the theatre, and that one *Shabeer Hussain Khan Tejabwala* had no right, title or interest in the theatre, that the defendants in the suit be ordered to hand over vacant and peaceful possession of the theatre, and the defendants, their servants and agents be restrained by an injunction from interfering directly or indirectly with its rights to obtain and remain in possession of the theatre or any part thereof and to exercise its right of exhibiting "motion pictures" and entertainment performances etc. This suit was filed against the receivers in insolvency of the owners of the theatre, against *Raval* and *Faraqui*, against *Tejabwala* and also against *Baldevdas Shivalal* who claimed to be the owner of the theatre. The suit was based on the claim by Filmistan as lessees or sub-lessees of the theatre and was exclusively triable by the Court of Small Causes by virtue of section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Three sets of written statements were filed against the claim made by Filmistan, but no reference need be made thereto, since at this stage in deciding this appeal the merits of the pleas raised by the defendants are not relevant. After issues were raised on 20th June, 1966, the plaint was amended and additional

written statements were filed by the defendants. The learned Judge was then requested to frame three additional issues in view of the amended pleadings : the issues were :

" 11. Whether in view of the said consent decree in suit No. 149 of 1960 defendants Nos. 5 and 6 are debarred on principles of *res judicata* from agitating the question that the said document dated 27th November, 1954, as confirmed by their letter dated 31st January, 1955, and further confirmed by document dated 1st December, 1960, is not a lease ?

12. Whether in view of the said consent decree defendants 5 and 6 are estopped from contending and leading any evidence and putting questions in cross-examination of plaintiffs witnesses to show that the said document dated 27th November, 1954, as confirmed by their letter dated 31st January, 1955, and further confirmed by document dated 1st December, 1960, is not a lease?

13. Whether in respect of the terms of the said consent decree as also of the said document dated 27th November, 1954, as confirmed by their letter dated 31st January, 1955, and further confirmed by document dated 1st December, 1960, defendants Nos. 5 and 6 are debarred from leading any evidence of the plaintiffs witnesses in view of section 92 of the Evidence?"

In drawing up the additional issues not much care was apparently exercised : whether a party is entitled to lead evidence or to put questions in cross-examination of the plaintiff's witnesses cannot form the subject-matter of an issue.

Filmistan then applied to the Court of Small Causes for an order that issues Nos. 11, 12 and 13 be tried as preliminary issues. The learned Judge observed that the issues were not purely of law, that in any event the case or any part thereof was not likely to be disposed of on these issues, and that ordinarily in "appealable cases" the Court should, as far as possible, decide all the issues together and that piecemeal trial might result in protracting the litigation. He also observed that the issues were not of law going to the root of the case and were on that account not capable of being decided without recording evidence.

A revision application against that order was dismissed *in limine* by the High Court of Gujarat. When the case reached hearing and the evidence of a representative of Filmistan was being recorded Counsel for the defendants asked in cross-examination the question whether the "agreement between the plaintiff and defendant Nos. 5 and 6 was a commercial transaction and was not a lease ?" The question was objected to by Counsel appearing for Filmistan. Thereafter elaborate arguments were advanced and the Trial Judge passed an order disallowing the objection.

The objection to the question raised by Filmistan was not that it related to a matter to be decided by the Court and on which the opinion of witnesses was irrelevant. The objection was raised as an attempt to reopen the previous decision given by the Trial Judge refusing to try issues Nos. 11, 12 and 13 as preliminary issues. Counsel for Filmistan contended that an enquiry into the nature of the legal relationship arising out of the agreement dated 1st December, 1960, "was barred by the principle of *res judicata* and estoppel under the provisions of section 92 of the Evidence Act", since the question was already concluded by the consent decree in suit No. 149 of 1960. The trial Judge observed that he had carefully gone through the consent decree and the registered agreement dated 1st December, 1960, and he found that the consent decree had not decided that the transaction between the parties of the year 1954 was in the nature of a lease ; that in the plaint in the earlier suit it was not even averred that the rights granted were in the nature of lease-hold rights; that suit No. 149 of 1960 was for declaration of the rights of Filmistan to exhibit motion pictures in the theatre under the agreement dated 27th November, 1954, and for an injunction restraining the defendants from violating the said rights of Filmistan under the agreement; and that the agreement dated 1st December, 1960 was "not plain enough to exclude the oral evidence of the surrounding circumstances, and conduct of the parties to explain its terms and language." Accordingly he held that the question asked in cross-examination of the witnesses for Filmistan intended to disclosure of the surrounding circumstances and conduct of the parties in order to show in what manner the language of the document was related to the existing facts, could not be excluded.

The Court also rejected the contention that there was any bar of estoppel, and held that evidence as to the true nature of the transaction was not inadmissible by virtue of section 92 of the Evidence Act.

Filmistan feeling dissatisfied with the order invoked the revisional jurisdiction of the High Court of Gujarat under section 115 of the Code of Civil Procedure. The revision petition was entertained and elaborate arguments were advanced at the Bar. The High Court referred to a number of authorities and observed that the correctness of the findings of the Trial Court on issues Nos. 12 and 13 may not be examined in exercise of the powers under section 115 of the Code of Civil Procedure. The Court proceeded to observe :

“The question then arises for consideration whether in fact the subordinate Court has decided the question *res judicata*” and that “it is true that the jurisdiction of the Court of Small Causes to decide disputes between a tenant and his landlord and falling within the purview of section 28 of the Bombay Rent Control Act is derived from section 28 of the said Act, but at the same time if an issue is in fact barred by *res judicata*, then the Court has no jurisdiction on principles of *res judicata* to go into that question or to decide that question over again to the extent to which the Court, viz., the trial Court in the instant case, proposed to go into that question and allow the whole question, that was closed once for all by consent decree of 1st December, 1960, to be reopened, it is proposing to exercise the jurisdiction which is not vested in it by law. It is not open to any Court of law to try an issue over again or reopen the same if an earlier decision operates as *res judicata*. Once the jurisdiction of the Court has been taken away, any proposal to reopen the question closed by the earlier decision would be exercise of jurisdiction which is not vested in the Court by law and to that extent the decision would become revisable, even if it is the decision as to the *res judicata* of an issue”.

and concluded :

“It is not open to me in revision at this stage to express any opinion about the rights and contentions of the parties with reference to the agreement of 1st December, 1960. But the only thing that can be said is that so far as the agreement of 27th November, 1954, is concerned, it must be held, in view of the consent decree of 1st December, 1960, that that document of 27th November, 1954, created a lease * * *.

The consent decree must be held to create a bar of *res judicata* as far as the question of document of 27th November, 1954, creating a lease is concerned. The learned Judge will not proceed with the trial.”

By section 115 of the Code of Civil Procedure the High Court is invested with power to call for the record of any case decided by any Court subordinate to such High Court and in which no appeal lies thereto, if such subordinate Court appears—(a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, and to make such order in the case as it thinks fit. Exercise of the power is broadly subject to three important conditions (1) that the decision must be of a Court subordinate to the High Court ; (2) that there must be a case which has been decided by the subordinate Court ; and (3) that the subordinate Court must appear to have exercised jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

In the present case the Court of Small Causes had only decided that a question seeking information about the true legal relationship arising out of the document could be permitted to be put to the witnesses for Filmistan. The Court gave no finding expressly or by implication on the issue of *res judicata* or any other issue. In the view of the Trial Court the question whether the legal relationship arising out of the agreement dated 1st December, 1960, was in the nature of a lease or of other character had to be decided at the trial and the previous judgment being a judgment by consent “could not operate as *res judicata*” for, it was not a decision of the Court,

and that the consent decree in suit No. 149 of 1960 had not decided that the agreement dated 27th March, 1954, was of the nature of a lease, and that in the plaint in that suit it was not even averred that it was a lease.

The Trial Judge in overruling the objection did not decide any issues at the stage of recording evidence ; he was not called upon to decide any issues at that stage. The observations made by him obviously relate to the arguments advanced at the Bar and can in no sense be regarded even indirectly as a decision on any of the issues. But the High Court has recorded a finding that the agreement dated 27th November, 1954, created a lease and that the consent decree operated as *res judicata*. A consent decree, to the decisions of this Court, does not operate as *res judicata* because a consent decree is merely the record of a contract between the parties to a suit, to which is super added for seal of the Court. A matter in contest in a suit may operate as *res judicata* only if there is an adjudication by the Court : the terms of section 11 of the code leave no scope for a contrary view. Again it was for the Trial Court in the first instance to decide that question and thereafter the High Court could, if the matter were brought before it by way of appeal or in exercise of its revisional jurisdiction, have decided that question. In our judgment, the High Court had no jurisdiction to record any finding on the issue of *res judicata* in a revision application filed against an order refusing to uphold an objection to certain question asked to a witness under examination.

The true nature of the order brought before the High Court and the dimensions of the dispute covered thereby apparently got blurred and the High Court proceeded to decide matters on which no decision was till then recorded by the Trial Court, and which could not be decided by the High Court until the parties had opportunity of leading evidence thereon.

It may also be observed that by ordering that a question may properly be put to a witness who was being examined, no case was decided by the Trial Court. The expression "case" is not limited in its import to the entirety of the matter in dispute in an action. This Court observed in *Major S. S. Khanna v. Brig. F. J. Dillon*¹, that the expression "case" is a word of comprehensive import ; it includes a civil proceedings and is not restricted by anything contained in section 115 of the Code to the entirety of the proceeding in a civil Court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But it was not decided in *Major S. S. Khanna's case*¹, that every order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy ; every order in the suit cannot be regarded as a case decided within the meaning of section 115 of the Code of Civil Procedure.

The order passed by the High Court is set aside and the Trial Court is directed to proceed and dispose of the suit. We trust that the suit will be taken up early for hearing and disposed of expeditiously. We recommend that the form of the issues Nos. 11, 12 and 13 will be rectified by the learned Trial Judge.

Filmistan will pay the costs of the appeal in the Court and in the High Court.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice* AND G. K. MITTER, J.

M. C. Chacko

... Appellant*

v.

The State Bank of Travancore

... Respondent.

*Transfer of Property Act (IV of 1882), section 100—Charge on immovable property—When created.**Contract Act (IX of 1872), section 2 (d)—Stranger to contract—When can sue.*

For creating a charge on immovable property no particular form of words is needed ; by adequate words intention may be expressed to make property or a fund belonging to a person charged for payment of a debt mentioned in the deed. But in order that a charge may be created, there must be evidence of intention disclosed by the deed that a specified property or fund belonging to a person was intended to be made liable to satisfy the debt due by him.

The recitals of the deed in the instant case do not evidence any intention of the donor to create a charge in favour of the bank ; they merely set out an arrangement between the donor and the members of his family that the liability under the letter of guarantee executed by him in favour of the bank, if and when it arises, will be satisfied by his son out of the property allotted to him under the deed. It was only intended to confer a right of indemnity upon the other members of the family.

It is settled law that a person not a party to a contract cannot, subject to certain well recognised exceptions, enforce the terms of the contract ; the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant.

Appeal by Special Leave from the Judgment and Order dated the 23rd November, 1964 of the Kerala High Court in A. S. No. 502 of 1961.

S. V. Gupte, Senior Advocate (*Anantha Krishna Iyer, S. Balakrishnan and R. Thiagarajan*, Advocates, with him), for Appellant.

H. R. Gokhale, Senior Advocate (*J. S. Arora*, Advocate and *K. Baldev Mehta*, Advocate for *Anand, Dasgupta and Sagar*, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, Ag. C. J.—The High Land Bank, Kottayam of which the appellant M. C. Chacko was the Manager had an overdraft account with the Kottayam Bank. K. C. Chacko, father of the appellant, had executed from time to time letters of guarantee in favour of the Kottayam Bank agreeing to pay the amounts due by the High Land Bank under the overdraft arrangement. By the last letter of guarantee dated 22nd January, 1953. K. C. Chacko agreed to hold himself liable for the amounts due by the High Land Bank to the Kottayam Bank on the overdraft arrangement subject to a limit of Rs. 20,000.

The Kottayam Bank Ltd. filed a suit in the Court of the Subordinate Judge of Kottayam against the High Land Bank for a decree for the amount due in the account. To this suit were also impleaded K. C. Chacko, the guarantor, M. C. Chacko, Manager of the High Land Bank, and M. C. Joseph, Kuriakose, Annamma and Chinamma, the last three being the son, daughter and wife respectively of K. C. Chacko. Against the High Land Bank the claim was made on the footing of the overdraft account : against K. C. Chacko on the letter of guarantee and against M. C. Chacko, his brother, his sister and his mother as universal donees of the property of K. C. Chacko under a deed dated 21st June, 1951, under which, it was

* C.A. No. 652 of 1966.

claimed, a charge was created on the properties to which the deed related and against M. C. Chacko, also on the claim that he had personally agreed to pay the amount due by the High Land Bank. During the pendency of the suit, K. C. Chacko died and the suit was prosecuted against his widow, daughter and sons who were described also as his legal representatives.

The trial Court decreed the suit against the High Land Bank and also against M. C. Chacko, limited to the property received by him from his father under the deed dated 21st June, 1951. The claim of the Kottayam Bank to enforce the liability under the letter of guarantee personally against K. C. Chacko was held barred by the law of limitation and on that account not enforceable against his heirs and legal representatives. The Court also rejected the claim that M. C. Chacko had personally agreed to pay the amount due under the overdraft arrangement.

In appeal to the High Court by M. C. Chacko the decree passed by the trial Court was confirmed and the cross-objections filed by the State Bank of Travancore with which the Kottayam Bank was merged claiming that M. C. Chacko was personally liable were dismissed. This appeal with Special Leave is preferred by M. C. Chacko against the decree of the High Court.

Two questions arise in this appeal : (1) whether under Exhibit D-1 a charge is created in favour of the Kottayam Bank to satisfy the debt arising under the letter of guarantee and (2) whether the charge assuming that a charge arises is enforceable by the Bank when it was not a party to the deed Exhibit D-1.

Exhibit D-1 is called a deed of partition : in truth it is a deed whereby K. C. Chacko gave the properties described in the Schedule A to M. C. Chacko and other properties described in Schedules B to F to M. C. Chacko, M. C. Joseph, Annamma and Chinamma. In paragraph 17 it is recited :

"I have no debts whatsoever. If in pursuance of the letter given by me to the Kottayam Bank at the request of my eldest son, Chacko, for the purpose of the High Land Bank Ltd., Kottayam, of which he is the Managing Director, any amount is due and payable to the Kottayam Bank, that amount is to be paid from the High Land Bank by my son, Chacko. If the same is not so done and any amount becomes payable (by me) as per my letter, for that my eldest son, Chacko and the properties in Schedule A alone will be answerable for that amount."

The other paragraphs which deal with the properties in Schedule A may also be referred to. Paragraph 10 of the deed recited :

"The donees of the properties included in A, B and C Schedules are, as from this date, to be in possession of their respective properties and to get mutation of registry in their names, pay land revenue and enjoy the income save that from coconut trees."

By paragraph 12 it was declared that notwithstanding the deed of partition, K. C. Chacko will take the income from the coconut trees standing on the properties included in Schedules A, B, C and F till his death and that the donees of the properties will take and enjoy the income from the coconut trees in their respective properties after his death. In paragraph 13 it was recited that :

"As it is decided that Chinamma should receive and have for her maintenance the rent of the building in item 7 in the A Schedule, as well as the rent of the building in item 18 of the B Schedule, she is to be in possession of these buildings as from this date and is to let them out and enjoy the rent. The respective donees will have possession and enjoyment after her death. Chinamma is to have full rights and liberty to reside in any of the houses included in A, B or C Schedule and so long as she so resides in any of the houses, the donees of the respective house is to meet all her expenses. The rent collected by Chinamma from the buildings given possession of to her is to be utilised by her for her private expenses as she pleases."

In our judgment the various covenant in the deed were intended to incorporate an arrangement binding between the members of the family for satisfaction of the debt, if any, arising under the letter of guarantee.

We are unable to agree with the High Court that by clause 17 of the deed it was intended to create a charge in favour of the Kottayam Bank for the amount which may fall due under the letter of guarantee. The letter of guarantee created merely a personal obligation. The deed Exhibit D-1 was executed before the last letter of guarantee dated 22nd January, 1953. By clause 17 of Exhibit D-1 it is merely directed that the liability if any arising under the letter of guarantee, shall be satisfied by M.C. Chacko and not by the donor, his son M.C. Joseph, his daughter Annamma and his wife Chinnamma. The reason for the provision in the deed is clear. M.C. Chacko was the Managing Director of the High Land Bank Ltd. and it was at the instance of M.C. Chacko that the letters of guarantee were executed by the donor. For creating a charge on immovable property no particular form of words is needed : by adequate words intention may be expressed to make property or a fund belonging to a person charged for payment of a debt mentioned in the deed. But in order that a charge may be created, there must be evidence of intention disclosed by the deed that a specified property or fund belonging to a person was intended to be made liable to satisfy the debt due by him. The recitals in clause 17 of the deed do not evidence any intention of the donor to create a charge in favour of the Kottayam Bank ; they merely set out an arrangement between the donor and the members of his family that the liability under the letter of guarantee, if and when it arises, will be satisfied by M.C. Chacko out of the property allotted to him under the deed.

The debt which M.C. Chacko was directed by the deed to satisfy was not in any sense a "family debt." It was a debt of K.C. Chacko; and K.C. Chacko was personally liable to pay that debt. After his death his sons, his daughter and his widow would be liable to satisfy the debt out of his estate in their hands. From the recitals in the deed Exhibit D-1 an intention to convert a personal debt into a secured debt in favour of the Bank, a third person, cannot be inferred. In *Akella Suryanarayana Rao and others v. Dwarapudi Basiviraddi and others*¹, the Madras High Court in construing a deed of partition of joint family property pursuant to a compromise decree, held that properties allotted to certain branches to which were also "allotted certain debts" with a stipulation that until the debts were fully discharged the properties allotted to the shares of the respective persons shall be liable in the first instance, were not subject to a charge in favour of the creditors. The Court held that the covenant in the partition deed resulted in a contract of indemnity, and not a charge. In the present case also the covenant that M.C. Chacko will either personally or out of the properties given to him satisfy the debt is intended to confer a right of indemnity upon other members of the family, if the Kottayam Bank enforced the liability against them, and created no charge in favour of the Bank. Clauses 12 and 13 of the deed support that view. By clause 12 the right to the coconut trees standing in the properties included in Schedules A, B, C and F is reserved to K.C. Chacko. Similarly Chinnamma, wife of K.C. Chacko, is permitted during her lifetime to occupy the houses in the properties described in the three schedules and to receive the income and to utilize the same for herself. It is clear that K.C. Chacko had no intention to create a charge or to encumber any of the properties for the debt which may become due to the Bank.

The Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, enforce the terms of the contract : the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. In *Krishna Lal Sadhu v. Pramila Bala Dosi*², Rankin, C.J. observed :

1. (1932) 62 M.L.J. 533 : (1932) I.L.R. 55 Mad. 436; A.I.R. 1932 Mad. 457. 2. (1928) I.L.R. 55 Cal. 1315.

" Clause (d) of section 2 of the Contract Act widens the definition of ' consideration ' so as to enable a party to a contract to enforce the same in India in certain cases in which the English Law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of *nudum pactum*. Not only, however, is there nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rightly excluded by the definition of ' promisor ' as ' promised '."

Under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract : *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*¹. It has however been recognised that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied that rule to an Indian case *Khwaja Muhammad Khan v. Husaini Begam*². In a later case *Jamna Das v. Ram Autar*³, the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.

Even if it be granted that there was an intention to create a charge, the Kottayam Bank not being a party to the deed enforce the charge only if it was a beneficiary under the terms of the contract, and it is not claimed that the Bank was a beneficiary under the deed Exhibit D-1. The suit against M.C. Chacko must therefore be dismissed.

The decree passed by the High Court is modified and it is declared that M.C. Chacko is not personally liable for the debt due under the letter of guarantee executed by K.C. Chacko, nor are the properties in Schedule A allotted to M.C. Chacko under the deed dated 21st June, 1951, liable to satisfy the debt due to the Kottayam Bank under the letter of guarantee.

Having regard to the circumstances of the case and specially that a concession that persons not parties to a contract may enforce the benefit reserved to them under the Contract, was made before the High Court, we direct that the parties to this appeal will bear their respective costs throughout.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—J.C. SHAH AND G.K. MITTER, JJ.

Ratan Lal Shah

... Appellant*

v.

Firm Lalman Das Chhadamma Lal and another

... Respondents.

Civil Procedure Code (V of 1908), Order 41, rule 4—Object of—One of the parties to a suit filing an appeal—If can be given relief on grounds common to him and to other parties who are not parties in the appeal.

The object of the rule enunciated in Order 41, rule 4, Civil Procedure Code, is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The appellate Court in such an appeal may vary or reverse the decree in favour of all the parties who are in the same interest as the appellant. Relief can be given to the appellant

1. (1915) A.C. 847.

3. (1911) L.R. 39 I.A. 7: 21 M.L.J. 1153.

2. (1910) L.R. 37 I.A. 152: 20 M.L.J. 614.

*C.A. No. 1099 of 1966.

even in the absence of a person against whom a decree has been passed on a ground common with the appellant.

Karam Singh Sobti and another v. Shri Pratap Chand and another, (1964) 4 S.C.R. 647, followed.

Appeal by Special Leave from the Judgment and Decree dated the 10th July, 1963, of the Allahabad High Court in First Appeal No. 16 of 1953.

C.B. Agarwala, Senior Advocate, (*K.P. Gupta*, Advocate, with him), for Appellant.

B.C. Misra, Senior Advocate, (*O.P. Gupta*, *Ram Prakash Agarwal* and *Sultan Singh*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Shah, J.—Firm Lalman Das Chhadamma Lal hereinafter called ‘the plaintiffs’—commenced an action against “Mohan Singh Ratan Lal, through its partners Mohan Singh and Ratan Lal”, in the Court of the Senior Civil Judge, Nainital, for a decree for Rs. 12,883 and interest thereon for value of goods supplied. Ratan Lal denied liability for payment of the amount claimed. Mohan Singh by a separate written statement admitted that goods were supplied by the plaintiffs to the firm, but submitted that he was liable only for one-fifth of the amount claimed. The Trial Judge decreed the claim of the plaintiffs in its entirety against “Mohan Singh and Ratan Lal and the firm known as Mohan Singh Ratan Lal.”

Against the decree, Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as the second respondent in the appeal. The notice of appeal sent to Mohan Singh was returned unserved and an application made by Counsel for the appellant to serve Mohan Singh “in the ordinary course as well as by registered post” was not disposed of by the Court. On 9th July, 1963, Ratan Lal applied that it was “detected that there had been no service of the notice of appeal upon Mohan Singh and it was essential for the ends of justice that notice of appeal may be served upon Mohan Singh.” The Court by order dated 10th July, 1963 rejected the application and proceeded to hear the appeal. The Court was of the view that since there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final, Ratan Lal could not claim to be heard on his appeal. The High Court observed :

“If we hear him (Ratan Lal) the result may be that on the success of his appeal there will be two conflicting decisions between the “same parties in the same suit based on the same cause of action. Further more, the appellant has not taken steps to serve the second respondent (Mohan Singh) and the appeal must be dismissed for want of prosecution. On both these grounds we dismiss this appeal.”

Against the order passed by the High Court, this appeal has been preferred with Special Leave.

In our view the judgment of the High Court cannot be sustained. The appeal could not be dismissed on the ground that Mohan Singh was not served with the notice of appeal, nor could the appeal be dismissed on the ground that there was a possibility of two conflicting decrees. Order 41, rule 4 of the Code of Civil Procedure provides :

“Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs, or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.”

The object of the rule is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. There was some conflict of judicial opinion in the High Courts on the question whether power under Order 41,

rule 4 of the Code of Civil Procedure may be exercised where all the parties against whom a decree is passed on a ground which is common to them are not impleaded in the appeal. The preponderance of authority in the High Courts was that even in the absence of a person against whom a decree has been passed on a ground common with the appellant, the appeal was maintainable, and appropriate relief may be granted. It is, however, unnecessary to examine those decisions for, in our judgment, the question has been considered by this Court in *Karam Singh Sobti and another v. Shri Pratap Chand and another*¹. In that case a landlord of certain premises filed an action in ejectment against the tenant and the sub-tenant in respect of premises on the ground that the tenant had sub-let the premises without the landlord's consent. The Trial Judge decreed the suit holding that the landlord had not acquiesced in the sub-letting. The sub-tenant alone appealed to the Additional Senior Subordinate Judge who set aside the order of the Trial Court. It was urged before this Court that the appeal by the sub-tenant to the Subordinate Judge was incompetent, because the tenant against whom a decree in ejectment was passed had not appealed. On certain questions which are not material for the purpose of this judgment, there was difference of opinion between Sarkar, J., on the one hand, and S.K. Das, Acting C.J., and Hidayatullah J., on the other, but the Court unanimously held in that case that the appeal was maintainable before the Subordinate Judge, even though the tenant had not appealed against the order of the Court of First Instance. Sarkar, J., observed at p. 663 :

"The suit had been filed both against the tenant and the sub-tenant, being respectively the Association and the appellant. One decree had been passed by the trial Judge against both. The appellant had his own right to appeal from that decree. That right could not be affected by the Association's decision not to file an appeal. There was one decree and, therefore, the appellant was entitled to have it set aside even though thereby the Association would also be freed from the decree. He could say that that decree was wrong and should be set aside as it was passed on the erroneous finding that the respondent had not acquiesced in the sub-letting by the Association to him. He could challenge that decree on any ground available. The lower appellate Court was, therefore, quite competent in the appeal by the appellant from the joint decree in ejectment against him and the Association, to give him whatever relief he was found entitled to, even though the Association had filed no appeal."

With that view S.K. Das, Acting C.J., and Hidayatullah, J., agreed : see page 652. It is true that in that case the tenant was made a party to the appeal before the Subordinate Judge. But the judgment of the Court proceeded upon a larger ground that the sub-tenant had a right to appeal against the decree passed against him and that right was not affected by the tenant's decision not to file an appeal.

Counsel for the plaintiffs contended that the appeal filed by Ratan Lal if it be heard may possibly result in an order which may prejudicially affect Mohan Singh, and if Mohan Singh has no opportunity of being heard no decree may be passed against him, for to do so would be contrary to the fundamental rules of natural justice. But in the appeal filed by Ratan Lal there is no possibility of a decree being passed which may impose a more onerous liability upon Mohan Singh. The Trial Court has passed a decree against Ratan Lal and Mohan Singh jointly and severally. Mohan Singh is liable for the full amount of the claim of the plaintiffs. If the appeal filed by Ratan Lal succeeds, the Court may reduce the liability of Mohan Singh, but there may conceivably be no order by the Court operating to the prejudice of Mohan Singh in the appeal.

It was also urged by Counsel for the plaintiffs that Ratan Lal had been negligent in the High Court in prosecuting the appeal, and it would be putting a premium upon his negligence to allow him now to prosecute the appeal. It is not possible on the record, as it stands, to say whether failure to serve notice of appeal upon Mohan Singh was wholly attributable to the negligence of Ratan Lal. But even if

it be assumed that he was negligent, on that ground he cannot be deprived of his legal right to prosecute the appeal and to claim relief under Order 41, rule 4 of the Code of Civil Procedure, if the circumstances of the case warrant it, the decree of the Trial Court proceeded on a ground common to Mohan Singh and Ratan Lal. In the appeal filed by Ratan Lal he was denying liability for the claim of the plaintiffs in its entirety. This was essentially a case in which the Court's jurisdiction under Order 41, rule 4, Code of Civil Procedure could be exercised.

The appeal is allowed and the decree passed by the High Court is set aside. The proceedings are being remanded the High Court will admit the appeal in its original number and hear and dispose of it according to law. There will be no order as to costs in this Court of this appeal. In view of the fact that there has been some negligence on the part of Ratan Lal to prosecute the appeal in the High Court, we direct that he will pay the costs of the appeal in the High Court in any event.

R.M.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. S. HEGDE AND A. N. RAY, JJ.

Jitendra Bahadur Singh

... *Appellant**

v.

Krishna Bahari and others

... *Respondents.*

*Representation of the People Act (XLIII of 1951), section 92 (a)—Election petition—
—Inspection of ballot papers—When may be permitted.*

The basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers are : (1) the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case, and (2) the tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary.

The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition and must be points of substance and not of mere form.

The election tribunals in this country have uniformly refused to permit the scrutiny of ballot papers unless there was *prima facie* evidence in support of the allegations made in the election petition.

The trial Court in the instant case correctly came to the conclusion that before an order of inspection of the ballot papers can be made it must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. It did say that it was so satisfied but it gave no reasons whatsoever as to how it came to be satisfied. A judge can be satisfied only on the basis of proof and not on the basis of mere allegations. There is absolutely no proof in this case to support the allegations on the basis of which the scrutiny of the ballot papers was prayed for. The trial Court did not mention in its order even a single reason in support of its satisfaction as to the need for inspecting ballot papers. Every judicial order must be based on reasons and reasons must be disclosed in the order itself. Unfortunately the learned trial Judge had overlooked the importance to be attached to the secrecy of the ballot papers.

Appeal by Special Leave from the Judgment and Order dated the 21st May, 1968 of the Allahabad High Court, Lucknow Bench in Civil Misc. Applications Nos. 41 (E) and 42 (E) of 1968 in Election Petition No. 7 of 1967.

* C.A. No. 1483 of 1968.

C. B. Agarwala, Senior Advocate (*V. P. Joshi* and *S. S. Khanduja*, Advocates, with him), for Appellant.

G. N. Dikshit, *R. N. Dikshit* and *O. P. Saini*, Advocates, for Respondents Nos. 1 and 9.

The Judgment of the Court was delivered by

Hedge, J.—This appeal by Special Leave is directed against the order made by Sahgal, J., on 21st May, 1968, permitting the 1st respondent, an elector challenging the validity of the election of the appellant to Lok Sabha from 15, Shahabad Parliatary Constituency in the general election held in 1967, to inspect the packets of ballot papers containing the accepted as well as the rejected votes of the candidates.

In the election in question as many as 10 persons contested. The appellant, the Jan Sangh nominee was the successful candidate. The 9th respondent, Shri Nevatia Rameshwar Prasad, the congress nominee was his nearest rival. In the election petition the petitioner not only wants the appellant's election to be held void, he also wants that the 9th respondent should be declared elected. The election of the appellant has been challenged on various grounds, with most of which we are not at present concerned. We are only concerned with the allegations relating to the irregularity in the scrutinising and counting of votes. The averments relating thereto are found in paragraphs 13 and 14 of the election petition. They are as follows :

(1) only one counting agent was permitted at each table whereas three persons were doing the counting work simultaneously and it was impossible for one man to look into and detect the wrong acts of three persons at the same time.

Under this head it was further mentioned that the counting staff was from amongst the Government servants who had gone on two months strike before the election and during the elections they had adopted hostile attitude towards the congress candidates and had made efforts to bring about their defeat ;

(2) the bundles of votes of either candidates were neither properly made nor properly scrutinised ;

(3) about 5,000 votes of the congress candidates were improperly rejected ignoring the protests of Mr. Malhotra, the election agent of the congress nominee ;

(4) invalid votes were counted in favour of the returned candidate. The votes of the congress candidates were counted for the returned candidate.

In Schedule 'E' certain figures showing the alleged improperly rejected as well as accepted votes pertaining to certain booths are mentioned. It also shows the number of votes of the congress nominee counted as the votes of the returned candidate. Neither the petition nor the Schedule discloses the basis for arriving at those figures.

The election petitioner is neither the candidate nor his election agent. In the election petition, it was not stated that he was even the counting agent. In the verification appended to the election petition, it was averred that the allegations contained in paragraphs 12 to 15 of the election petition were believed by the petitioner to be true on the basis of the information received from the workers of the congress nominee and others which means that the allegations made by him in paragraphs 13 and 14 of the election petition were based on hearsay information. He does not and he could not vouchsafe their accuracy though he claims to have believed the information given to him to be correct. Similarly in the verification appended to Schedule 'E', the election petitioner stated that he has given the information contained in that Schedule on the basis of the information received from the counting agents of the congress nominee. Neither in the election petition nor in the Schedule he mentioned that the counting agents had given him the information in question on the basis of any record made by them.

In the affidavit filed by the petitioner in support of his application seeking permission to inspect the ballot papers, he went one step further. Therein he averred that on one of the days when the counting was going on, he acted as one of the

counting agents for the congress nominee. Hence he claims to have personal knowledge of the rejection of some valid votes and the acceptance of some invalid votes. No affidavit of either the congress nominee or his election agent or any of the persons who could have had personal knowledge of the matter was filed in support of that application. No oral evidence has been taken in the case file now. The returned candidate has denied the allegations referred to earlier. It is true that some of the defeated candidates in their written statements have lent support to the allegations made by the election petitioner. The reason for the same is obvious. But even they have not filed any affidavit in support of the concerned allegations. Solely on the basis of the averments made in the election petition and the facts sworn to in the affidavit filed by the election petitioner in support of his application seeking scrutiny of the ballot papers, the trial Court had issued the impugned direction.

Before proceeding to consider the material in support of the impugned order, it is necessary to mention that it is not the case of the election petitioner that any written objection had been filed during the counting either to the acceptance or to the rejection of any vote. In the petition, it is averred that "the Returning Officer on being pointed out by the election agent of respondent No. 9, Shri P.C. Malhotra, said his decision was final and can be questioned through Election Petition." Evidently this averment relates to the objections said to have been taken by Shri Malhotra in respect of the orders made by the returning officer as to the validity of some of the votes. Apart from the fact that the allegation in question is very vague and lacking in details, not even an affidavit of Shri Malhotra has been filed in support of that allegation. Admittedly no application was made to the returning officer for recounting the votes. We have to examine the facts of this case bearing in mind these circumstances.

The importance of maintaining the secrecy of ballot papers and the circumstances under which that secrecy can be violated has been considered by this Court in several cases. In particular we may refer to the decisions of this Court in *Ram Sewak Yadav v. Hussain Kamil Kidwai and others*¹ and *Dr. Jagjit Singh v. Giani Kartar Singh*². These and other decisions of this Court and of the High Courts have laid down certain basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers. They are :

(1) that the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case, and (2) the tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary.

The trial Court was of the opinion that if an election petitioner in his election petition gives some figures as to the rejection of valid votes and acceptance of invalid votes, the same must be considered as an adequate statement of material facts. In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information. It is not his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition. The facts stated in paragraphs 13 and 14 of the election petition and in Schedule 'E' are mere allegations and are not material facts supporting those allegations. This Court in insisting that the election petitioner should state in the petition the material facts was referring to a point of substance and not of mere form. Unfortunately the trial Court has mistaken the

1. (1964) 6 S.C.R. 238.

2. (1967) 1 S.C.J. 762; A.I.R. 1966 S.C.

form for the substance. The material facts disclosed by the petitioner must afford an adequate basis for the allegations made.

The learned Trial Judge while deciding the point in issue overlooked certain important circumstances. The election petition is silent as regards certain important aspects. This omission has bearing on the point to be decided. The allegation that the returning officer did not permit the appellant more than one counting agent for each counting table is an extremely vague allegation. It is not the election petitioner's case that the congress nominee had appointed more than one counting agent for any counting table but the returning officer did not accept their appointment. Under section 47 of the Representation of People Act, 1951, a contesting candidate or his election agent may appoint in the prescribed manner one or more persons but not exceeding such number as may be prescribed by the rules, to be present as his counting agent or agents at the counting of votes and when any such appointment is made notice of the appointment shall be given in the prescribed manner to the returning officer. Rules framed under that Act prescribe the number of counting agents that a candidate may appoint. The form of the notice required to be given under section 47 of the Act is given in the rules. The appointment of the counting agents is to be made in the prescribed form in duplicate, one copy of which is to be forwarded to the returning officer while the other copy should be made over to the counting agent. Rules also provide that no counting agent shall be admitted into the place fixed for counting unless he has delivered to the returning officer the second copy of the instrument of his appointment after duly completing and signing the declaration contained therein. The petitioner did not state in the election petition that any of the counting agents appointed by the congress candidate or his election agent in accordance with the rules had been refused admission to the place of counting. Hence the allegation that the returning officer did not permit enough number of counting agents to be appointed is not supported by any statement of facts necessary to be stated. In other words the material facts relating to the allegations made have not been stated.

Now coming to the rejection of the votes polled in favour of the congress nominee, under the rules before a vote is rejected the agents of the candidates must be permitted to examine the concerned ballot paper. Therefore it was quite easy for them to note down the serial number of the concerned ballot papers. The election petition is silent as to the inspection of the ballot papers or whether the counting agents had noted down the serial numbers of those ballot papers or whether those agents raised any objection relating to the validity of those ballot papers; if so who those agents are and what are the serial numbers of the ballot papers to which each one of them advanced their objections. These again are the material facts required to be stated.

As seen earlier the allegations made in the election petition are purported to have been founded on the informations given by others. No one takes direct responsibility for those allegations. No oral evidence was given in support of them, not even affidavits were filed in support of the allegations. The scrutiny of ballot papers was sought on the basis of assertions which were neither accompanied by a statement of material facts nor supported by any evidence.

The trial Court correctly came to the conclusion that before an order of inspection of the ballot papers can be made it must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. It did say that it was so satisfied but it gave no reasons whatsoever as to how it came to be satisfied. A judge can be satisfied only on the basis of proof and not on the basis of mere allegations. There is absolutely no proof in this case to support the allegations on the basis of which the scrutiny of the ballot papers was prayed for. The trial Court did not mention in its order even a single reason in support of its satisfaction as to the need for inspecting the ballot papers. Every judicial order must be based on reasons and those reasons must be disclosed in the order itself. Unfortunately the learned Trial Judge had overlooked the importance to be attached to the secrecy of the ballot papers.

We have earlier referred to the principles enunciated by this Court to be followed before ordering the scrutiny of ballot papers. The legal position in England is the same as in this country. In fact our election law is patterned on the basis of the English Election Law. In Halsbury's Laws of England (Volume 14 at page 310, paragraph 559), it is observed :

"The usual practice is for an application for a recount to be made by summons to a judge on the rota for the trial of parliamentary election petitions before the trial on an affidavit showing the grounds on which the application is based. A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer."

In Rogers on Elections (Vol. II at p. 199), it is observed that an application for recount should be made by summons supported by affidavits showing grounds. Fraser in his Law of Parliamentary Elections and Election Petitions observes at page 222 :

"A strong case must be made on affidavit before an order can be obtained for inspection of ballot papers or counterfoils."

Even before the Representation of the People Act, 1951, was enacted the law in this country relating to inspection of ballot papers was as stated earlier. The election tribunals in this country have refused to permit the scrutiny of ballot papers unless there was *prima facie* evidence in support of the allegations made in the election petition—see *Tanjore, N.M.R.*,¹ *Punjab North Case*,² *Karnal Mohammanan Constituency Case*,³ *Karnal (South) General Constituency Case*,⁴ *Chingleput Case*⁵ see also *R. Swaminath's case*,⁶ *Seshaiiah v. Koti Reddi*⁷ and *Lakshumanayya v. Rajam Aiyar*⁸.

For the reasons mentioned above we allow this appeal and set aside the order made by the learned trial judge. He will now proceed with the trial of the case in accordance with law. The 1st respondent, the election petitioner shall pay the costs of the appellant in this appeal.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice* AND G.K. MITTER, J.

Mst. Ayesha Bibi

... *Appellant**

v.

The Commissioner of Wakf, West Bengal and others

... *Respondents.*

Bengal Wakf Act (XIII of 1934), section 70 (1) and (4)—Scope of—Notice to Commissioner, if necessary even where the Commissioner is a party to the suit—Application for declaring a decree void—Limitation for—Computation—Notice—What amounts to.

Wakfs Act (XXIX of 1954), section 57 (1) and (3)—Scope.

Under the Bengal Wakfs Act the Commissioner has a definite duty to perform in all suits in which the interests of the wakf are involved. Where the Commissioner was made a party to a suit praying for a declaration that a wakf was invalid, inoperative and void, and he contested the suit, it is clear he had notice of the suit. The fact that subsequently the Commissioner was given up as a party and he agreed that his name may be struck off as a defendant and the suit was compromised and a decree of declaration that the wakf was invalid and void was passed, does not mean that the Commissioner had no notice of the suit or decree.

It is no doubt true that sub-section (1) of section 70 of the Act requires that in every suit or proceedings in respect of any wakf property the Court shall issue a

1. *Hammond's Election Cases* 673.

2. *Hammond's Election Cases* 569.

3. 2 *Doabia* 235.

4. 2 *Doabia* 80.

5. *Hammond's Election Cases*, 307.

* C.A. No. 579 of 1966.

6. 2 *E.L.R.* 51.

7. 3 *E.L.R.* 39.

8. (1930) 58 *M.L.J.* 118; *A.I.R.* 1930 *Mad.* 195.

notice to the Commissioner. But where the Commissioner is a party defendant in the suit and he has actually appeared in the suit, it is equivalent to a notice under section 70 (1) of the Act. While it is true that the mere fact that the Commissioner had private knowledge in some capacity or other of the proceedings is not enough to constitute notice under section 70 (1), where he has been made a party to the suit and he had knowledge of its compromise, there is no need to give another special notice under the section.

State Wakf Board, Madras v. Abdul Azeez Sahib and others, (1967) 1 M.L.J. 190 : A.I.R. 1968 Mad. 79, Explained.

Muzafar Ahmed v. Indra Kumar Das and others, (1943) 77 Cal. L.J. 159, Dissented and doubted.

The Commissioner of Wakfs, Bengal v. Shahbzada Mohammed Zahangir Shah, (1942) 46 C.W.N. 157, followed.

Section 70 (1) enables the Commissioner to have a decree declared void only if he had no notice of the proceedings and he had no prior knowledge of the suit. Where the Commissioner had knowledge of the suit he cannot claim a second knowledge as the start of limitation. The notice contemplated under section 70 (1) may be given better by a letter from the Court or by way of service of summons where he was a party to the suit. The fact that he was later struck off from the suit to which course he did not object and the suit was decreed thereafter cannot entitle the Commissioner to file an application under sub-section (4) to set aside the decree that he had no notice of the compromise petition.

Appeal by Special Leave from the Judgment and Order dated the 20th August, 1964, of the Calcutta High Court in Civil Rule No. 1715 of 1961.

D.N. Mukherjee, Advocate, for Appellant.

B.C. Mitter and S.C. Majumder, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Hidayatullah. C. J.—This is an appeal by Special Leave from the judgment and order of the High Court of Calcutta, 20th August, 1964, in an application under section 115 of the Code of Civil Procedure, reversing the judgment of the Subordinate Judge, Howrah. The facts are as follows :

One Haji Abdul Karim, grandfather of respondents 2 to 4 executed a Wakf-al-aulad on 30th March, 1917. He constituted himself as the first Mutwali and named his two sons and widow as Mutwalis after his own death. The Wakf provided for the benefit of the family and after the extinction of all the family a scheme for feeding the poor. On 14th February, 1956, the present appellant Ayesha Bibi filed a suit claiming 1/16th of the property as a sharer after the death of her husband Abdul Hamid. This claim was made against respondents 2 to 4 who were the Mutwalis. Ayesha Bibi joined the Commissioner of Wakfs, West Bengal as a defendant to the suit. The suit was filed in the Court of Munsif, Howrah and reliefs claimed were a declaration that the Wakf was invalid, inoperative and void and that its enrolment in the Wakf Office was wrongly done and was of no avail. She also asked for a permanent injunction restraining the Commissioner of West Bengal and other respondents from interfering with the possession of the property. The Commissioner of Wakfs appeared in answer to the notice of the suit and filed a written-statement on 4th April, 1956. He contended that the properties were governed by the Wakf which was valid and also that he was entitled to a notice under section 80 of the Code of Civil Procedure before the suit was filed. He stated that although he was entitled to a notice under section 70 (1) of the Bengal Wakfs Act, 1934, it was not necessary to add him as a defendant and he denied collusion between himself and the other defendants. He observed that the other defendants were interested in secularising the wakf property for their own selfish ends.

On 15th November, 1957, an application for amendment of the relief against the Wakf Commissioner was made to which the Wakfs Commissioner objected. In his objections, he stated that the suit was of a collusive nature as was apparent from

the nature of the pleadings of the plaintiff and defendants other than himself. The petition, however, was allowed. No action was taken by the Commissioner to get that order set aside. On 15th May, 1958 the parties to the suit, other than the Commissioner, filed an application of compromise and 22nd May, 1958, was fixed for decision. On the same day an application for striking off the name of the Commissioner from the array of the defendants was made. This was heard in the presence of the Counsel for the Commissioner and he did not object to the name being struck off. As a result the name of the Commissioner was struck off as a defendant. The suit was also decreed the same day on compromise declaring the Wakf to be invalid and void and granting a perpetual injunction.

On 20th June, 1958, the Commissioner made an application under section 70 (4) of the Act for a declaration that the decree was void as no notice was given to him under section 70 (1) of the Act. The appellant objected but on 20th April, 1960, the Munsif allowed the application and declared the decree to be void. The Commissioner appealed to the Court of the Subordinate Judge, Howrah and the appeal was allowed. It was held that the application under section 70 (4) was incompetent as the Commissioner was present in the suit and the compromise decree was passed with the knowledge of the Commissioner and there was no need for a fresh notice to him under section 70 (1) of the Act. The Commissioner then filed a revision under section 115, Civil Procedure Code, and a learned Single Judge of the High Court by order, now under appeal, reversed the decision of the Subordinate Judge and restored the decree of the Munsif. The order is challenged in this appeal.

Before we consider the question whether the Commissioner's application under section 70 (4) was proper it is necessary to examine the scheme of the Wakf Act. The Act was passed to make provision for proper administration of Wakf properties in Bengal. It applies to all wakfs whether created before or after the commencement of the Act, any property of which is situated in Bengal. By Chapter II a Wakf Board is constituted and a whole-time Officer called the Commissioner of Wakfs is appointed. Chapter III lays down the functions of the Board and the Commissioner and one of the functions under section 34 is the protection of Wakfs-al-al-aulad. Chapter IV deals with the enrolment of the Wakfs for which purpose a register of Wakfs is maintained. Under section 45 the Commissioner has the power to enroll wakfs and also to amend the register from time to time. Under section 46-A the decision of the Commissioner is final subject to a decision of a competent Court. Chapter V deals with wakf accounts and Chapter VI with statements of Wakfs-al-al-aulad. Chapter VII creates a bar to transfer of immovable property of wakfs. Chapter VIII lays down the duties of Mutwalis with other ancillary matters. Chapter IX deals with finance and Chapter X deals with judicial proceedings. Chapters XI, XII and XIII deal with amendment and appeals, rule-making power of the Provincial Government and power of the Board to make bylaws and include some miscellaneous provisions.

We are concerned in this case with Chapter X which deals with judicial proceedings. Section 69 in this Chapter provides as follows :

"69. Bar to compromise of suit or proceeding without sanction of Court. No suit or proceeding by or against a Mutwali as such in any Court shall be compromised without the sanction of the trying Court."

Section 70 then provides :

"70. Notice of suits, etc., be given to the Commissioner.

(1) In every suit or proceeding in respect of any wakf property or of a mutwali as such except a suit or proceeding for the recovery of rent by or on behalf of the mutwali the Court shall issue notice to the Commissioner at the cost of the party instituting such suit or proceeding.

(2) Before any wakf property is notified for sale in execution of a decree, notice shall be given by the Court to the Commissioner.

(3) Before any wakf property is notified for sale for the recovery of any revenue, cess, rates or takes due to the Crown or to local authority notice shall be

given the Commissioner by the Court, Collector or other person under whose order the sale is notified.

(4) In the absence of a notice under sub-section (1) any decree or order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of his coming to know of such suit or proceeding, applies to the Court in this behalf.

(5) In the absence of a notice under sub-section (2) or sub-section (3) the sale shall be declared void, if the Commissioner within one month of his coming to know of the sale, applies in this behalf to the Court, or other authority under whose order the sale was held."

Section 71 enables the Commissioner to join as a party in any litigation on his own application and to conduct or defend certain suits or proceedings on behalf of or in the interest of the wakf.

It will be noticed from the analysis of the Act that the Commissioner has a definite duty to perform in all suits in which the interests of the wakf are involved. Sub-section (1) of section 70 requires that in every suit or proceedings in respect of any wakf property the Court shall issue a notice to the Commissioner. This was done here because the Commissioner was a party and a summons had gone to him from the Court. It is contended before us that this was a not notice but only a summons but we think that nothing much turns upon the distinction. The Commissioner had notice of the proceedings. He appeared in the case, defended the wakf, characterised the suit as collusive and he was fully cognizant of all that was happening in the suit. The learned Judge in the High Court also held that there was no need to give the Commissioner another notice under sub-section (1) because the Commissioner had already notice of the suit.

The question, therefore, is whether in the absence of a notice under sub-section (1) the decree could be declared to be void. Here the argument of the Commissioner in the High Court was that he had been removed from the array of the defendants and that he was, therefore, entitled to a special notice of the petition of compromise in the case. It is to be noticed that section 70 speaks of several special notices, such as, in sub-section (2) before any wakf property is notified for sale in execution of a decree, or in sub-section (3) before any wakf property is notified for sale for the recovery of any revenue, cess, rates or taxes, but it does not provide for any special notice of a petition for compromise of a suit except the first notice that a suit had been filed in the Court. It is significant that in section 69 although compromise cannot be made without the sanction of the trying Court, there is no mention of any special notice to the Commissioner. It follows, therefore, that the Commissioner was entitled to a notice of the suit. That may be by a letter from the Court giving him this notice, or, if he was made a party, by a summons to attend the Court. In the present case the second course was followed and a copy of the plaint must have accompanied the summons and in our opinion this was sufficient compliance with the provisions of the first sub-section of section 70. It is to be recalled that the Commissioner did appear, filed a written-statement, contested the suit and also described it as a collusive action between the plaintiff and the other defendants. It is, however, surprising that when an application was made for striking off his name from the array of the defendants the Commissioner agreed to such course. This meant that in spite of notice to him of the collusive nature of the suit he was content to remain outside the suit and to give up all his pleas about the wakf and the collusive nature of the suit. Having so acted it seems difficult to think that the decree could be declared void simply because the Commissioner had no special notice of the compromise. No special notice of compromise petition is required to be issued under the Act. He had notice of whole of the suit and of the claim made by the plaintiff in the case. He was afforded an opportunity to resist the suit and, in fact, resisted it but later gave up the fight and agreed to go out of the suit. In these circumstances, it will be wrong to hold that the decree was void because the Commissioner was not given a notice of the compromise petition.

Learned Counsel for the Commissioner relied strongly upon a decision of the Madras High Court reported in *State Wakf Board, Madras v. Abdul Azeez Sahib and others*¹, in which the decision in the present case was noticed and applied for declaring a decree void. In that case the Counsel for the representatives of Wakf Board, Mr. Sherfuddin was also for some time the Chairman of the Wakf Board and his knowledge of the suit was attributed to the State Wakf Board and it was held that there was notice as required by section 57 (1) of Wakf Act, 1954 (XXIX of 1954), section 57 (1) of that Act read :

“In every suit or proceeding relating to title to wakf property.....the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding.”

Under section 57 (3) it was further provided :

“In the absence of a notice under sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf.”

Under the third sub-section quoted here the application had to be made within one month of the knowledge of the Board and it was held by the trial Judge that knowledge of Mr. Sherfuddin was knowledge of the Board and the application was delayed. Reversing this decision the learned Chief Justice of Madras held that knowledge of Mr. Sherfuddin was not the knowledge of the Chairman of the State Wakf Board and could not be held to constitute knowledge within the section. According to the learned Chief Justice the knowledge which started limitation for the application was official knowledge in his capacity as a Chairman and not in his capacity as Counsel. This case is thus distinguishable. Here the Commissioner of Wakfs Board was made a party and had full notice of the pendency of the suit and that it was a collusive suit between the plaintiff and the Mutwalis. It cannot be said, therefore, that he had no knowledge or that he had no notice of the proceedings. Indeed the learned Chief Justice of Madras while relying upon the decision in the present appeal also said that the facts of the two cases were quite different and the main point involved was also different. He only relied upon a passage that in the judgment of the learned Judge of the Calcutta High Court the private knowledge of the Commissioner did not exonerate the Court from its obligation to give notice to the Board. There is no question here of any private knowledge. The knowledge was provided by the summons to the Commissioner and he did appear in the case. In the other case there was no notice whatever from the Court, nor even summons and it is thus clearly distinguishable.

The learned Counsel further relied upon *Muzafar Ahmed v. Indra Kumar Das and others*². In that case the Commissioner was sent a notice but was not made a party. The suit was dismissed. In the appeal that followed the Commissioner was not made a party and no notice of appeal was served on him. The appeal was allowed. In the second appeal a ground was taken that the appeal below was incompetent, as there was no notice to the Commissioner. Notice of the second appeal was, however, issued to the Commissioner. The decree was held to be not void but voidable and as the Commissioner had not applied within a month, the decree was allowed to stand. The Court also held that the words ‘suit or proceeding’ in section 70 (4) did not include an appeal. There is much in this decision which may require careful consideration. It is sufficient to say that the decision does not support the present contention of the Commissioner.

*Benoy Kumar Acharies Choudhury and others v. Ahamma Ali and another*³, only lays down that under section 70 of the Act, a notice is necessary to be served on the Commissioner in a suit in respect of wakf property even though the wakf may not be admitted. To this proposition no exception can be taken but it does not advance the case of the Commissioner.

1. (1967) 1 M.L.J. 190 : A.I.R. 1963 Mad. 79.

2. (1943) 77 C.L.J. 159.

3. (1942) 46 C.W.N. 339.

On the other hand, in *The Commissioner of Wakfs, Bengal v. Shahbada Mohammed Zahangir Shah*¹, it was held that although a Commissioner was entitled to a notice of a suit, under section 70 of the Wakf Act, but if he actually contested the suit as a party-defendant, he could be treated as an intervener under section 71, even if no notice was given to him and that the suit was not vitiated. This case supports the proposition that joining the Commissioner as a party and his actual appearance in the suit stand equal to a notice under section 70 (1).

None of the cases really supports the proposition now contended for before us. The language of the fourth sub-section of section 70 is quite clear that the Commissioner must not have knowledge previously of the suit. Where the Commissioner has knowledge of the suit he cannot claim a second knowledge as the start of limitation. In other words, his presence as a party in the suit after summons to him must be treated as a notice to him under the first sub-section of section 70. The decision of the Subordinate Judge was thus correct and was wrongly reversed.

The Commissioner attempted to raise the question of a notice under section 80 of the Code of Civil Procedure but that question could only arise in the original suit and not in these proceedings. In the result the judgment under appeal must be set aside and that of the Subordinate Judge, Howrah restored with costs against the Commissioner. We regret this result and only hope that some way will be found out of the difficulty created by the foolish action of the Commissioner in leaving the field clear for the compromise of the suit.

R. M.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND G. K. MITTER, JJ.

Maganti Subrahmanyam (dead) by his legal representatives ... Appellant,*

v.

The State of Andhra Pradesh ... Respondent.

Andhra Pradesh (Andhra Area) Estates Communal Forest and Private Lands (Prohibition of Alienation) Act (1947) and Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Effect—Later enactment, if repeals the earlier one—Section 2 (b) and section 4 (1) and (3)—Forest land,—Meaning of.

It is no doubt true that the Preamble to the Andhra Pradesh (Andhra Area) Estates Communal Forest and Private Lands (Prohibition of Alienation) Act, 1947, shows that it was enacted to prevent indiscriminate alienation of communal forest and private lands pending enactment of legislation for acquiring the interests of landholders in such estates and introducing ryotwari settlement therein. No fixed duration of the Act was specified and it is impossible to hold that merely because of the preamble the Act is only a temporary Act. The enactment of the later Act, the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 cannot be considered as repealing the earlier Act merely because the later Act has the effect of repealing permanency settlements in the State and the acquisition of the interests of landholders in permanently settled and certain other estates.

The definition of 'forest land' in section 2 (b) of the Act is an inclusive one and it does not mean that before a piece of land could be said to be forest land there would have to be a notification by the Government under the Act. The District Judge is the competent authority under section 4 of the Act to determine disputes as to the nature of the land.

Appeal by Special Leave from the Judgment and Order dated the 24th March, 1965 of the Andhra Pradesh High Court in Civil Revision Petition No. 966 of 1962.

A. V. V. Nair, Advocate, for Appellant.

P. Ram Reddy, Senior Advocate (*B. Parthasarathy*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Mitter, J.—This appeal by Special Leave is from a common judgment and order of the High Court of Madras disposing of three Revision Applications arising out of O.P. No. 95 of 1948 filed under section 4 (3) and (4) of the Andhra Pradesh (Andhra Area) Estates Communal Forest and Private Lands (Prohibition of Alienation) Act, 1947 (hereinafter called the 'Act').

The central question in this appeal is, whether certain transfers of lands alleged to be forest lands made by the 6th respondent herein become void and inoperative under section 4 of the Act. The said respondent who was a big landholder granted a patta to his wife, 7th respondent, for Ac. 100-00 of land on 9th November, 1944. Another patta was similarly granted to the appellant in respect of Ac. 90-00 of land on 25th November, 1944. On the same day, respondent No. 6 granted a third patta for Ac. 200-00 of land to respondents 2 to 5. The Act came into force on 25th October, 1947. On 15th October, 1948 Original Petition No. 95 of 1948 was filed in the District Court of Eluru by two ryots for a declaration that the alienations were void and did not confer any rights on the alienees. Thereafter the said petition was split into two parts, O.P. No. 95 of 1948 being directed against respondents 1 to 6 while O.P. No. 95-(a) of 1948 was directed against the 7th respondent. The petitions were disposed of by an order of the District Judge dated 18th July, 1950 holding that lands covered by the pattas were forest lands and all the alienations were void and inoperative. A Civil Revision Petition was filed in the High Court of Madras by respondents 1 to 5 against the order of the District Judge. This was numbered as C.R.P. No. 22 of 1951. Respondent No. 7 filed a Miscellaneous Petition No. 9534 of 1950 in the High Court of Madras. By order dated 6th August, 1962 both the petitions were dismissed by a single Judge of the Madras High Court. This order was however set aside in a Letters Patent Appeal filed by respondents 1 to 5 (No. 261 of 1952) wherein it was held that the petitioners as ryots had no right to get transposed as the petitioner. The State Government thereafter got itself transposed as the petitioner. The District Court however held that the petition was not maintainable by reason of the repeal of the Act by reason of the passing of a subsequent Act (XXVI of 1948) styled the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, hereinafter referred to as the Act of 1948. Against this the State Government filed a Revision Petition in the High Court of Andhra Pradesh numbering 1555 of 1955. The High Court held that the dismissal of the petition on the ground of repeal of the Act was improper and that the petition should be disposed of on the merits and remitted the matter to the District Judge. By a judgment dated 30th November, 1960 the District Judge allowed the petition negating the contentions of the respondent but holding that the lands were forest lands and transfers thereof were void. The appellant and others filed Civil Revision Petitions in the High Court of Andhra Pradesh which were disposed of and dismissed by a common judgment dated 24th August, 1965. Hence this appeal.

The points urged before us by learned Counsel for the appellant were: (1) The Act applied only to lands which were admittedly forest lands and the operation thereof could not be extended to lands in respect of which there was a dispute as to the nature thereof. It was argued that any such dispute could only be decided by the Settlement Officer and not by the District Judge. (2) The Act was a temporary Act and all proceedings thereunder came to an end with the repeal of the Act; and (3) A notification by the State Government describing the land as forest land was an essential pre-requisite to the application of the Act.

The purpose of the Act was to prohibit the alienation of communal, forest and private lands in estates in the Province of Madras and the preamble to the Act shows that it was enacted to prevent indiscriminate alienation of communal, forest

and private lands in estates in the Province of Madras pending the enactment of legislation for acquiring the interests of landholders in such estates and introducing ryotwari settlement therein. No fixed duration of the Act was specified and it is impossible to hold that merely because of the above preamble the Act became a temporary Act., the definition of 'forest land' is given in section 2 (b) of the Act reading :

“ 'Forest land' includes any waste land containing trees and shrubs pasture land and other class of land declared by the State Government to be forest land by notification in the Fort Samy. George Gazette ; ”

Sub-section (1) of section 3 prohibited landholders from selling, mortgaging, converting into ryoti land, leasing or otherwise assigning or alienating any communal or forest land in an estate without the previous sanction of the District Collector. on or after the date on which the Ordinance which preceded the Act came into force, namely, the 27th June. 1947. Section 4 (1) provided that :

“ Any transaction of the nature prohibited by section 3 which took place. in the case of any communal or forest land, on or after the 31st day of October, 1939 . . . shall be void and inoperative and shall not confer or take away, or be deemed to have conferred or taken away, any right whatever on or from any party to the transaction :

* * * * *

This sub-section had a proviso with several clauses. Our attention was drawn to clauses (iii), (iv) and (v) of the proviso out in our opinion one of these provisos was applicable to the facts of the case so as to exclude the operation of sub-section 1 of section 4 Under sub-section (3) of section 4.

“ If any dispute arises as to the validity of the claim of any person to any land under clauses (i) to (v) of the proviso to sub-section (1), it shall be open to such person or to any other persons interested in the transaction or to the State Government to apply to the District Judge of the district in which the land is situated, for a decision as to the validity of such claim.”

Under sub-section (4) the District Judge to whom such application is made was to decide whether the claim to the land was valid or not after giving notice to all persons concerned and where the application was not made by the State Government, to the Government itself. and his decision was to be final. Madras Act (XXVI of 1948) was passed on 19th April, 1949 being an Act to provide for the repeal of the Permanent Settlement, the acquisition of the rights of landholders in permanently settled and certain other estates in the Province of Madras, and the introduction of ryotwari settlement in such estates. Apparently because of the preamble to the Act it was contended that with the enactment of the repeal of the Permanent Settlement by the Act of 1948 which also provided for the acquisition of the rights of landholders in permanently settled estates, the Act stood repealed. We fail to see how because of the preamble to the Act it can be said that it stood repealed by the enactment of the later Act unless there were express words to that effect or unless there was necessary implication. It does not stand to reason to hold that the alienation of large blocks of land which were rendered void under the Act became good by reason of the passing of the later Act. Our attention was drawn to section 63 of the later Act which provided that :

“ If any question arises whether any land in an estate is a forest or is situated in a forest, or as to the limits of a forest, it shall be determined by the Settlement Officer, subject to an appeal to the Director within such time as may be prescribed and also to revision by the Board of Revenue.”

In terms the section was only prospective and it did not seek to impeach any transaction which was effected before the Act and was not applicable to transactions anterior to the Act. In our opinion section 56 (1) of the later Act to which our attention was drawn by the learned Counsel does not fall for consideration in this case and the disputes covered by that section do not embrace the question before us.

Madras General Clauses Act (I of 1891), deals with the effect of repeals of statutes. Section 8 sub-section (f) thereof provides that :

“Where any Act, to which this Chapter applies, repeals any other enactment, then the repeal shall not—

(a) to (c)

* * *

(f) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such fine, penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.”

This shows that even if there was a repeal any investigation started before the repeal would have to be continued and legal proceedings under the Act could be prosecuted as if the repealing Act had not been passed.

There is also no force in the contention that unless there was a notification under section 2 (b) of the Act declaring a particular land to be forest land, the applicability of the Act would be excluded. The definition of ‘forest land’ in that section is an inclusive one and shows that ‘forest land’ would include not only waste land containing trees, shrubs and pasture lands but also any other class of lands declared by Government to be forest land. This does not mean that before a piece of land could be said to be forest land there would have to be a notification by the Government under the Act.

Lastly, Counsel contended that sub-section (1) of section 20 of the later Act as originally enacted applies to forest lands and therefore the later Act became applicable thereto. The original section was however substituted, for another by section 9 of the Madras Estates (Abolition and Conversion into Ryotwari) (Amendment) Act, 1956 which was to be deemed to have come into force on 19th April, 1949, being the date on which the Act of 1948 originally came into force. The section as it now stands did not confer any jurisdiction on the Settlement Officer to determine any question as to whether any land was forest land within the meaning of the Act and consequently the adjudication by the District Judge under sub-section (4) of section 4 was quite competent. Accordingly we dismiss the appeal, but do not think it necessary to make any order for costs relating thereto.

R.M.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—M. Hidayatullah *Chief Justice.*, J. C. SHAH, V. RAMASWAMI, G.K. MITTER AND A.N. GROVER, JJ.

A.V.S. Narasimha Rao and others

... *Appellants**

v.

State of Andhra Pradesh and another

... *Respondents.*

Andhra Pradesh Non-Gazetted Officers' Association, and others... *Interveners.*

Public Employment (Requirement as to Residence) Act (XLIV of 1957), section 3 and Andhra Pradesh Public Employment (Requirement as to Residence) Rules (1959), rule 3—Validity of.

Constitution of India (1950), Article 16—Scope.

Interpretation of Statutes—Provision as exception to general rule—Construction.

Section 3 of the Public Employment (Requirement as to Residence) Act, 1957, in so far as it relates to Telangana and rule 3 of the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959 are *ultra vires* the Constitution of India.

Under Article 16 of the Constitution, by the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause,

* W. P. No. 65 of 1969.

there can be no discrimination, among other things, on the ground of residence. An exception is however made in clause (3) to cover cases where local sentiments have to be respected or to prevent an inroad from more advanced States into less developed States. Parliament is entitled to make law prescribing, in regard to a class or classes of employment, residence within a State or Union territory prior to such employment or appointment. But that clause refers to residence within the State in the sense of the whole State as the venue for residential qualification and not residence in districts, taluks, cities, towns or villages within the State. The words 'any requirement' in the clause cannot be read as to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State.

Clause (3) of Article 16 which is in the nature of an exception to the general rule-making every office or employment open and available to every citizen and offices or employment in one part of India open to citizens in all other parts of India. As such it should be construed in a narrow and strict manner and not in a wide and liberal way.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

S.V. Gupte, Senior Advocate, (*P.A. Choudhury* and *K. Rajendra Chaudhuri*, Advocates with him), for Petitioners.

M.C. Setalvad, Senior Advocate, and *P. Ramachandra Rao*, Advocate-General for the State of Andhra Pradesh, (*A. Raghuvir*, Government Pleader, Andhra Pradesh High Court and *A.V. Rangam*, Advocate with them), for Respondent No. 1.

M. C. Setalvad, Senior Advocate, (*R.N. Sachithy*, Advocate with him), for Respondent No. 2.

R.V. Pillai, *H.S. Gururaj Rao* and *Subodh Markandeya*, Advocates for Respondents Nos. 3 to 45.

Sardar Ali Khan and *P.N. Duda*, Advocates, and *J.B. Dadachanji*, Advocate of *M/s. J.B. Dadachanji and Co.*, for Respondent No. 46.

P.A. Chaudhury, *K. Rajendra Chaudhuri* and *C.S. Sreenivasa Rao*, Advocates, for Interveners.

The Judgment of the Court was delivered by

Hidayatullah, C.J.—The petitioners are persons employed in the ministerial services of the Andhra Pradesh Government. All of them were working in various offices located in the cities of Hyderabad and Secunderabad. On 19th January, 1969, leaders of all political parties in the Legislature of the Andhra Pradesh State appeared to have met and reached the decision that to implement what are called 'Telengana Safeguards', the following measures should be taken :

"All non-domicile persons, who have been appointed either directly, by promotion or by transfer to posts reserved under the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959 for domiciles of Telengana region will be immediately relieved from service. The posts so rendered vacant will be filled by qualified candidates possessing domicile qualifications and in cases where such candidates are not available the posts shall be left unfilled till qualified domicile candidates become available. Action on the above lines will be taken immediately.

All non-domicile employees so relieved shall be provided employment in the Andhra region without break in service and by creating supernumerary posts, if necessary."

The Government of Andhra Pradesh then passed an order [G.O. Ms. 36, G.A. (S.R.) Dept.] on 21st January, 1969, relieving before 28th February, 1969, all non-domicile persons appointed on or after 1st November, 1956 to certain categories of posts reserved for domiciles of Telengana under the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959. Names of such incumbents were

to be shown in a *pro forma* and they were to be employed in the Andhra region without break in service by creating supernumerary posts, if necessary. These supernumerary posts were to be treated as temporary addition to the strength of the office concerned and were to be adjusted against future vacancies in corresponding posts as they arose. The action was based upon section 3 of the Public Employment (Requirement as to Residence) Act (XLIV of 1957), which was an Act of Parliament made in pursuance of clause (3) of Article 16 of the Constitution making special provision for requirement as to residence and brought into force on 21st March, 1959. Section 3 of the Act gave the power to make Rules in respect of certain classes of employment in certain areas. It provided :

“3. Power to make rules in respect of certain classes of public employment certain areas,—

(1) The Central Government may, by notification in the Official Gazette, make rules prescribing, in regard to appointments to—

(a) any subordinate service or post under the State Government of Andhra Pradesh, or

*	*	*	*	*
*	*	*	*	*

any requirement as to residence within the Telengana area or the said Union territory as the case may be, prior to such appointment.

(2) In this section,—

(a) *	*	*	*	*
*	*	*	*	*

(b) “Telengana area” comprises all the territories specified in sub-section (1) of section 3 of the State Reorganisation Act, 1956.”

Under section 4 the Rules had to be laid before each House of Parliament for a period of not less than 30 days and Parliament could make such alterations as it liked. Under section 5 the Rules had a life of 5 years but by subsequent legislation the period was extended to 10 years. It is said that the period is to be extended by another 5 years. The Rules were made on 21st March, 1959. They are called the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959. Rule 3 provides :

“3. Requirement as a residence Prior to Appointment :

A person shall not be eligible for appointment to a post within the Telengana area under the State Government of Andhra Pradesh or to a post under a local authority (other than a cantonment board) in the said area unless—

(i) he has been continuously residing within the said area for a period of not less than fifteen years immediately preceeding the prescribed date ; and

(ii) he produces before the appointment authority concerned, if so required by it, a certificate of eligibility granted under these rules ;

Provided that in relation to posts in the secretariat Departments and the Offices of the Heads of Departments of the State Government of Andhra Pradesh situated in the cities of Hyderabad and Secunderabad, the requirement as to residence laid down in this rule shall apply to the filling of only the second vacancy in every unit of three vacancies which are to be filled by direct recruitment ;

Provided further that any period of temporary absence from the Telengana area for the purpose of prosecuting his studies or for undergoing medical treatment or any period of such temporary absence not exceeding three months for any other reasons shall not be deemed to constitute a break in the continuity of such residence, but for purpose of calculating the said period of fifteen years any such period of temporary absence shall be excluded.”

The petitioners were appointed between 27th December, 1956, and 4th July, 1968. They challenge the Act, the Rules and the proposed action as *ultra vires* the Constitution. Their case is that Article 16 (3) under which the Act and the Rules purport to be made has been misunderstood as conferring a power to make a law prescribing requirement as to residence in a part of a State. For this reason section 3 of the Act is challenged as *ultra vires* the Constitution.

Article 16 on which the Act, the Rules and the present action are all based, reads :

16. Equality of opportunity in matters of public employment.

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making, any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within the State or Union territory prior to such employment or appointment.

(4)	*	*	*	*	*
(5)	*	*	*	*	*)

The question is one of construction of this article, particularly of the first three clauses, to find out the ambit of the law-making power of Parliament. The first clause emphasises that there shall be in India equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The word 'State' here is to be understood in the extended sense given to it by the definition of that word in Article 12. The second clause then specifies a prohibition against discrimination only on the grounds of religion, race, sex, descent, place of birth, residence or any of them. The intention here is to make every office or employment open and available to every citizen, and *inter alia* to make offices or employment in one part of India open to citizens in all other parts of India. The third clause then makes an exception. This clause was amended by the Constitution (Seventh Amendment) Act, 1956. For the original words of the clause 'under any State specified in the First Schedule or any local or other authority within its territory any requirement as to residence within that State', the present words from 'under the Government' to 'Union territory' have been substituted. Nothing turns upon the amendment which seeks to apply the exception in the clause to Union territory and to remove ambiguity in language.

The clause thus enables Parliament to make a law in a special case prescribing any requirement as to residence within a State or Union territory prior to appointment, as a condition of employment in the State or Union territory. Under Article 35 (a) this power is conferred upon Parliament but is denied to the Legislatures of the States, notwithstanding anything in the Constitution, and under (b) any law in force immediately, before the commencement of the Constitution in respect to the matter shall subject to the terms thereof and subject to such adaptations that may be made under Article 372 is to continue in force until altered or repealed or amended by Parliament.

The legislative power to create residential qualification for employment is thus exclusively conferred on Parliament. Parliament can make any law which prescribes any requirement as to residence within the State or Union territory prior to employment or appointment to an office in that State or Union territory. Two questions arise here. Firstly, whether Parliament, while prescribing the requirement, may prescribe the requirement of residence in a particular part of the State; and, secondly, whether Parliament can delegate this function by making a declaration and leaving

the details to be filled in by the rule making power of the Central or State Governments.

Mr. S. V. Gupte, for the petitioners, points out that the Constitution is speaking of State and Union territory. It has already made a declaration that no person shall be disqualified for any office in the territory of India, because of his residence in any particular part of India. The exception, therefore, must be viewed narrowly and not carried to excess by interpretation. The article speaks of residence in a State and means only that. If it chose to speak of residence in parts of State such as Districts, Taluqas, cities, towns, etc., more appropriate and specific language could have been used such as 'any requirement as to residence within that State or Union territory or part of that State or Union territory.' Having used the word State, the unit State is only meant and not any part thereof. Reference is made to the history of the drafting of the Article and the debates in the Constituent Assembly which bear out this contention.

On the other hand, Mr. Satalvad bases his argument on two things. He contends that the power is given to Parliament to make *any* law and, therefore, Parliament is supreme and can make any law on the subject as the article says. He very ingeniously shifts the emphasis to the words 'any requirement' and contends that the requirement may be as to residence in the State or any particular part of State.

The claim for supremacy of Parliament is misconceived. Parliament in this, as in other matters, is supreme only in so far as the Constitution makes it. Where the Constitution does not concede supremacy, Parliament must act within its appointed functions and not transgress them. What the Constitution says is a matter for construction of the language of the Constitution. Which is the proper construction of the two suggested? By the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may have to be respected or sometimes an inroad from more advanced States into less developed States may have to be prevented and a residential qualification may, therefore, have to be prescribed, the exception in clause (3) was made. Even so, that clause spoke of residence within the State. The claim of Mr. Satalvad that Parliament can make a provision regarding residence in any particular part of a State would render the general prohibition lose all its meaning. The words 'any requirement' cannot be read to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr. Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in Districts, Taluqas, cities, towns or villages. The fact that this clause is an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. We accordingly reject the contention of Mr. Satalvad seeking to put a very wide and liberal construction upon the words 'any law' and 'any requirement.' These words are obviously controlled by the words 'residence within the State or Union territory' which words mean what they say, neither more nor less. It follows, therefore, that section 3 of the Public Employment (Requirement as to Residence) Act, 1957, in so far as it relates to Telangana (and we say nothing about the other parts) and rule 3 of the Rules under it are *ultra vires* the Constitution.

In view of our conclusion on this point it is not necessary to express any opinion whether delegation to the Central and/or State Governments to provide by rules for the further implementing of the law made by Parliament is valid or not.

It was argued that the *Mulki Rules* existing in the former Hyderabad State must continue to operate by virtue of Article 35 (b) in this area. This point is not raised by the petitions under consideration and no expression of opinion by us is desirable.

For the reasons given above we quash the orders passed and declare section 3 of the Public Employment (Requirement as to Residence) Act, 1957 as also rule 3

of the Rules *ultra vires* the Constitution. The petitions shall be allowed but there shall be no order about costs.

R.M.

Petitions allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate/Original Jurisdiction)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, J. C. SHAH, V. RAMASWAMI, G. K. MITTER AND A. N. GROVER, JJ.

The Rt. Rev. Bishop S. K. Patro and others

... *Appellants**

v.

The State of Bihar and others

... *Respondents.*

and

S. V. Qadir and others

... *Petitioners*

v.

The State of Bihar and others

... *Respondents.*

Constitution of India (1950), Article 30—Right of minorities to establish and administer educational institutions of their choice—Scope —If available only to citizens of India.

The guarantee of protection under Article 30 of the Constitution of India is not restricted to educational institutions established after the commencement of the Constitution. Even institutions which had been established before the Constitution and continued to be administered by minorities, either based on religion or language qualify for the protection of the right of minorities declared by Article 30.

In re The Kerala Education Bill, 1957, (1959) S.C.J. 321 : (1959) S.C.R. 995, referred.

It is true that only persons residing in India will be competent to claim the protection under the Article and foreigners, not resident in India, cannot claim the right to set up educational institutions of their choice. But that does not however mean that the protection may be availed of only in respect of an institution established before the Constitution of India by persons born and resident in British India. While the protection under Article 29 may be claimed only by Indian citizens, Article 30 does not expressly refer to citizenship as a qualification for the members of the minorities. The language of Article 30 is wide and must receive its full meaning and its scope cannot be cut down by considerations of Article 23 or 29 of the Constitution. The fact that funds were obtained from the United Kingdom for assisting in setting up and developing a school by the minorities or that the management of the school was carried on by some persons who may not have been born in India is not a ground for denying the protection of Article 30.

Rev. Father W. Proost and others v. The State of Bihar and others, (1969) 1 S.C.J. 700 ; Rev. Sidhajibhai Sabhai and others v. State of Bombay and another, (1963) 3 S.C.R. 837, referred.

Prior to the enactment of the Constitution there was no settled concept of Indian citizenship, independently of citizenship of British Empire, and such concepts cannot be incorporated in the interpretation of Article 30.

Appeal from the Judgment and Order, dated the 10th September, 1968 of the Patna High Court in Civil Writ Jurisdiction Case No. 503 of 1967 and Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

M. C. Setalvad, Senior Advocate (R. Gopalakrishnan, Advocate, with him), for Appellants (In C. A. No. 2346 of 1968).

R. Gopalakrishnan, Advocate, for Petitioners (In W. P. Nos. 430 and 431 of 1968).

D. Goburdhun, Advocate, for Respondents (In C. A. No. 2346 of 1968).

B. P. Jha, Advocate, for Respondents (In W. Ps. Nos. 430 and 431 of 1968).
The Judgment of the Court was delivered by

Shah, J.—A primary school started in 1854 at Bhagalpur was later converted into a Higher Secondary School.

The Legislature of the State of Bihar enacted the Bihar High Schools (Control and Regulation of Administration) Act XIII of 1960 which by section 8 invested the State Government with power to frame rules. Section 8 (1) provides :

“The State Government may, after previous publication and subject to the provisions of Articles 29, 30 and 337 of the Constitution of India, make rules not inconsistent with this Act for carrying out the purposes of this Act.”

In 1964 rules were framed under the Act by the State Government of Bihar, Rule 41 provides :

“These rules shall not apply to the schools established and administered by the minorities whether based on religion or language.”

By order dated 4th September, 1963, the President of the Board of Secondary Education approved the election of Bishop Parmar as President and Rev. Chest as Secretary of the Church Missionary Society Higher Secondary School. This order was set aside by the Secretary to the Government, Education Department, by order dated 22nd May, 1967. On 21st June, 1967, the Regional Deputy Director of Education, Bhagalpur, addressed a letter to the Secretary, Church Missionary Society School, Bhagalpur, inviting his attention to the order dated 22nd May, 1967, and requested him to take steps to constitute a Managing Committee of the School “in accordance with that order.”

A petition was then filed in the High Court of Patna by four petitioners (who are appellants in Appeal No. 2346 of 1968) for a writ quashing the order 22nd May, 1967, and for an order restraining the respondents—the State of Bihar, the Secretary to the Government of Bihar, Department of Education and the educational authorities of the State—from interfering with the right of the petitioners to control, administer and manage the affairs of the School. The High Court of Patna dismissed the petition. The High Court held that the primary School at Bhagalpur was established by the Church Missionary Society of London ; that the School had developed into the present Church Missionary Society Higher Secondary School ; and that the School was administered in recent times by the Church Missionary Society of the Bhagalpur Diocese ; and that the School not being an education institution established by a minority, protection was not afforded thereto by Article 30 of the Constitution. Against the order dismissing the petition, Civil Appeal No. 2346 of 1968 has been filed in this Court.

Two other petitions are filed in this Court claiming relief on the footing that by the order dated 22nd May, 1967, of the Government of Bihar the fundamental right of the Christian minority to maintain an educational institution of its choice and guaranteed by Article 30 (1) is infringed. Writ Petition No. 430 of 1968 is filed by the Principal, Church Missionary Society Higher Secondary School, Bhagalpur, the Secretary, Bihar Christian Council, Gaya, the Secretary, Santhalia Christian Council, Bhagalpur, and the Secretary, National Christian Council of India, Nagpur. Writ Petition No. 431 of 1968 has been filed by Rev. M. P. Hembrom, Parish Priest, Church Missionary Society, Bhagalpur, two of whose children are being educated at the School. These petitions are heard with Civil Appeal No. 2346 of 1968.

The High Court found on a consideration of the evidence that the Church Missionary Society Higher Secondary School is a “denominational institution”, that “scripture classes are held in the School and lessons on the life and teaching of Lord Jesus Christ are taught” and examinations are held in the subject for all students. that every morning, before the classes begin, the prayers from the prescribed Church Books are offered by the students and the members of the staff, and each meeting of the Managing Committee of the School begins and closes with prayers from the “Book of Common Prayer”. Correctness of the finding recorded by the High Court is not challenged before us. The finding recorded by the High Court

that the School originally started in the year 1854 as a primary school had since developed into the present Church Missionary Society Higher Secondary School is also not challenged before us.

The only question which falls to be determined is whether the petitioners in the two writ petitions and the appellants in appeal No. 2346 of 1968 are entitled to claim the protection of Article 30 of the Constitution on the ground that the Church Missionary Society Higher Secondary School at Bhagalpur is an educational institution of their choice established by a minority.

Article 30 of the Constitution by clause (1) provides :

“All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.”

The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution : institutions which had been established before the Constitution and continued to be administered by minorities, either based on religion or language qualify for the protection of the right of minorities declared by Article 30 of the Constitution. In *In re The Kerala Education Bill, 1957*.¹ Das, C. J., observed at page 1051 :

“There is no reason why the benefit of Article 30 (1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30 (1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30 (1) gives the minorities two rights, namely (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as Article 26 covers the right to maintain pre-Constitution religious institutions.”

It was the case of the State and the parties intervening in the writ petition before the High Court that the School was established by the Church Missionary Society, London, which they claimed was a Corporation with an alien domicile and “such a Society was not a minority based on religion or language” within the meaning of Article 30 of the Constitution. On behalf of the appellants in the appeal and the petitioners in the two writ petitions filed in this Court it is claimed that the School was started in 1854 by the local Christian residents of Bhagalpur. They concede that the Church Missionary Society of London did extend financial aid in the establishment of the School, but they contend that on that account, the School did not cease to be an educational institution established by a religious minority in India.

There is on the record important evidence about establishment in 1854 of the Lower Primary School at Bhagalpur. It is unfortunate that sufficient attention was not directed to that part of the evidence in the High Court. The “Record Book” of the Church Missionary Association at Bhagalpur which is Annexure ‘D’ to writ Petition No. 430 of 1968 furnishes evidence of vital importance having a bearing on the establishment of the School. It contains copies of letters written from Bhagalpur and minutes of meetings held and the resolutions passed by the Local Council of Bhagalpur. On 1st June, 1948, Rev. Vaux informed the Calcutta Corresponding Committee of the Church Missionary Society by a letter that if the Calcutta Society were to establish a School at Champanagar, “local assistance shall not be wanting to the extent of 1,000 or 1,200 rupees a year, besides providing a school house and residence for the master” and that “At first, for breaking up the fallow ground and setting the school a going the presence of a Missionary of tact and experience may be necessary”. On 26th June, 1948, Rev. Vaux by another letter informed the Calcutta Corresponding Committee that a special service was held in the Church on 22nd June, 1848, and thereafter on Friday 23rd June, 1848, a meeting was held and contributions were invited from persons present including Indian residents, that monthly subscriptions of Rs. 202 for the “salary of masters” and other expenses were promised, and that an amount of Rs. 1,647 was donated for building the school

and residence for the master ; that the general impression made was so favourable to the cause that he felt justified in assuring the Calcutta Committee that the local Committee were in a position to guarantee certain requisites for making a commencement such as payment of the salary of the School Master and Mistress and the building of a house for their accommodation which may afterwards be enlarged so as to form a suitable residence for a Mission.

By letter dated 10th July, 1848, the Secretary, Calcutta Corresponding Committee, informed Rev. Vaux that they were looking out for a prominent person to commence missionary operations by opening a School "which is indeed a common way of beginning a Mission." In a letter dated 22nd December, 1848, written from Bhagalpur it was stated :

"The Society will provide for the Missionary's salary and trust that local funds will provide a residence for him of a suitable kind. All other Mission requirements, such as school teachers, etc., should be left to be provided on the spot."

Then there are minutes of the resolutions passed at a meeting held on 24th October, 1849 by the Parent Committee and another resolution dated 25th October, 1851, of the Local Committee, to raise funds, and to determine upon disbursements with the advice of the Missionary to promote the objects of the Mission. In the minutes of the meeting dated 25th October, 1851, it is recorded that a statement of account of receipts and disbursements upto 30th September, 1851 including expenses of a boys' school and salary of masters, "hire of school rooms and furniture" and expenses of a girls' school "including cost of working materials up to date" was submitted.

In a letter from the Treasurer of the Committee dated 10th May, 1852, it was stated :

"One of the conditions on which the Church Missionary Society consented to send a Missionary to this station was that he should be provided by local friends with a suitable residence. As this appeared to be a *sine qua non*, subscriptions were raised for the purpose of building a Mission house ; * * *

* * * To this end I propose, that as soon as the balance in hand amounts to Rs. 11,000 that sum be transferred by me as your Treasurer to the Calcutta Corresponding Committee of the C.M.S. ; to be held by them *in trust* as the "Bhagalpur Mission Fund." The interest of this sum will be more than sufficient to pay the rent of the present Mission premises, viz., Rs. 45 per month ; and accordingly, as soon as the transfer is effected responsibility. The whole of our remaining local funds and future collections can then be devoted to the support of schools, orphanage and we shall be better able to regulate our expenditure by our means, and increase our efforts in proportion to our wants."

At a meeting of the Local Committee held on 22nd March, 1853, it was resolved that the Committee expresses their satisfaction at the progress made by Mr. Droese in building the Bungalow and that the Treasurer be authorised to pay to Mr. Droese out of the Reserve Fund the further sum of Rs. 3,500 required to complete the building.

At a meeting of the Local Committee held on 23rd August, 1856, it was recorded that on an area of 21 *bighas* of land for which a perpetual lease was obtained on 26th November, 1853, the Association had built a Bungalow and offices for the Missionary, houses for native Christians and an orphanage. At a meeting held on 17th October, 1856, it was resolved that the Committee desired sincerely to thank Mr. Brown for "kind, active and liberal interest he had taken in the Mission from the first and particularly for making over to the Society mission property which his own exertions had in great measure secured."

It appears from this correspondence and the resolutions and the discussions at the meetings that a permanent home for the Boys' School was set up in 1854 on property acquired by local Christians and in buildings erected from funds collected by them. The institution along with the land on which it was built and the balance

of money from the local fund were handed over to the Church Missionary Society in 1856. It is also true that substantial assistance was obtained from the Church Missionary Society, London. But on that account it cannot be said that the School was not established by the local Christians with their own efforts and was not an educational institution established by a minority.

The Church Missionary Society Higher Secondary School is an educational institution administered by a minority ; that was so found by the High Court and is not now in controversy.

The High Court held that the primary school started in the year 1854 was started by the Church Missionary Society, London, and such a Society cannot be said to be a citizen of India and that in any event the persons who constituted the Society were aliens and on that account it cannot be said that the Church Missionary Society Higher Secondary School is an educational institution established by a minority. It is unnecessary to dilate upon these matters at length, for, in our judgment, the conclusion that the School was established not by the local Christians of Bhagalpur, but by the Church Missionary Society, London, is not justified on the evidence. The extracts from the Record Book clearly show that the local residents of Bhagalpur had taken a leading role in establishing and maintaining the school. Assistance was undoubtedly obtained from other bodies including the Church Missionary Society, London. But the School was set up by the Christian Missionaries and the local residents of Bhagalpur with the aid of funds part of which were contributed by them.

It is unnecessary to enter upon an enquiry whether all the persons who took part in establishing the School in 1854 were "Indian citizens." Prior to the enactment of the Constitution there was no settled concept of Indian citizenship, and it cannot be said that Christian Missionaries who had settled in India and the local Christian residents of Bhagalpur did not form a minority community. It is true that the minority competent to claim the protection of Article 30 (1) and on that account the privilege of establishing and maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer upon foreigners not resident in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well-defined religious or linguistic minority. It is not however predicated that protection of the right guaranteed under Article 30 may be availed only in respect of an institution established before the Constitution by persons born and resident in British India.

It is necessary to bear in mind the difference in the phraseology used in Articles 29 and 30 of the Constitution. By Article 29 (1) any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same, and clause (2) guarantees that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. The protection of the rights under Article 29 may be claimed only by Indian citizens. Article 30 guarantees the right of minorities to establish and administer educational institutions : the article does not expressly refer to citizenship as a qualification for the members of the minorities. In *Rev. Father W. Proost and others v. The State of Bihar and others*¹, this Court observed :

"In our opinion the width of Article 30 (1) cannot be cut down by introducing in it considerations on which Article 23 (1) is based. The latter article is a general protection which is given to minorities to conserve their language, script or culture. * * * The two articles created two separate rights, although it is possible that they may meet in a given case."

The Court then observed, after referring to the judgment in *Rev. Sidhajibhai Sabhai and others v. State of Bombay and another*² that :

".....the language of Article 30 (1) is wide and must receive full meaning. We are dealing with protection of minorities and attempts to whittle down the protection cannot be allowed. We need not enlarge the protection but we may not reduce a protection naturally flowing from the words. Here the protection clearly flows from the words and there is nothing on the basis of which aid can be sought from Article 29 (1)."

The fact that funds were obtained from the United Kingdom for assisting in setting up and developing the School or that the management of the institution was carried on by some persons who may not have been born in India is not a ground for denying the protection of Article 30 (1).

We are also unable to agree with the High Court that before any protection can be claimed under Article 30 (1) in respect of the Church Missionary Society Higher Secondary School it was required to be proved that all persons or a majority of them who established the institution were "Indian citizens" in the year 1854. There being no Indian citizenship in the year 1854 independently of the citizenship of the British Empire, to incorporate in the interpretation of Article 30 in respect of an institution established by a minority the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution.

The order passed by the Educational authorities requiring the Secretary of the Church Missionary Society Higher Secondary School to take steps to constitute a Managing Committee in accordance with the order dated 22nd May, 1967, is, declared invalid.

The appeal is allowed and the rule in the two writ petitions is made absolute. There will be no order as to costs in the two writ petitions. Since it appears that all the requisite materials were not placed prominently before the High Court in the writ petition out of which Appeal No. 2346 of 1968 has arisen, we direct that in the appeal the parties shall bear their own costs throughout.

R.M.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND C. A. VAIDIALINGAM, JJ.

The State of Orissa

... *Appellant**

v.

Chandrasekhar Singh Bhoi, etc.

... *Respondents.*

Orissa Land Reforms Act (XVI of 1960) and Orissa Land Reforms (Amendment) Act (XV of 1965) Chapter IV and Constitution of India (1950), Articles 31 (2) 31 (2-A) and 31-A—Validity of Chapter IV of Amendment Act.

By the amendments made in the Constitution by the 17th Amendment Act the Principal Act is incorporated in the Ninth Schedule to the Constitution with effect from 20th June, 1964. The Act is therefore not liable to be attacked on the plea that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by Part III of the Constitution. But the power of the competent Legislature to repeal or amend the Act incorporated in the Ninth Schedule is not thereby taken away. The amending Act passed after the enactment of the Constitution (Seventeenth Amendment) Act, 1964 does not therefore qualify for the protection of Article 31-B.

By Article 31 (2) read with Article 31 (2-A) property may be compulsorily acquired only for a public purpose and by authority of a law which provides for compensation for the property so acquired and either fixed the amount of the compensation or specifies the principles on which, and the manner in which, the

* C. As Nos. 1017 to 1027, 1029 to 1032, 1034 to 1037, 1931 to 1905 of 1963.

compensation is to be determined and given. In order that property may be validly acquired compulsorily the law must provide for the transfer of ownership or right to possession of any property to the State or to a corporation owned or controlled by the State.

(After referring to section 45 of the Act), this is clearly compulsory acquisition of land within the meaning of Article 31 (2) of the Constitution and the compensation determined merely at fifteen times the fair and equitable rent may not, *prima facie* be regarded as determination of compensation according to the principles specified by the Act. The Principal Act (XVI of 1960) and the amending Act (XIII of 1965) were both Acts enacted for ensuing agrarian reform, and the lands held by the petitioners were 'estate' within the meaning of Article 31-A. By section 45 the rights of the land holders were sought to be extinguished or modified. But to the operative part of Article 31-A, by section 2 of the Constitution (Seventeenth Amendment) Act, 1964, the second proviso was added by the Constitution (Seventeenth Amendment) Act, 1964, it was clearly enacted that under any law which provides for the acquisition of any land in an estate under the personal cultivation of the holder, compensation shall not be less than the market value of the land if such land be within the ceiling limit applicable to the holder under any law for the time being in force.

The right to compensation which is not less than the market value under any law providing for the acquisition by the State of any land in an estate in the personal cultivation of a person is guaranteed by the second proviso only where the land is within the ceiling limit applicable to him under any law for the time being in force. A law cannot be said to be in force unless it is brought into operation by legislative enactment, or by the exercise of authority by a delegate empowered to bring it into operation. The theory of a statute being "in operation in a constitutional sense" though it is not in fact in operation has no validity.

Chapter IV of the Principal Act was repealed by the Amending Act XV of 1965, on the plain words of the proviso 2 to Article 31-A the law prescribing the ceiling limit must be in force at the date of acquisition. In the present case the law relating to the ceiling limit, *viz.*, Chapter IV of the Principal Act was never made operative by a notification, and was repealed by Act (XV of 1965). The ceiling limit under section 47 of the Principal Act was on that account inapplicable to the landholders who challenged the validity of section 45 of the amending Act.

Held, section 1 (3) of Act (XVI of 1960) is undoubtedly a law in force but until the power is exercised by the State Government to issue an appropriate notification, the provisions of Chapter IV could not be deemed to be law in force, and since, no notification was issued before Chapter IV of the Principal Act was repealed, there was no ceiling limit applicable to the landholders under any law for the time being in force which attracted the application of the Second Proviso to Article 31-A.

Appeals from the Judgment and Order dated the 30th January, 1967 of the Orissa High Court in O.J.Cs. Nos. 329 of 1965, etc.

C. B. Agarwala, Senior Advocate (R. N. Sachthey, Advocate, with him), for Appellant (In all the Appeals).

H. R. Gokhale, Senior Advocate (Santosh Chatterjee, Advocate and G.S. Chatterjee, Advocate of M/s. Kshatriya and Chatterjee, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Shah, J.—The State of Orissa has appealed to this Court against the judgment of the State High Court declaring "unconstitutional and invalid" Chapter IV of the Orissa Land Reforms (Amendment) Act XV of 1965.

The Orissa Land Reforms Act (XVI of 1960) (hereinafter called the principal Act) received the assent of the President on 17th October, 1960. By section 1 (3) of the principal Act it was provided that the Act shall come into force in whole or in part, on such date or dates as the Government may from time to time by notification

appoint and different dates may be appointed for different provisions of the Act. By a notification issued on 25th September, 1968 certain provisions of the principal Act other than those contained in Chapters III and IV were brought into force. By a notification dated 9th December, 1965, Chapter III (sections 24 to 37 dealing with resumption for personal cultivation of any land held by a tenant and related matters) was brought into force. But Chapter IV (sections 38 to 52 dealing with ceiling of holdings of land and disposal of excess land) was not brought into operation. The Legislature of the State of Orissa amended the principal Act by Act XIII of 1965. By Act XIII of 1965 amendments were made in the principal Act : the expressions "ceiling area" and "privileged raiyat" were defined by clauses (5) and 24 of section 24 and the expression "classes of land" was defined in section 2 (5-a). The original Chapters III and IV of the principal Act were deleted and were substituted by fresh provisions. Nothing need be said about the amendments made in Chapter III because in these groups of appeals the validity of these provisions is not in issue. It may suffice to say that Chapter III (sections 24 to 36) as amended deals with the right of the landlord to resume land for personal cultivation, the extent of that right, and the proceedings for resumption of land. Chapter IV as amended deals with ceiling and disposal of excess land. By section 37 it is provided :

"(1) No person shall hold after the commencement of this Act lands as landholder or *raiya*t under personal cultivation in excess of the ceiling area determined in the manner hereinafter provided.

* * * * *

By section 38 the Government is authorised to grant exemption from the operation of the ceiling in respect of certain classes of land. Section 39 deals with the principles for determining the ceiling area. Sections 40, 41 and 42 deal with the filing of returns in respect of lands in excess of the ceiling area on the date of commencement of the Act and the consequences of failure to submit the return. Section 43 provides for the preparation and publication of draft statements showing ceiling and surplus lands by the Revenue Officer and section 44 provides for the publication of the final statement of ceiling and surplus lands after hearing objections, if any, received and after making enquiries as the Revenue Officer may deem necessary. Section 45 provides that :

"With effect from the beginning of the year next following the date of the final statement referred to in sub-section (3) of section 44 the interests of the person to whom the surplus lands relate and of all landholders mediately or immediately under whom the surplus lands were being held shall stand extinguished and the said lands shall vest absolutely in the Government free from all encumbrances."

Section 46 provides for determination of compensation. Section 47 sets out the principles for determining compensation. It provides that the compensation in respect of the interest of the landholders mediately or immediately under whom the surplus lands are being held as a landholder or *raiya*t shall be fifteen times the fair and equitable rent. It also provides for payment of market value of tanks, wells and of structures of a permanent nature situate in the land, determined on the basis of fair rent in the manner prescribed therein. Sections 48 and 49 deal with the preparation and publication of draft compensation assessment roll and the final compensation assessment roll. By section 51 provision was made for settlement of surplus lands vested in the Government under section 45 with persons as *raiya*ts in the order of priority mentioned therein and section 52 imposes a ceiling on future acquisitions. It is provided thereby :

"The foregoing provisions of this Chapter shall, *mutatis mutandis*, apply where lands acquired and held under personal cultivation subsequent to the commencement of this Act by any person through inheritance, bequest, gift, family settlement,

purchase lease or otherwise, together with the lands in his personal cultivation at the time of such acquisition exceeds his ceiling limit.

* * * * *

By the amendments made in the Constitution by the 17th Amendment Act the principal Act is incorporated in the Ninth Schedule to the Constitution with effect from 20th June, 1964. The Act is therefore not liable to be attacked on the plea that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by Part III of the Constitution. But the power of the competent Legislature to repeal or amend the Act incorporated in the Ninth Schedule is not thereby taken away. The amending Act passed after the enactment of the Constitution (Seventeenth Amendment) Act, 1964 does not therefore qualify for the protection of Article 31-B. See *Ramanlal Gulabchand Shah, etc. v. State of Gujarat and Others*¹, *Sri Ram Ram Narain Medhi v. The State of Bombay*². This position is not disputed.

Chapter IV incorporated in the principal Act by Orissa Act XIII of 1965 when brought into force is liable to be challenged on the ground that it is inconsistent with or taken away or abridges any of the fundamental rights conferred by Part III of the Constitution. It was urged however, and that plea has found favour with the High Court, that section 47 incorporated by Act XIII of 1965 which provided for compensation not based on the market value of the land but at fifteen times the fair and equitable rent is inconsistent with Article 31-A, proviso 2, and is on that account void. To appreciate the contention the constitutional provisions relating to protection guaranteed by the Constitution against compulsory acquisition of property may be noticed. By Article 31 (2) as amended by the Constitution (Fourth Amendment) Act, 1955, insofar as it is material, it is provided :

“No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given ;

* * * * *

Clause (2-A) of Article 31 which in substance defines the expression “law” providing for compulsory acquisition enacts that :

“Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.”

By Article 31 (2) read with Article 31 (2-A) property may be compulsorily acquired only for a public purpose and by authority of a law which provides for compensation for the property so acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given. In order that property may be validly acquired compulsorily the law must provide for the transfer of ownership or right to possession of any property to the State or to a corporation owned or controlled by the State.

By virtue of section 45 of the principal Act “the interests of person to whom the surplus lands relate and of all land-holders mediately or immediately under whom the surplus lands were being held.....stand extinguished and the lands.....vest absolutely in the Government free from all encumbrances”. This is clearly compulsory acquisition of land within the meaning of Article 31 (2) of the Constitution and the compensation determined merely at fifteen times the fair and equitable rent may not, *prima facie*, be regarded as determination of compensation according to

1. (1969) 1 S.C.J. 290 : A.I.R. 1969 S.C. 468. 2. (1959) S.C.J. 679 : (1959) 1 S.C.R. (Supp.) 459.

the principles specified by the Act. But Article 31-A which applies to the statute in question provides by the first clause :

“Notwithstanding anything contained in Article 13 no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) * * * * *

(c) * * * * *

(d) * * * * *

(e) * * * * *

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, article 19 or Article 31 :

* * * * *

The principal Act XVI of 1960 and the amending Act XIII of 1965 were both Acts enacted for ensuing agrarian reform, and the lands held by the petitioners were “estates” within the meaning of Article 31-A. By section 45 the rights of the landholders were sought to be extinguished or modified. But to the operative part of Article 31-A by section 2 of the Constitution (Seventeenth Amendment) Act, 1964, the second proviso was added. The second proviso enacts :

“Provided further that there where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.”

By the Constitution (Seventeenth Amendment) Act, 1964, it was clearly enacted that under any law which provides for the acquisition of any land in an estate under the personal cultivation of the holder, compensation shall not be less than the market value of the land if such land be within the ceiling limit applicable to the holder under any law for the time being in force.

Before the High Court it was urged on behalf of the landholders that when the principal Act was enacted it became law in force, and the ceiling limit prescribed thereby became effective, even though Chapter IV was not extended by a notification under section 1 (3) of the Act, and since the subsequent legislation seeks to restrict the ceiling limit and to vest the surplus land in the Government under section 45 as amended, there is compulsory acquisition of land which may be valid only if the law provides for payment to the landholder for extinction of his interest, the market value of that part of the surplus land which is within the ceiling limit under the principal Act. This argument found favour with the High Court. In their view the expression “law in force” must be “construed only in the constitutional sense and not in the sense of its actual operativeness”, and on that account it must be held that there was a ceiling limit already provided by the principal Act as it was ‘law in force’ within the meaning of that expression as used in the second proviso to Article 31-A. They proceeded then to hold that section 47 of the Act as amended provided for payment of compensation at a rate which is less than the market value of the land falling within the ceiling limit as originally fixed under Act XVI of 1960, and the guarantee of the second proviso to Article 31-A of the Constitution is on that account infringed. We are unable to accept this process of reasoning. The right to compensation which is not less than the market value under any law providing for the acquisition by the State of any land in an estate in the personal cultivation of a person is guaranteed by the second proviso only where the land is within the ceiling limit applicable to him under any law for the time being in force. A law cannot be

said to be in force unless it is brought into operation by legislative enactment, or by the exercise of authority by a delegate empowered to bring it into operation. The theory of a statute being 'in operation in a constitutional sense' though it is not in fact in operation has, in our judgment, no validity.

Again Chapter IV of the principal Act was repealed by the Amending Act XV of 1965. Article 31-A, proviso 2 guarantees to a person, for compulsory acquisition of his land, the right to compensation which is not less than the market value, when the land is within the ceiling limit applicable to him under a law for the time being in force. On the plain words of the proviso the law prescribing the ceiling limit must be in force at the date of acquisition. In the present case the law relating to the ceiling limit viz., Chapter IV of the principal Act was never made operative by a notification, and was repealed by Act XV of 1965. The ceiling limit under section 47 of the principal Act was on that account inapplicable to the landholders who challenged the validity of section 45 of the amending Act.

The decision of this Court *A. Thangal Kunju Mudaliar v. M. Venkitachalam Potti and another*¹ on which the High Court relied lends no support to the views expressed by them. In that case the Travancore State Legislature enacted Act XIV of 1124 (M.E.) to provide for investigating cases of evasion of tax. The Act was to come into force by section 1 (3) on the date appointed by the State Government by notification. The States of Travancore and Cochin merged on 1st July, 1949 and formed the United State of Travancore and Cochin. By Ordinance I of 1124 M.E. all existing laws of the Travancore State were to continue in force in the United State. By a notification the Government of the United State brought the Travancore Act XIV of 1124 (M.E.) into force, and referred cases of certain tax-payers for investigation to the Commission appointed in that behalf. The tax-payers challenged the authority of the Commission to investigate the cases. They contended that the Travancore Act XIV of 1124 (M.E.) not being a law in force when the United State was formed, the notification bringing the Act into force was ineffective. The Court rejected that plea. Section 1 (3) of Travancore Act XIV of 1124 (M.E.) was existing law on 1st July, 1949, and continued to remain in force by virtue of Ordinance I of 1124 (M.E.). The notification issued in exercise of the power under section 1 (3) of the Travancore Act XIV of 1124 (M.E.), the reference of the cases of the petitioners, the appointment of the authorised officials and the proceedings under the Act could not be questioned because section 1 (3) was existing law on 1st July, 1949.

In *A. Thangal Kunju Mudaliar's case*¹, the contention that Travancore Act XIV of 1124 (M.E.) was not law in force until a notification was issued bringing into operation the provisions of the Act, authorising the appointment of a Commission, and referring the cases of tax-payers to the Commission, was rejected. The Court held that section 1 (3) was in operation on 1st July, 1949 and the power to bring into force the provisions of the Travancore Act was exercisable by the successor State. It was not held that the other provisions of the Act were in force even before an appropriate notification was issued. In the case in hand section 1 (3) of the principal Act was in force, but Chapter IV of the Act was not brought into force. The argument that provisions of the Act which by a notification could have been but were not brought into force, must still be deemed to be law in force, derives no support from the case relied upon.

Section 1 (3) of Act XVI of 1960 is undoubtedly a law in force, but until the power is exercised by the State Government to issue an appropriate notification, the provisions of Chapter IV could not be deemed to be law in force, and since no notification was issued before Chapter IV of the principal Act was repealed, there was no ceiling limit applicable to the landholders under any law for the time being in force which attracted the applications of the second proviso to Article 31-A.

The appeals must, therefore, be allowed, and the order passed by the High Court declaring Chapter IV of Act XIII of 1965 amending Act XVI of 1960 *ultra*

vires, be set aside. The State will get its costs in this Court from the respondents. There will be one hearing fee. There will be no order as to costs in the High Court.

S.V.J.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT:—M. Hidayatullah, *Chief Justice*. J.M. Shelat, V. Bhargava, K. S. Hegde and A. N. Grover, JJ.

A.K. Kraipak and others etc.

... *Petitioners*

v.

Union of India and others

... *Respondents*.

All India Services Act (LXI of 1951), section 3 and rule 4 of the Indian Forest Service (Recruitment) Rules, 1966 framed thereunder, and Indian Forest Service (Initial Recruitment) Regulations (V of 1966)—Constitution of India (1950), Articles 14 and 16—Nature of the power, conferred on the selection board—Whether quasi-judicial or administrative—Difference between quasi-judicial and administrative power—One of the members of the selection board himself a candidate for selection—Effect of his presence in the Board in selecting others—Natural Justice—Aim of—Applicability of to administrative proceedings.

The dividing line between an administrative power and a quasi-judicial power is quite there and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the laws conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is executed to be exercised. In a welfare state like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare state like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change, what was considered as an administrative power some years back is now being considered as a quasi-judicial power with the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these, public good is not advanced by a rigid adherence to precedents. Now problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power.

On facts, held, it was improper to have included Naquishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man Judge of his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of his selection board when the claims of his rivals particularly that of Basu was considered. He was also a party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there

tions of eligibility. That Regulation contemplates the formation of a service in the senior scale and a service in the junior scale. Regulation 5 is important for our present purpose. It deals with the preparation of the list of suitable candidates. It reads :

“(1) The Board shall prepare, in the order of preference, a list of such officers of State Forest Service who satisfy the conditions specified in regulation 4 and who are adjudged by the Board suitable for appointment to posts in the senior and junior scales of the Service.

(2) The list prepared in accordance with sub-regulation (1) shall then be referred to the Commission for advice, by the Central Government along with :—

(a) the records of all officers of State Forest Service included in the list ;

(b) the records of all other eligible officers of the State Forest Service who are not adjudged suitable for inclusion in the list, together with the reasons as recorded by the Board for their non-inclusion in the list ; and

(c) the observations, if any, of the Ministry of Home Affairs on the recommendations of the Board.

(3) On receipt of the list, along with the other documents received from the Central Government the Commission shall forward its recommendations to that Government.”

Regulation 6 stipulates that the officers recommended by the Commission under sub-rule (3) of Regulation 5 shall be appointed to the service by the Central Government subject to the availability of vacancies in the State cadre concerned.

In pursuance of the Regulation mentioned above, the Central Government constituted a special selection board for selecting officers to the Indian Forest Service in the senior scale as well as in the junior scale from those serving in the forest department of the State of Jammu and Kashmir. The nominee of the Chairman of the Union Public Service Commission, one M. A. Venkataraman was the Chairman of the board. The other members of the board were the Inspector-General of Forests of the Government of India, one of the Joint Secretaries in the Government of India, the Chief Secretary to the State Government of Jammu and Kashmir and Naquishbund, the Acting Chief Conservator of Forests of Jammu and Kashmir.

The selection board met at Srinagar in May, 1967 and selected respondent 7 to 31 in Writ Petition No. 173 of 1967. The cases of respondents Nos. 32 to 37 were reserved for further consideration. The selections in question are said to have been made solely on the basis of the records of officers. Their suitability was not tested by any examination, written or oral. Nor were they interviewed. For several years before that selection the adverse entries made in the character rolls of the officers had not been communicated to them and their explanation called for. In doing so quite clearly the authorities concerned had contravened the instructions issued by the Chief Secretary of the State. Sometime after the afore-mentioned selections were made, at the instance of the Government of India, the adverse remarks made in the course of years against those officers who had not been selected were communicated to them and their explanations called for. Those explanations were considered by the State Government and on the basis of the same, some of the adverse remarks made against some of the officers were removed. Thereafter the selection board reviewed the cases of officers not selected earlier as a result of which a few more officers were selected. The selections as finally made by the board were accepted by the Commission. On the basis of the recommendations of the Commission, the impugned list was published. Even after the review Basu, Baig and Kaul were not selected. It may also be noted that Naquishbund's name is placed at the top of the list of selected officers.

Naquishbund had been promoted as Chief Conservator of Forests in the year 1964. He is not yet confirmed in that post. G. H. Basu, Conservator of Forests in the Kashmir Forest Service who is admittedly senior to Naquishbund had appealed

to the State Government against his supersession and that appeal was pending with the State Government at the time the impugned selections were made. M. I. Baig and A. N. Kaul, Conservators of Forests also claim that they are seniors to Naqishbund but that fact is denied by Naqishbund. Kaul had also appealed against his alleged supersession but it is alleged that appeal had been rejected by the State Government.

Naqishbund was also one of the candidates seeking to be selected to the All India Forest Service. We were told and we take it to be correct that he did not sit in the selection board at the time his name was considered for selection but admittedly he did sit in the board and participate in its deliberations when the names of Basu, Baig and Kaul, his rivals, were considered for selection. It is further admitted that he did participate in the deliberations of the board while preparing the list of selected candidates in order of preference, as required by Regulation 5.

The selection board was undoubtedly a high powered body. That much was conceded by the learned Attorney-General who appeared for the Union Government as well as the State Government. It is true that the list prepared by the selection board was not the last word in the matter of the selection in question. That list along with the records of the officers in the concerned cadre selected as well as not selected had to be sent to the Ministry of Home Affairs. We shall assume that as required by Regulation 5, the Ministry of Home Affairs had forwarded that list with its observations to the Commission and the Commission had examined the records of all the officers afresh before making its recommendation. But it is obvious that the recommendations made by the selection board should have weighed with the Commission. Undoubtedly the adjudging of the merits of the candidates by the selection board was an extremely important step in the process.

It was contended before us that section 3 of the All India Services Act, rule 4 of the rules framed thereunder and Regulation 5 of the Indian Forest Service (Initial Recruitment) Regulations 1966 are void as those provisions confer unguided, uncontrolled and uncanalised power on the concerned delegates. So far as the vires of section 3 of the Indian Administrative Act is concerned, the question is no more *res integra*. It is concluded by the decision of this Court in *D. S. Garewal v. The State of Punjab and another*¹. We have not thought it necessary to go into the question of the vires of rule 4 and Regulation 5 as we have come to the conclusion that the impugned selections must be struck down for the reasons to be presently stated.

There was considerable controversy before us as to the nature of the power conferred on the selection board under rule 4 read with Regulation 5. It was contended on behalf of the petitioners that that power was a quasi-judicial power whereas the case for the contesting respondents was that it was a purely administrative power. In support of the contention that the power in question was a quasi-judicial power emphasis was laid on the language of rule 4 as well as Regulation 5 which prescribe that the selections should be made after adjudging the suitability of the officers belonging to the State service. The word 'adjudge' we were told means "to judge or decide." It was contended that such a power is essentially a judicial power and the same had to be exercised in accordance with the well accepted rules relating to the exercise of such a power. Emphasis was also laid on the fact that the power in question was exercised by a statutory body and a wrong exercise of that power is likely to affect adversely the careers of the officers not selected. On the other hand it was contended by the learned Attorney-General that though the selection board was a statutory body, as it was not required to decide about any right, the proceedings before it cannot be considered quasi-judicial; its duty was merely to select officers who in its opinion were suitable for being absorbed in the Indian Forest Service. According to him the word 'adjudge' in rule 4 as well as Regulation 5 means "found worthy of selection."

1. (1959) S.C.J. 399; (1959) 1 S.C.R. (Supp.) 792.

The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. The organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power. The following observations of Lord Parker, C. J., in *Ragina v. Criminal Inquiries Compensation Board, Ex parte Lain*¹, are instructive.

"With regard to Mr. Bridge's second point I cannot think that Atkin, L.J., intended to confine his principle to cases in which the determination affected rights in the sense of enforceable rights. Indeed, in the Electricity Commissioners case, the rights determined were at any rate not immediately enforceable rights since the scheme laid down by the commissioners had to be approved by the Minister of Transport and by resolutions of Parliament. The commissioners nevertheless were held amenable to the jurisdiction of this Court. Moreover, as can be seen from *Rex v. Postmaster-General, Ex parte Carmichael*,² and *Rex v. Boycott Ex parte Keasley*,³ the remedy is available even though the decision is merely a step as a result of which legally enforceable rights may be affected.

The position as I see it is that the exact limits of the ancient remedy by way of *certiorari* have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a *lis* inter parties. Later again it extended to cases where there was no *lis* in the strict sense of the word but where immediate or subsequent rights of citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of *certiorari* since their authority is derived solely from contract, that is from the agreement of the parties concerned.

Finally, it is to be observed that the remedy has now been extended, see *Reg v. Manchester Legal Aid Committee, Ex parte R.A. Brand & Co. Ltd.*⁴, to cases in which the decision of an administrative officer is only arrived at after an inquiry or process of a judicial or quasi-judicial character. In such a case this Court has jurisdiction to supervise that process.

We have as it seems to me reached the position when the ambit of *certiorari* can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the board in my judgment comes fairly and squarely, within the jurisdiction of this Court. It is, as Mr. Bridge said, 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.' It is clearly, therefore performing public duties."

The Court of Appeal of New Zealand has held that the power to make a Zoning order under Dairy Factory Supply Regulation. 1936 has to be exercised judicially, see *New Zealand and Dairy Board v. Okita Co-operative Dairy Co. Ltd.*⁵. This

1. (1967) 2 Q.B. 854 at p. 881.

2. (1928) 1 K.B. 291.

3. (1939) 2 K.B. 651.

4. (1952) 2 Q.B. 413.

5. (1953) New Zealand Law Reports 366.

Court in *The Purtabpore Co., Ltd. v. Cane Commissioner of Bihar and others*¹, held that the power to alter the area reserved under the Sugar Cane (Control) Order, 1966 is a quasi-judicial power. With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these, public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power. But for the purpose of the present case we shall assume that the power exercised by the selection board was an administrative power and test the validity of the impugned selections on that basis.

It is unfortunate that Naqishbund was appointed as one of the members of the selection board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the All India Service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the State of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney-General that a mere suspicion of bias not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates.

The members of the selection board other than Naqishbund, each one of them separately, have filed affidavits in this Court swearing that Naqishbund in no manner influenced their decision in making the selection. In a group deliberation each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder that the other members of the selection board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept the contention that in adjudging the suitability of the candidates the members of the board did not have any mutual discussion. It is not as if the records spoke of themselves. We are unable to believe that the members of selection board functioned like computers. At this stage it may also be noted that at the time the selections were made, the members of the selection board other than Naqishbund were not likely to have known that Basu had appealed against his supersession and that his appeal was pending before the State Government. Therefore there was no occasion for them to distrust the opinion expressed by Naqishbund. Hence the board in making the selections must necessarily have given weight to the opinion expressed by Naqishbund.

This takes us to the question whether the principles of natural justice apply to administrative proceedings similar to that with which we are concerned in these cases. According to the learned Attorney-General those principles have to bearing in determining the validity of the impugned selections. In support of his contention he read to us several decisions. It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding. The question how far the principles of natural justice govern administrative enquiries came up for consideration before the Queens Bench Division in *re, H.K. (An Infant)*¹. Therein the validity of the action taken by an Immigration Officer came up for consideration. In the course of his judgment Lord Parker, C.J., observed thus :

"But at the same time, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or *bona fide* decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly ; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the Courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."

In the same case Blain, J., observed thus :

"I would only say that an immigration officer having assumed the jurisdiction granted by those provisions is in a position where it is his duty to exercise that assumed jurisdiction whether it be administrative, executive or quasi-judicial, fairly, by which I mean applying his mind dispassionately to a fair analysis of the particular problem and the information available to him in analysing it. If any hypothetical case, and in any real case, this Court was satisfied that an immigration officer was not so doing, then in my view *mandamus* would lie."

In *State of Orissa v. Dr. (Miss) Binapani Dei and others*², Shah, J., speaking for the Court, dealing with an enquiry made as regards the correct age of a Government servant, observed thus :

"We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State....."

The aim of the rules of natural justice is to secure justice of to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own case (*Nemo debet esse iudex propria causa*), and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently

1. (1967) 2 Q.B. 617 at 630.

2. (1967) 2 S.C.R. 625 : (1967) 2 S.C.J. 339.

it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. The University of Kerala and others*¹, the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

It was next urged by the learned Attorney-General that after all the selection board was only a recommendatory body. Its recommendations had first to be considered by the Home Ministry and thereafter by the U.P.S.C. The final recommendations were made by the U.P.S.C. Hence grievances of the petitioners have no real basis. According to him while considering the validity of administrative actions taken, all that we have to see is whether the ultimate decision is just or not. We are unable to agree with the learned Attorney-General that the recommendations made by the selection board were of little consequence. Looking at the composition of the board and the nature of the duties entrusted to it we have no doubt that its recommendations should have carried considerable weight with the U.P.S.C. If the decision of the selection board is held to have been vitiated, it is clear to our mind that the final recommendation made by the Commission must also be held to have been vitiated. The recommendations made by the Union Public Service Commission cannot be dissociated from the selections made by the selection board which is the foundation for the recommendations of the Union Public Service Commission. In this connection reference may be usefully made to the decision in *Regina v. Criminal Injuries Compensation Board Ex Parte Lain*.²

It was next urged by the learned Attorney-General that the mere fact that one of the members of the Board was biased against some of the petitioners cannot vitiate the entire proceedings. In this connection he invited our attention to the decision of this Court in *Sumar Chand Jain v. Union of India and another*³. Therein the Court repelled the contention that the proceedings of a departmental promotion committee were vitiated as one of the members of that committee was favourably disposed towards one of the selected candidates. The question before the Court was whether the plea of *mala fides* was established. The Court came to the conclusion that on the material on record it was unable to uphold that plea. In that case there was no question of any conflict between duty and interest nor any member of the departmental promotion committee was a judge in his own case. The only thing complained of was that one of the members of the promotion committee was favourably disposed towards one of the competitors. As mentioned earlier in this case we are essentially concerned with the question whether the decision taken by the board can be considered as having been taken fairly and justly.

One more argument of the learned Attorney-General remains to be considered. He urged that even if we are to hold that Naqishbund should not have participated in the deliberations of the selection board while it considered the suitability of Basu, Baig and Kaul, there is no ground to set aside the selection of other officers.

1. (1969) 1 S.C.J. 543.

2. (1967) 2 Q.B. 864.

3. W.P. No. 237 of 1966 decided on 4-5-67.

According to him it will be sufficient in the interest of justice if we direct that the cases of Basu, Baig and Kaul be reconsidered by a Board of which Naqishbund is not a member. Proceeding further he urged that under any circumstance no case is made out for disturbing the election of the Officers in the junior scale. We are unable to accept either of these contentions. As seen earlier Naqishbund was a party to the preparation of the select list in order of preference and that he is shown as No. 1 in the list. To that extent he was undoubtedly a judge in his own case, a circumstance which is abhorrent to our concept of justice. Now coming to the selection of the officers in the junior scale service, the selections to both the senior scale service as well as junior scale service were made from the same pool. Every officer who had put in a service of 8 years or more, even if he was holding the post of an Assistant Conservator of Forests was eligible for being selected for the senior scale service. In fact some Assistant Conservators have been selected for the senior scale service. At the same time some of the officers who had put in more than eight years of service had been selected for the junior scale service. Hence it is not possible to separate the two sets of officers.

For the reasons mentioned above these petitions are allowed and the impugned selections set aside. The Union Government and the State Government shall pay the costs of the petitioners.

S.V.J.

Petitions allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A.N. GROVER, JJ.
The Sales Tax Officer, Special Circle, Ernakulam and another ... Appellants*

v.

M/S. Sudarsanam Iyengar & Sons ... Respondent.

Travancore Cochin General Sales Tax rules (1950), Rule 33—Interpretation—Assessment of escaped turnover of business—"Determine"—Meaning of—Assessment, if denotes the entirety of proceedings or the final order of assessment.

It is well established that assessment proceedings under the Sales Tax Act must be held to be pending from the time the proceedings are initiated until they are terminated by a final order of assessment. In the context of Sales Tax legislation the use of the words "proceed to assess" and "determine" would not lead to different consequences or result. In this connection the words which follow the word "determine" in rule 33 of the Travancore Cochin General Sales Tax Rules, 1950 must be accorded their due signification. The words "assess the tax payable" cannot be ignored and it is clearly meant that the assessment has to be made within the period prescribed. Assessment is a comprehensive word and can denote the entirety of proceedings which are taken with regard to it. It cannot and does not mean a final order of assessment alone unless there is something in the context of a particular provision which compels such a meaning being attributed to it.

Appeal by Special Leave from the Judgment and Decree dated the 18th June, 1968 of the Kerala High Court in Writ Appeal No. 46 of 1967.

M.R.K. Pillai, Advocate, for Appellant.

T.A. Ramachandran, Advocate, for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the Kerala High Court. The facts may be firstly stated : The respondent was a non-resident dealer carrying on business in Quilon, Ernakulam and Calicut in the State of Kerala. When the assessment in respect of sales tax for the assessment years 1961-62 and 1962-63 was pending the respondent had applied for a bifurcation of the assessment

by treating his business at three places mentioned above as separate units. This request was acceded to by the Board of Revenue. The orders of assessment relating to the two years were made in April, 1964 and March, 1964 respectively.

The Sales Tax Officer issued notices in December, 1965 for reopening the original assessments on the ground that certain turnover had escaped assessment. The objections of the respondent to these notices having failed a writ petition seeking to quash the orders made by the Sales Tax authorities was filed. A learned Single-Judge held that in respect of the assessment year 1961-62 the Sales Tax Officer had no jurisdiction or authority to proceed under Rule 33 of the Travancore Cochin General Sales Tax Rules, 1950 which were in force at the material time. It was found that the notice served in December, 1965 relating to that assessment year was beyond the time limit of three years prescribed by the rule. As regards the assessment year 1962-63 the learned judge held that the time-limit would expire on 31st March, 1966. Owing to the writ petition and the stay orders which had been made the assessment could not be completed. The learned judge felt that it was owing to the orders of the Court that the Sales Tax authorities had been prevented from completing the assessment within the time. While disposing of the writ petition it was observed that the Sales Tax authorities would be at liberty to complete the proceedings initiated by the notice within the period of 59 days at the expiry of which the period prescribed by Rule 33 was to expire. The respondent preferred an appeal to a division bench which set aside the direction granting 59 days extension for completing the assessment on the ground that the same was not justified under the law.

Counsel for the appellant has confined the appeal only to the proceedings relating to the assessment year 1962-63. It is admitted that with regard to the other year 1961-62 the proceedings became barred. It is contended before us that on a true construction of Rule 33 it should be held that the proceedings under that Rule have to commence within three years next succeeding to that to which the tax relates and that it is not necessary that the entire proceedings relating to the escaped assessment should be completed within that period. In other words if such proceedings under Rule 33 have been commenced within the period prescribed by the rule they can be continued even beyond the period of three years till a final order of assessment is made. Reliance has been placed on a number of decisions of this Court some of which may be noticed. In *The State of Punjab and others v. Tara Chand Lajpat Rai*¹, the question which came up for consideration was that where the Sales Tax Authority issued a notice under section 11 (2) of the Punjab General Sales Tax Act, 1948 before the expiry of three years from the termination of the period for furnishing returns but finalised the assessment order after three years from the aforesaid date, whether such an assessment could be said to be barred by time. It was held that assessment proceedings commenced in the case of a registered dealer either when he furnished a return or when a notice was issued to him under section 11 (2) of the Punjab Act and if such proceedings were taken within the prescribed time, though the assessment was finalised subsequently even after the expiry of the prescriber period no question of limitation would arise. In *The State of Punjab and another v. Murlidhar Mahabir Prasad*², the question of laws was whether on a proper interpretation of sub-sections (4) and (5) of section 11 of the Punjab Act the period of limitation was three years for making the assessment from the last date on which the return was to be filed or whether the order of assessment was valid even after it was made after a period of three years provided the necessary notice had been issued within that period. The aforesaid provision of the Punjab Act may be read :

“ 11. (4) If a registered dealer, having furnished returns in respect of a period fails to comply with the terms of a notice issued under sub-section (2) the Assessing Authority shall within three years after the expiry of such period, proceed to assess to the best of his judgment the amount of the tax due from the dealer.

1. (1967) 19 S.T.C. 493 : (1967) 3 S.C.R. 1408.
10 : (1967) 2 S.C.J. 404 : A.I.R. 1967 S.C. 2. (1968) 21 S.T.C. 29.

(5) If a registered dealer does not furnish returns in respect of any period by the prescribed date, the Assessing Authority shall within three years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed to assess to the best of his judgment, the amount of tax, if any, due from the dealer."

Relying mainly on the observation in *Ghanshyam Das v. Regional Assistant Commissioner of Sales Tax, Nagpur*¹, this Court held that the proceedings for assessment were valid because the same had been initiated within the period prescribed under section 11 (5). The principle laid down in *Tara Chand Lajpat Rai's*², case was followed.

Rule 33 of the relevant rules is in these terms :

Rule 33 (1) "If for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority as the case may be, subject to the provisions of sub-rule (2) may at any time within three years next succeeding that to which the tax or licence fee relates determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable or levy the licence fee in such turnover after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary."

Now in view of the previous decisions the principle is firmly established that assessment proceedings under the Sales Tax Act must be held to be pending from the time the proceedings are initiated until they are terminated by a final order of assessment. The distinguishing feature on which emphasis has been laid by the Counsel for the respondent is that the language employed in rule 33 is such as to lead to only one conclusion that the final determination of the turnover which has escaped assessment and the assessment of the tax have to be done within three years. It is pointed out that in the other Sales Tax provisions which came up for consideration in the cases mentioned above the words employed were "proceed to assess" e.g., sub-sections (4) and (5) of section 11 of the Punjab General Sales Tax Act. Our attention has been invited to the appropriate dictionary meaning of the word "determine" which is "to settle or decide"—to come to a judicial decision—(Shorter Oxford English Dictionary). It is suggested that the word "determine" was employed in Rule 33 with a definite intention to set the limit within which the final order in the matter of assessment should be made, the limit being three years. We find it difficult to accept that in the context of Sales Tax legislation the use of the words "proceed to assess" and "determine" would lead to different consequences or result. In this connection the words which follow the word "determine" in Rule 33 must be accorded their due signification. The words "assess the tax payable" cannot be ignored and it is clearly meant that the assessment has to be made within the period prescribed. Assessment is a comprehensive word and can denote the entirety of proceedings which are taken with regard to it. It cannot and does not mean a final order of assessment alone unless there is something in the context of a particular provision which compels such a meaning being attributed to it. In our judgment despite the phraseology employed in Rule 33 the principle which has been laid in other cases relating to analogous provisions in Sales Tax statute must be followed as otherwise the purpose of a provision like Rule 33 can be completely defeated by taking certain collateral proceedings and obtaining a stay order as was done in the present case or by unduly delaying assessment proceedings beyond a period of three years.

It is undoubtedly open to the Legislature or the rule making authority to make its intention quite clear that on the expiry of a specified period no final order of assessment can be made. Then the taxing authorities would certainly be debarred from completing the assessment beyond the period prescribed as was the case in sub-section (3) of section 34 of the Income-tax Act, 1922; but such is not the case here

1. (1964) 4 S.C.R. 436: (1964) 1 I.T.J. 74; 2. (1967) 19 S.T.C. 493: (1967) 3 S.C.R. (1964) 1 S.C.J. 121: 51 I.T.R. 557. 10: (1967) 2 S.C.J. 404: A.I.R. 1967 S.C. 1408.

and we would hold that the assessment proceedings relating to the year 1962-63 were within time.

The appeal is allowed and the judgment of the High Court is set aside. The case shall go back to the High Court for disposal of such points as were previously not decided. In terms of the previous order dated 3rd April, 1969, the respondents shall be entitled to costs in this Court.

V.M.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND P. JAGANMOHAN REDDY, JJ.

K. Ranganatha Reddiar

... *Appellant**

v.

The State of Kerala

... *Respondent.*

Prevention of Food Adulteration Rules (1955), Proviso to Rule 12-A—Interpretation—Requirement of warranty in writing about “the nature, substance and quality” of the article of food as demanded by the vender—“Quality is up to the mark” if could be interpreted to have same effect as certifying “the nature, substance and quality” of an article of food.

When the proviso to rule 12-A of the Prevention of Food Adulteration Rules, 1955, expressly says that no warranty in such form (Form VI-A) shall be necessary in certain eventualities it would be rewriting the rule to hold that nevertheless the things must exist in the label or the cash memo. It seems that if the words in the warranty can reasonably be interpreted to have the same effect as certifying “the nature, substance and quality” of an article of food, the warranty will fall within the proviso. The Prevention of Food Adulteration Act is of wide application and millions of small traders have to comply with the provisions of the Act and the Rules.

The words “quality is up to the mark” in the cash memo means that the quality of the article is up to the standard required by the Act and the vendee. Quality in this context would include nature and substance because the name of the article is given in the cash memo. It must be remembered that it is not a document drafted by a solicitor; it is a document using the language of a tradesman. Any tradesman, when he is assured that the quality of the article is up to the mark will readily conclude that he is being assured that the article is not adulterated. The offence, if any, has been committed by the seller and not the appellant.

Appeal from the Judgment and Order dated the 21st July, 1967 of the Kerala High Court in Criminal Appeal No. 109 of 1966.

A. S. R. Chari, Senior Advocate (A. S. Nambiar and K.R. Nambiar, Advocates, within him), for Appellant.

V. K. Krishna Menon, Senior Advocate (M. R. K. Pillai, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—In this appeal by certificate the only point that arises is whether the cash memo. Exhibit D-1, issued by the seller to the appellant contains a warranty within rule 12-A of the rules framed under the Prevention of Food Adulteration Act (XXXVII of 1954), hereinafter referred to as the Act. The Magistrate who tried the complaint, held that Exhibit D-1 was a proper warranty and it fell within the proviso to rule 12-A. The High Court on appeal held to the contrary.

The relevant facts are these. The appellant is a Rice and General Merchant and holds a wholesaler's licence. It was alleged in the complaint that the appellant had

* Cr. A. No. 141 of 1967.

stored and exposed for sale and sold compounded Asafoetida which was found to have been adulterated by wheat starch and tapioca starch and that non-permitted orange coal tar dye was present. The report of the Public Analyst to Government, Trivandrum, was relied on in this connection.

The appellant appeared as a witness and he stated that he purchased Asafoetida from L. T. Alakesan and Brothers, received it in enclosed packets in bags and sold it in bags. He received invoice which reads as follows :

"L.T. Alakesan & Brothers,

Asafoetida Merchants, Vellamadam

Sri K. Ranganatha Reddiar, Kottarakara

Rate : 6.00

Particulars : C.S.T. Rs. 2. One case of Asafoetida Misky bag 30	Rs. 180-00
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The quality is up to the mark C.S.T.	Rs. 3.60
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	Rs. 183.60
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Ruppes one hundred and eighty-three and nP. sixty only.

One case (1-d) (I-d) 1/4/64 (Sd.) 147542 18/5/64. "

He further stated that "it is written on the packet as "Extra Superior" in English and as "Compounded miskey full of quality and flavour" in Tamil."

The relevant statutory provisions are :

The Prevention of Food Adulteration Act, 1954.

"Section 14. *Manufacturers, distributors and dealers to give warranty* :—

No manufacturer, distributor or dealer of any article of food shall sell such article to any vendor unless he also gives a warranty in writing in the prescribed form about the nature and quality of such article to the vendor."

Section 19 (2). A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded article of food if he proved:—

(a) that he purchased the article of food—

(i) in a case where a licence is prescribed for the sale thereof, from a duly licensed manufacturer, distributor or dealer,

(ii) in any other case, from any manufacturer, distributor or dealer, with a written warranty in the prescribed form ; and

(b) that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it".

The Prevention of Food Adulteration Rules, 1955.

"Rule 12-A, *Warranty*—Every trader selling an article of food to a vendor shall, if the vendor so requires, deliver to the vendor a warranty in Form VI-A :

Provided that no warranty in such form shall be necessary if the label on the article of food or the cash memo. delivered by the trader to the vendor in respect of that article contains a warranty certifying that the food contained in the package or container or mentioned in the cash memo. is the same in nature, substance and quality as demanded by the vendor.

Explanation.—The term 'trader' shall mean an importer, manufacturer, wholesale dealer or an authorised agent of such importer, manufacturer or wholesale dealer."

[1] We are not concerned with the question whether rule 12-A is contrary to the provisions of the Act. We take it that it is valid and if the appellant's case falls within the proviso he is entitled to acquittal.

It was contended before us on behalf of the respondent that the warranty must state expressly that the food mentioned in the cash memo. was the same in nature, substance and quality as demanded by the vendor, and if these words did not exist in the cash memo., the proviso would not apply. We are unable to accede to this contention. It may be that if the warranty is not contained in a label or cash memo the warranty must be in Form VI-A, which uses these words :

"We hereby certify that the food/foods mentioned in this invoice is/are warranted to be the same in nature, substance and quality as that demanded by the vendor."

But we do not decide this as it is not necessary to do so. In our view when the proviso expressly says that no warranty in such form shall be necessary in certain eventualities it would be rewriting the rule to hold that nevertheless the same things must exist in the label or the cash memo. It seems to us that if the words in the warranty can reasonably be interpreted to have the same effect as certifying "the nature, substance and quality" of an article of food, the warranty will fall within the proviso. The Act is of wide application and millions of small traders have to comply with the provisions of the Act and the Rules. The learned Counsel for the State says that if they are not able to comply with the provisions they should stop carrying on their trade. But if the object underlying the Act can be achieved, without disorganising the trade, by giving a reasonable interpretation to rule 12-A, it is our duty to do so.

A number of English cases were referred to us, but we do find it necessary to refer to them as they interpret the Sale of Food and Drugs Act, 1875, and the later Food and Drugs Act, 1955. The language of the relevant sections dealing with defences is different and warranties employing different words have been interpreted. But they do at least show this that trade can be carried on and the object of the Act is not defeated even if traders use ordinary language of the trade or popular language in warranties.

Coming now to the language used in the cash memo. it seems to us that the words "quality is up to the mark" mean that the quality of the article is up to the standard required by the Act and the vendee. Quality in this context would include nature and substance because the name of the article is given in the cash memo. It must be remembered that it is not a document drafted by a solicitor, it is a document using the language of a tradesman. Any tradesman, when he is assured that the quality of the article is up to the mark will readily conclude that he is being assured that the article is not adulterated. The offence, if any, has been committed by the seller and not the appellant.

There was some argument before us as to the difference in the meaning of the words "nature, substance and quality." It was pointed out that section 14 only uses two words "nature and quality" and not substance. But it is not necessary to express our views on this point. Reference was made to the case of *Baburally v. Corporation of Calcutta*.¹ This Court held that the words on the label and the so-called cash memo in that case did not contain the requisite warranty. But we are unable to see how that case assists either the appellant or the State.

In the result the appeal is allowed, judgment of the High Court set aside and that of the Magistrate restored. The appellant's bail bond shall be treated as cancelled.

V.M.K.

Appeal allowed.

1. (1967) 1 S.C.J. 626 : (1967) M.L.J. (Cri.) 322 : (1966) 2 S.C.R. 815.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.

Jothi Timber Mart, etc.

... Appellants*

v.

The Corporation of Calicut and another

... Respondents.

Calicut City Municipal Act (XXX of 1961), Proviso to section 126 (1)—Interpretation—Levy of tax on timber on entry—No tax on timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water—Proviso if exempts from taxation timber brought into the city in the course of transit even when not directly removed out of the city by rail, road or water.

By virtue of Article 246 read with Schedule VII, Item 52, List II, of the Constitution, the State may legislate in the matter of "tax on the entry of goods into a local area for consumption, use or sale therein." The municipality derives its power to tax from the State Legislature and can obviously not have authority more extensive than the authority of the State Legislature. Section 126 of the Calicut City Municipal Act, 1961 (XXX of 1961), declares a charge of tax on timber brought into the city. The proviso to section 126 (1) says that no tax shall be levied on any timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water. The proviso does not exempt from taxation timber brought into the city in the course of transit even when it is not directly removed out of the city by rail, road or water. It is difficult to hold that the proviso is enacted with the object of bringing to tax all (entry of timber which is not brought into the city in the course of transit to any) place outside the city and directly removed out of the city by rail, road or water.

Appeals from the Judgment and Orders dated the 31st August, 1965 of the Kerala High Court in Writ Appeals Nos. 134 of 1964, etc.

H. R. Gokhale, Senior Advocate (*B. Datta*, Advocate and *J. B. Dadachanji* and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellants (In all the Appeals).

C. K. Daphtary, Senior Advocate, (*A. S. Nambiar* and *Miss Lily Thomas*, Advocates, with him), for Respondent No. 1 (In all the Appeals).

D. P. Singh and *M. R. K. Pillai*, Advocates, for Respondent No. 2 (In all the Appeals).

The Judgment of the Court was delivered by

Shah, J.—In a group of petitions presented before the High Court of Kerala the appellants challenged the validity of the levy of "timber-tax" by the Corporation of Calicut on the grounds, *inter alia*, that the State Legislature is incompetent to impose that tax under the Kerala Act (XXX of 1961). *Govindan Nair, J.*, declared that the Legislature was incompetent to enact section 126 of the Calicut City Municipal Act, 1961 (XXX of 1961). The decision of *Govindan Nair, J.*, was reversed in appeal by a Division Bench of the High Court and the petitions were dismissed.

By virtue of Article 246 read with Schedule VII, Item 52, List II of the Constitution, the State may legislate in the matter of "tax on the entry of goods into a local area for consumption, use or sale therein." The appellants contend that section 126 conferring authority to impose timber tax violates the restrictions upon the legislative power imposed by the Constitution and on that account is void.

Section 98 of the Act enumerates the taxes and duties which the Municipality may levy and one of the taxes described in clause (e) is "tax on timber brought into the city". Section 126 of declares a charge of tax on timber brought into the city : it provides, (insofar as it is material):

" (1) If the Council by a resolution determine that a tax shall be levied on timber brought into the city, such tax shall be levied at such rates, not exceeding five rupees per ton, and in such manner as may be determined by the Council:

Provided that no tax shall be levied on any timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water.

(2) No timber shall, except in the case referred to in the proviso to sub-section (1) be brought into the city unless the tax due thereon has been paid.

(3) The tax shall be levied on timber kept within the city for sale if the Commissioner has reason to believe that the tax, if any, due thereon has not been paid :

* * * * *

Power to make bye-laws for sale and seizure of timber in respect of which tax is not paid and for carrying out the provisions relating to the levy of tax is conferred by section 126 (6) and section 369 (1) of the Act. The Corporation of Calicut has framed bye-laws relating to the levy and collection of timber tax. It is provided by clause 3 that the tax on timber shall be paid immediately on timber being brought into the City. Bye-law 7 provides :

" (1) If timber is brought into the city and it is claimed that it is in the course of transit to a place outside the city and not for consumption, use or sale within the city and if in the opinion of the authority or officer authorised to collect the tax on timber, such timber brought into the city is not for the purpose of transit but for the purpose of consumption, use or sale therein, such authority or officer may demand from the person claiming exemption an amount equal to the tax leviable for such timber as security.

(2) If the person, who has paid the security satisfies the Commissioner within 14 days from the date of payment that the timber in respect of which the amount was paid was brought into the city in the course of transit and not for consumption, use or sale therein the Commissioner shall refund the amount to such person. Otherwise the same shall be appropriated towards tax due on such timber.

(3) * * * * *

(4) * * * * *

The High Court held that timber may be imported within the limits of the Corporation for four purposes—(1) for consumption in the city; (2) for use in the city; (3) for sale in the city; and (4) for transit through the city, and since all the four purposes were within the enacting part of the section and the proviso to section 126 (1) having eliminated the right of the Municipality to levy tax for transit through the city, "the taxing power conferred by Entry 52, List II of the Seventh Schedule was ensured and its constitutional strength and validity upheld" thereby.

Counsel for the appellants contends that the High Court was in error in holding that entry of timber into the Municipal area may be only for consumption, use, or sale within the Municipality or in the course of transit through the limits of the municipality. He says that the entry may for instance be merely for storage of the goods within the limits of the municipality and a provision levying tax on goods entering the limits of the municipality without a specification of the purpose is beyond the legislative power of the State.

Entry of goods within the local area for consumption, use or sale therein is made taxable by the State Legislature : authority to impose a general levy of tax on entry of goods into a local area is not conferred on the State Legislature by item 52 of List II of Schedule VII of the Constitution. The Municipality derives its power to tax from the State Legislature and can obviously not have authority more extensive than the authority of the State Legislature. If the State Legislature is competent to levy a tax only on the entry of goods for consumption, use or sale into a local area, the Municipality cannot under a legislation enacted in exercise of the power conferred by item 52, List II have power to levy tax in respect of goods brought into the local area for purposes other than consumption, use or sale. The authority, of the State Legislature itself being subject to a restriction in that behalf, section 126 may reasonably be read as subject to the same limitations. When the power of the Legislature with limited authority is exercised in respect of a subject-matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other ; and that the Legislature did not intend to transgress the limits imposed by the Constitution ; see *In re Hindu Women's Rights to Property Act, 1937*¹. To interpret the expression "brought into the city" used in section 126 (1) as meaning brought into the city for any purpose and without any limitations would, in our judgment, amount to attributing to the Legislature an intention to ignore the constitutional limitations. The expression "brought into the city" in section 126 was therefore rightly interpreted by the High Court as meaning brought into the municipal limits for purposes of consumption, use or sale and not for any other purpose.

While we agree with the ultimate conclusion of the High Court we may observe that we do not agree with the assumption made by the High Court that the entry of goods into the city may be only for the four purposes mentioned by the High Court ; nor do we hold that the proviso exempts from taxation timber brought into the city in the course of transit even when it is not directly removed out of the city by rail, road or water. The proviso in our judgment has a limited operation. It merely provides that the municipality shall not be entitled to levy a tax on timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water. But on that account we are unable to hold that the proviso is enacted with the object of bringing to tax all entry of timber which is not brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water.

The appeals fail and are dismissed. There will be no order as to costs in these appeals.

V.M.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND K. S. HEGDE, JJ.

Shyamal Chakravarty

... *Petitioner**

v.

The Commissioner of Police, Calcutta and another

... *Respondents.*

Preventive Detention Act (IV of 1950), section 3—Scope—Detenu and his associates using deadly weapons, acid bulbs, iron rods, lathis etc., indiscriminately and thus endangering human lives in the locality—Detenu and his associates also preventing the police constables from discharging their lawful duties—Grounds of detention if have reference merely to maintenance of order.

The detenu in each of the cases (as indicated in the grounds of detention) acted along with associates who were armed with lathis, iron rods, acid bulbs, etc. It is

1. (1941) 2 M.L.J. 12: (1941) F.L.J. 1: (1941) F C R 12.

*W.P. No. 102 of 1969.

4th August, 1969.

clearly said in ground No. 1 that he committed a riot and in discriminately used acid bulbs, iron rods, lathis, etc., endangering human lives. This ground cannot be said to have reference merely to maintenance of order because it affects the locality and everybody who lives in the locality. Similarly, in the second ground, he along with his associates prevented the police constables from discharging their lawful duties and thus affected everybody living in the locality. In ground No. 3, again the whole locality was in danger as the detenu and his associates were armed with deadly weapons and these were in fact used indiscriminately endangering human lives in the locality. The object of the detenu seems to have been to terrorise the locality and bring the whole machinery of law and order to a halt. Therefore, it cannot be said that the grounds do not have any relation to the maintenance of public order. There has been no breach of the provisions of the Preventive Detention Act, 1950. The fact that public order is affected by an act which was also an offence under the Indian Penal Code seems to be irrelevant.

Petition under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*.

Vinoo Bhagat, Advocate, *amicus curiae*, for Petitioner.

S. P. Mitra, Advocate and G. S. Chatterjee, Advocate, for Sukumar Basu, Advocate, for Respondents.

The Judgment of the Court was delivered by

Sikri, J.—This is a petition under Article 32 of the Constitution by Shyamal Chakraborty who has been detained under the Preventive Detention Act, 1950 (hereinafter referred to as the Act). Three grounds have been urged by the learned Counsel why we should issue a writ of *habeas corpus* directing his release : (1) that the detenu's representation was not considered by the Government, (2) that the grounds furnished to the detenu mentioned offences under the Indian Penal Code and cannot be used for the purpose of detaining the detenu except in emergencies, and (3) that the grounds do not have any relation to the maintenance of public order. Following are the facts as they emerge from the affidavits on record.

The detenu was detained by an order No. 3846-D-D. (S), dated 13th November, 1968, passed by the Commissioner of Police, Calcutta in exercise of powers conferred on him by section 3 (2) of the Act. The detenu was arrested on 13th November, 1968 and was served with the grounds of detention both in English and in vernacular on the same day. On 15th November, 1968, the Commissioner of Police reported the fact of such detention of the petitioner together with the grounds and other particulars having bearing on the necessity of the order to the State Government. On 19th November, 1968, the Governor was pleased to approve the said order of detention under section 3 (3) of the Act and on the same day the Governor submitted the report to the Central Government under section 3 (4) of the Act together with grounds and other particulars having bearing on the necessity of the order. On 7th December, 1968, his case was placed before the Advisory Board under section 9 of the Act. On 6th January, 1969, the Advisory Board after consideration of the materials placed before it was of the opinion that there was sufficient cause for detention of the petitioner. The petitioner had not submitted any representation to the State Government till then. By an order dated 8th January, 1969, the Governor was pleased to confirm the order of detention. It appears that on the 13th January, 1969 and 16th January, 1969, the detenu made representations. After the receipt of these representations the same were sent by the Home Department to the Commissioner of Police for his report. On 1st April, 1969, the Commissioner of Police informed the Home Department that he did not recommend the release of the petitioner. But the representations of the petitioner were not received back from the Commissioner of Police with his letter of the 1st April, 1969. Later on the Commissioner of Police sent back the representation dated 13th January, 1969 to the Home Department. This Court on 28th March, 1969, issued a notice under Article 32 of the Constitution to the Commissioner of Police and to the State Government to show cause why Rule Nisi should not be issued made returnable three weeks hence.

On receipt of this notice the State Government refrained from passing any order on the representation dated 13th January, 1969. The representation dated 16th January, 1969 is untraceable, but effort is being made to trace it. According to the Commissioner of Police it was on the same lines as the representation dated 13th January, 1969.

It is necessary to reproduce the grounds of detention served on the detenu and they are in the following terms :

“ You are being detained in pursuance of a detention order made under sub-section (2) of section 3 of the Preventive Detention Act, 1950 (IV of 1950) on the following grounds :

You have been acting in a manner prejudicial to the maintenance of public order by the commission of offences of rioting, assault etc., as detailed below :

(1) That on 28th June, 1968, at about 6 P.M. you along with your associates being armed with lathis, iron rods, acid bulbs, etc., committed a riot in Kumartuli Park in course of which you severely assaulted Shri Amal Krishna Roy of 20-A Abhoy Mitra Street and iron rods, acid bulbs etc., were indiscriminately used endangering human lives.

(2) That on 23rd July, 1968, at about 6.10 P.M. you along with your associates being armed with lathis, iron rod, hockey sticks, etc., attacked constables Sankar Lal Bose and Jagdish Singh both of Shyampukur P.S. on Kaliprosad Chakraborty Street near the Gaudiya Math who went there to discharge their lawful duties, as a result of which constable Sankar Lal Bose sustained bleeding injuries on his person.

(3) That in the night of 3rd October, 1968, between 11.50 P.M. and 1.30 A.M. you along with your associates being armed with deadly weapons took part in a riot at Rabindra Sarani from Bug Bazar Street crossing to Kumartuli Street crossing in course of which bombs, brickbats and soda water bottles were indiscriminately hurled endangering human lives.

You are hereby informed that you may make a representation to the State Government against the detention order and that such representation should be addressed to the Assistant Secretary to the Government of West Bengal, Home Department, Special Section, Writers' Buildings, Calcutta and forwarded through the Superintendent of the Jail in which you are detained as early as possible.

You are also informed that under section 10 of the Preventive Detention Act, 1950 (IV of 1950) the Advisory Board, shall, if you desire to be heard, hear you in person and that if you desire to be so heard by the Advisory Board you should intimate such desire in your representation to the State Government.”

Coming now to the first point raised by the learned Counsel it seems to us that there has been no breach of the provisions of the Act. This Court has held that it is obligatory on the Government to deal with the representations made by the detenu, but the facts recited above show that the detenu did not choose to make a representation before the Advisory Board dealt with the matter, and further the State Government was in the process of dealing with the representation when this Court issued the notice. Moreover, in the representation dated 13th January, 1969, the detenu barely stated that the grounds were false and that the detenu was a poor man and the family conditions were miserable and he was living peacefully in the town and had never committed any act which was manifestly prejudicial to the maintenance of public order or communal harmony. He prayed that “ under the circumstances, I am to request you to kindly produce me before the Advisory Board and release me.” At that stage it was impossible to produce him before the Advisory Board. The Advisory Board had already dealt with the matter. Under these circumstances we are unable to say that there has been a breach of section 7. We trust that the State Government will now immediately deal with the representation or representations and pass a suitable order.

Calicut City Municipal Act (XXX of 1961), Proviso to section 126 (1)—Interpretation—Levy of tax on timber on entry—No tax on timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water—Proviso, if exempts from taxation timber brought into the city in the course of transit even when not directly removed out of the city by rail, road or water	396
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[S.C. N.C. 37.]

*M. Hidayatullah, C. J.**A. N. Ray and**I. D. Dua, JJ.*

2-2-1970.

*Brij Kishore Pandey v.**The State of U.P.*

Cr. A. No. 108 of 1969.

Penal Code (XLV of 1860), section 302—Punishment for murder—Award of lesser sentence—Discretion of Court.

Both the sentences of death and imprisonment for life for the offence of murder are legal and the Courts have a fair discretion in the matter, in the light of the circumstances existing in each case.

The previous history of the accused in the present case, which shows a certain amount of lack of control and a sense of grievance together with certain abnormalities of mind, make it clear that it was an act of a person who was easily excited and therefore likely to be moved by irresistible impulses. Considering also his age, (22 years and 9 months), although his act was probably pre-planned in the sense that he had a knife with him, it was an act of person who suddenly lost control. Although under our present law the plea of irresistible impulse is not yet accepted as a defence to a charge of murder, it may be taken into account in assessing the true punishment to be given in a given case. Therefore, although the Supreme Court would be very unwilling to interfere in matters of sentence, on the facts of the present case the ends of justice would be amply served by reducing the sentence of death to one of imprisonment for life.

V.K.

Sentence reduced.

[S.C. N.C. 38.]

*M. Hidayatullah, C. J.,**J. C. Shah,**K. S. Hegde,**A. N. Grover,**A. N. Ray and I. D. Dua, JJ.*

2-2-1970.

*Champa Kumari Singhi v.**The Member Board of Revenue, West**Bengal.*

C.A. Nos. 564-571 of 1968.

Tax recovery—Limitation—Agreement between Income-tax Department and assessee—Tax to be paid in instalments and on failure to pay any of the instalments whole amount to be paid forthwith—Failure to pay first instalment—Proceedings for recovery commenced after the expiration of one year from the last day of the financial year in which the demand was made—Whether barred by limitation.

Indian Income-tax Act 1922 (Central Act XI of 1922), section 46 (1), (7) proviso, (iv).

Under an agreement entered into between the assessee and the Income-tax Department the total tax liability of the parties was calculated and each party became jointly and severally liable for the whole amount. The instalments were fixed to be payable on 31st March, every year, commencing from 31st March, 1953, and ending with 31st March, 1957, and on the breach of a single instalment the whole of the amount became exigible. On 22nd September, 1952, notices of demand were sent to the assessee for the payment of the first instalment which fell due on 31st March, 1953. The assessee failed to pay the first instalment on and 14th March, 1956, certificates under section 46 (2) of the Indian Income-tax Act, 1922, were issued for the recovery of the amount. The assessee filed writ petitions in the High Court to quash the recovery proceedings on the ground that the proceedings were barred by limitation because the proceedings should have been commenced within the end of the financial year commencing from 31st March, 1953. The High Court held that the proceedings were not barred by limitation. On appeal to Supreme Court,

Held, (by majority) (*Hegde, J.*, dissenting)—The recovery proceedings were not barred by limitation.

S—N R C

Clause (iv) of the proviso to sub-section (7) of section 46 does not mention about the exigibility of the whole amount or exigibility of any particular instalment. It only says that if instalments are granted, the time of one year ending with the end of the financial year is to be calculated from the date on which the last instalment is payable.

Held on facts, the scheme of the instalments took the matter out of the main part of sub-section (7) and brought it within the proviso to clause (iv). Under the assessment order a notice of demand was sent to pay the money of the first instalment of Rs. 9,50,000 by 31st March, 1953. On breach of it, the whole amount was said to be exigible and the demand in respect of that was also made. The appellants, therefore, became defaulters on the failure to pay the first instalment. Whenever instalments are granted, the period of limitation counts from the last instalment and here it would be one year from 31st March, 1957. The certificate was issued on 14th March, 1956, and, therefore, it was well within the period of limitation.

T.K.K.

Appeals dismissed.

[S.C. N.C. 39.]

M. Hidayatullah, C.J.

J. C. Shah,

K. S. Hegde,

A. N. Grover,

A. N. Ray and

I. D. Dua, JJ.

5-2-1970.

District Collector v.

M/s. Ibrahim & Co.

C.A. Nos. 1285-1309 of 1966.

Constitution of India (1950), Articles 14, 19, 352, 358, 359 and 301 to 305—Proclamation of emergency under Article 352—Effect—Executive action of Government, if and when protected by Article 358 or 359—Freedom of trade guaranteed by Article 301—Cannot be taken away by an executive fiat.

On 30th December, 1964 the State of Andhra Pradesh ordered that the sugar quota allocated to the twin cities of Hyderabad and Secunderabad be given in its entirety to a co-operative society at Hyderabad. On that account the respondents, who held licences under the Andhra Pradesh Sugar Dealers Licensing Order, 1963, for distribution of sugar and who were also recognised dealers under the Sugar Control Order, 1963, were prevented from carrying on their business. When this order was made the proclamation of emergency declared by the President under Article 352 of the Constitution of India on 26th October, 1962, was in force. On the question of validity of the order :

Held, the order was invalid and had been rightly struck down by the High Court as "null, void and *ultra vires*."

No doubt on the issue of the proclamation of emergency under Article 352, the State is, for the duration of the emergency, competent to enact legislation, notwithstanding that it impairs the freedoms guaranteed by Article 19 of the Constitution. The State is also competent to take executive action which the State would, but for the provisions contained in Article 19, be competent to take. But the executive order immune from attack is only that order which the State was competent, but for the provisions contained in Article 19, to make. Executive action of the State which is otherwise invalid is not immune from attack merely because a proclamation of emergency is in operation when it is taken. Since the impugned order was plainly contrary to the statutory provisions contained in the Andhra Pradesh Sugar Dealers Licensing Order, 1963 and the Sugar Control Order, it was not protected under Article 358 of the Constitution.

Nor had it the protection under Article 359. Only if the impugned order was shown to be made under the authority reserved by the Defence of India Ordinance or rules made thereunder, the jurisdiction of the Court to entertain a petition for impairment of the guarantee under Article 14 may be excluded. But the im-

pugned action was not shown to be taken under the Defence of India Ordinance or under the rules or order made thereunder.

Again under Article 301 the freedom of trade, commerce and intercourse throughout the territory of India is declared free, subject to restrictions contained in Articles 303 to 305. By Article 304 even by Legislature, restrictions on the freedom of trade, commerce and intercourse with or within the State may only be imposed, *if such restrictions are reasonable and are required in the public interest and the Bill or amendment is introduced or moved in the Legislature of a State with the previous sanction of the President.* Obviously the guarantee under Article 501 cannot be taken away by executive action.

V.K.

Appeals dismissed.

[S.C. N.C. 40.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
5-2-1970.

Kshirode Behari Chakravarty v.
Union of India.
C.A. No. 2374 of 1966.

Constitution of India (1950), Article 311—Dismissal of public servant—Enquiry under Article 311—Scope.

The enquiry under Article 311 is a domestic enquiry and the Court is not concerned with the question whether on the evidence before the officer or authority passing the order against the civil servant, there was sufficient evidence to justify the order. The guarantee under Article 311 is of the regularity of the enquiry. If the enquiry is not vitiated on the ground of any procedural irregularity the Court is not concerned to decide whether the evidence justifies the order.

V.K.

Appeal dismissed.

[S.C. N.C. 41.]

M. Hidayatullah, C.J.,
J. C. Shah,
K. S. Hegde,
A. N. Grover,
A. N. Ray and
D. Dua, JJ.
5-2-1970.

Sanjeevi Naidu, etc. v.
State of Madras.
C.A. Nos. 397, 400-402, 404-417, 422-441,
451 etc., of 1969.

Constitution of India (1950), Article 166 (3)—Madras Government Business Rules, Rule 23 (A)—Validity—If *ultra vires* the powers under Article 166 (3).

Rule 23 (A) of the Madras Government Business Rules, which provides that the powers and functions which the State Transport undertaking may exercise under section 68-C of the Motor Vehicles Act shall be exercised and discharged on behalf of the State Government by the Secretary to the Government of Madras in the Industries, Labour and Housing department, is valid and is not *ultra vires* the powers under Article 166 (3) of the Constitution of India.

The Constitution has authorised the Governor under Article 166 (3) to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. The Governor can not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function, on the advice of the Council of Ministers. In the very nature of things, neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. These matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated.

It cannot therefore be contended that by making rule 23 (A) the power under section 68-C of the Motor Vehicles Act conferred by Parliament to the State Government has been delegated to somebody else.

V.K.

Appeals dismissed.

[S.C. N.C. 42.]

A. N. Ray and
I. D. Dua, JJ.
9-2-1970.

Govinda Kadtuji Kadam v.
State of Maharashtra.
Cri. A. No. 188 of 1969.

Criminal Procedure Code (V of 1898), sections 410, 418 and 421—Appeal under section 410—Summary dismissal by the High Court by the word “rejected”—Propriety.

Though on appeal under section 410, Criminal Procedure Code, by a person convicted at a trial held by a Sessions Judge or an Additional Sessions Judge the appellant is entitled under section 418 of the Code to challenge the conclusions both on facts and of law and to ask for a reappraisal of the evidence, the appellate Court has nevertheless full power under section 421 of the Code to dismiss the appeal *in limine* even without sending for the records, if on perusal of the impugned order and the petition of appeal it is satisfied with the correctness of the order appealed against. This power has to be exercised after perusing the petition of appeal and the copy of the order appealed against and after affording to the appellant or his pleader a reasonable opportunity of being heard in support of the appeal. The summary decision is accordingly a judicial decision which vitally affects the convicted appellant and in a fit case it is also open to challenge on appeal in the Supreme Court. An order summarily dismissing an appeal by the word “rejected”, as in the present case, though not violative of any statutory provision removes nearly every opportunity for detection of errors in the order. Such an order does not speak and is inscrutable giving no indication of the reasoning underlying it. It may at times embarrass the Supreme Court when the order appealed against *prima facie* gives rise to arguable points. When, therefore, an appeal in the High Court raises a serious and substantial point which is *prima facie* arguable it is improper for that Court to dismiss it summarily without giving some indication of its view on the points raised. The interest of justice and fairplay require the High Court in such a case to give an indication of its views so that the Supreme Court in the event of an appeal from that order being presented, has the benefit of the High Court’s opinion on those points.

Held on facts. that the order of dismissal *in limine* of the appeal of the appellants by the High Court was insupportable.

V.K.

Appeal allowed and case remanded.

[S.C. N.C. 43.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.

Basakha Singh & Co., Ltd. v.
Collector of Central Excise and Land
Customs.
C.A. No. 1987 of 1966.

9-2-1970.

Sea Customs Act (VIII of 1878), section 167 (8)—Import Trade Schedule, Items 314 and 315—Imported items whether 12 bore guns or parts thereof—Finding by customs authorities—Interference with by Courts—Scope.

The parts of a gun can be broadly categorised under four heads *viz.*, (1) Butt; (2) Barrel; (3) Action and (4) Forehand. According to the appellant, the articles imported are only Barrels and Actions. It did not import either Butts or Forehands. Even according to the Collector of Customs Butts were not imported. Without a butt a gun cannot be used. Therefore the Collector of Customs, Board of Revenue and the Government were not right in concluding that the articles imported by the

appellant are 12 bore guns for which he had no licence. They are obviously parts of gun. The Division Bench of the High Court was in error in thinking that every finding of the authorities under the Sea Customs Act, however, wrong it may be, is binding on the Court.

V.K.

Appeal allowed.

[S.C. N. C. 44.]

S. M. Sikri and
V. Bhargava, JJ.
12-2-1970.

Dev Kanta Barooah v.
Golak Chandra Baruah.
C.A. No. 1701 of 1968.

Representation of the People Act (XLIII of 1951), section 123 (4)—When attracted.

In an election it is always open to a candidate to show that his rival candidate is lacking in knowledge in education and is not capable of managing the affairs properly in any public body. A slight exaggeration is quite natural on occasions when canvassing is going on for an election.

Where statements of facts are given and only inferences are drawn the words used at the time of putting down the inferences have to be held to be expressions of opinion and not statements of fact.

It is quite clear that the words *Deshdrohita* and *Vishwasghataкта*, (Assamese words for revolt against country and treachery or breach of faith respectively). have been used only to bring into light the conduct of the respondent which was adverse to the policies of the Congress and against the interests of the country. Possibly, milder words could have been used to describe his conduct on these occasions, but even the use of strong words is not very unnatural at the time of election. The words used though harsh were not such as to lead the voters to think that the respondent had a low moral character. Care was taken to give the facts from which inferences were being drawn and the voters could well perceive for themselves whether the inference which was drawn and expressed in these strong terms was justified or not.

Further, a false statement of fact which deals with the political position or reputation or action of a candidate cannot be held to be a false statement as to the personal character of the respondent and cannot therefore constitute corrupt practice under section 143 (4) of the Representation of the People Act, 1951.

Held on facts, that the High Court was not right in setting aside the election of the appellant on the ground that he was guilty of the corrupt practice under section 123 (4) of the Act.

V.K.

Appeal allowed.

[S.C. N.C. 45.]

J. C. Shah.
K. S. Hegde and
A. N. Grever, JJ.
12-2-1970.

Khushal Khemgar Shah v.
Mrs. Khorshed Banu Dabiba Boatwalla.
C.A. No. 1201 of 1966.

Partnership Act (XI of 1932), sections 14, 39, 42, 46 and 55 (1)—Partnership deed stipulating that partnership should be continued by surviving partners even after death of a partner—Legal representative of deceased partner if disentitled to claim a share in the value of goodwill.

It cannot be contended that goodwill may be taken into account only when there is a general dissolution of the firm and not when the representative of a partner claims his share in the firm, which by express stipulation is to continue notwithstanding the death of a partner. Sections 39, 42, 46 and 55 (1) of the Partnership Act do not support such a contention. These provisions deal with the concept and consequences of dissolution of the firm; they do not either abrogate the terms of the contract between the partners relating to the consequences to ensue in the event of the death of a partner when the firm is not to stand dissolved by such death, nor to the right which the partner has in the assets and property of the firm.

It cannot be argued that in interpreting a deed of partnership, the business whereof it is stipulated shall be continued by the surviving partners even after the death of a partner, the Court will not award to the legal representatives of the deceased partner a share in the goodwill in the absence of an express stipulation to the contrary. The goodwill of a firm in that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features and is an asset. In interpreting the deed of partnership, the Court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement that the surviving partners are entitled to carry on the business on the death of the partner, to be extinguished. In the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the goodwill as well as to the other assets.

An agreement between the partners that the name, the place of business and the reputation of the firm are to be utilised by the surviving partners will not necessarily warrant an inference that it was intended that the heirs of the deceased partner will not be entitled to a share in the goodwill.

V.K.

Appeal dismissed.

[S.C. N.C. 46.]

M. Hidayatullah, C. J.,

J. C. Shah,

K. S. Hegde,

A. N. Grover,

A. N. Ray and

I. D. Dua, JJ.

12-2-1970.

Joint Commercial Tax Officer v.
Young Men's Indian Association.
C.A. Nos. 1724-1727 of 1967.

Madras General Sales Tax Act (I of 1959), section 2 (g) and (n) —Members club preparing and supplying food, snacks, beverages, etc., to its members— If liable to pay sales tax.

By Majority : The essential question, in the present case, is whether the supply of the various preparations by each club (*viz.*, the Metropolitan Club, Madras, the Young Men's Indian Association, Madras and the Lawley Institute, Ootacamund), to its members involved a transaction of sale. The State Legislature being competent to legislate only under Entry 54, List II of the 7th Schedule to the Constitution the expression "sale of goods" bears the same meaning which it has in the Sale of Goods Act, 1930. Thus in spite of the definition contained in section 2 (n) read with *Explanation I* of the Madras General Sales Tax Act, 1959, if there is no transfer of property from one to another there is no sale which would be exigible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in the matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent.

The final conclusion of the High Court in the judgment under appeal was that the case of each club was analogous to that of an agent or mandatory investing his own money for preparing things for consumption of the principal and later recouping himself for the expenses incurred. Thus, as no transaction of sale was involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparation by each one the clubs in the present case to its members.

Case-law discussed.

Per *Shah, J.*, (in a separate but concurring opinion) : Whether refreshments beverages and other articles supplied by a Members' club for consideration to its members are in law sold depends upon the circumstances in which the transaction takes place. In each case the liability to tax of the transaction will depend upon its strictly legal form. If an incorporated members' club supplies its property to its members at a fixed tariff, the transaction would readily be deemed to be one for sale,

even if the transaction is on a non-profit basis ; such a transaction would be liable to sales tax. Where, however, the club is merely acting on behalf of the members to make available to them refreshments, beverages and other articles, the transaction will not be regarded as a sale, for the club is the agency through which the members have arranged that the refreshments, etc., should be made available. The test in each case is whether the club transfers property belonging to it for a price or the club acts as an agent for making available property belonging to its members.

(His Lordship however disagreed with the majority on the question of the appropriateness of applying the analogy of the cases decided under the Licensing Act in the United Kingdom concerning the supply by clubs of alcoholic drinks to their members, to a taxing statute.)

V.K.

Appeals dismissed.

[S.C. N.C. 47.W

S. M. Sikri and
V. Bhargava, JJ.
13-2-1970.

Smt. Bhagwan Kaur v.
State of Punjab.
C.A. No. 1159 of 1966.

Pepsu Tenancy and Agricultural Lands Act (XIII of 1955), as amended by Pepsu Act (XV of 1956), sections 32-B and 22—Scope—Act if hit by Article 14 of the Constitution.

Section 32-B applies only to a landowner owning or holding land under his personal cultivation which in the aggregate exceeds the permissible limit and the contention that the words "under the personal cultivation" in the section applies only to a tenant and not to a landowner is untenable. Although this interpretation leads to some hardship on some person this is the correct meaning and accordingly the appellant cannot take advantage of section 32-B and the subsequent provisions in Chapter IV-A. If chapter IV-A is out of the way then it is difficult to hold that section 22 does not apply, on the facts of this case. Section 22 clearly enables the respondents to put in applications to acquire proprietary rights as it was not contested that they were tenants within the definition of the word in section 20.

The point that Pepsu Tenancy and Agricultural Lands Act, 1955, is hit by Article 14 of the Constitution of India is not open for any further discussion because the Supreme Court has held that this Act is protected by Article 31-A of the Constitution and cannot be challenged on the ground that it violates Article 14. (See *Pritam Singh Chahil v. State of Punjab*, A.I.R. 1967 S.C. 930 and *Inder Singh v. State of Punjab*, A.I.R. 1967 S.C. 1776).

V.K.

Appeal dismissed.

[S.C. N.C. 48.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
16-2-1970.

Chinnamuthu Gounder v.
P. S. A. Perumal Chettiar.
C.A. Nos. 1116-1118 of 1966.

Madras Cultivating Tenants' Protection Act (XXV of 1955), sections 3 (2) (d) and 6-A—Provisions of section 6-A, when attracted—Effect of tenant denying title of landlord.

The clear import of section 6-A is that in any suit before any civil Court for possession, if the defendant proves not only that he is a cultivating tenant but also that he is entitled to the benefits of the Act the civil Court is bound to transfer it to the Revenue Divisional Officer and cannot proceed to try and dispose of it itself. In the present case it has been found by the High Court as also by the trial Court that the appellants had wilfully denied the title of the respondent who is the landlord. They thus became disentitled to the benefits of the Act. Consequently the civil Court had jurisdiction to proceed with the trial and there was no question of its transferring the suit to the Revenue Divisional Officer. There has been a consistent course of decisions of the Madras High Court that in order to attract the applicability

of section 6-A both the conditions must co-exist, namely, the defendant must be a cultivating tenant within the meaning of the Act and he should be entitled to the benefits of the Act. If both these conditions are not satisfied no question of any transfer under section 6-A will arise. The civil Court may have to determine, for the purpose of coming to the conclusion whether a suit has to be transferred under section 6-A, certain questions which are within the jurisdiction of the Revenue Court under the Act. But that cannot affect the interpretation of the words "cultivating tenant entitled to the benefits of the Act."

V.K.

Appeal dismissed.

[S.C. N.C. 49.]

A. N. Ray and
I. D. Dua. JJ.
19-2-1970.

R. M. Chatterji v.
Havildar Kuer Singh.
Criminal Appeal No. 89 of 1967.

Criminal Procedure Code (V of 1898), sections 156, 169 and 190 (1) (c)—Police submitting final report after investigation that there is no case—Magistrate if can call upon police to submit a charge-sheet.

It has been emphasised in several decisions that it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of enquiry.

The provisions of the Cr. P. Code do not empower the magistrate to ask the police to submit a charge-sheet. If, however, the magistrate is of opinion that the report submitted by the police requires further investigation the magistrate may order investigation under section 156 (3) of the Code. Directing a further investigation is entirely different from asking the police to submit a charge-sheet. Further more, section 190 (1) (c) of the Code empowers the magistrate to take cognizance of an offence notwithstanding a contrary opinion of the police.

Thus, a magistrate cannot call upon the police to submit a charge-sheet when they have sent a report, that there is no case for sending up the accused for trial.

(Divergent views expressed by various High Courts referred to. Decisions of Calcutta and Madras High Courts approved and those of Bombay and Patna High Courts overruled.)

V.K.

Appeal allowed.

It will be convenient to deal with the points 2 and 3 mentioned above together. It is true, as urged by the learned Counsel for the petitioner, that this Court has consistently held that the grounds must have relevance to the maintenance of public order, and that they should not relate merely to the maintenance of order. It is true, as laid down by this Court, that the contravention of any law always affects order but before it can be said to affect public order it must affect the community or the public at large. As Ramaswami, J., put it in *Pushkar Mukherjee and others v. The State of West Bengal*¹ "in this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest."

The question which arises is this, do the grounds reproduced above relate merely to maintenance of order or do they relate to the maintenance of public order? It will be noticed that the detenu in each of these cases acted along with associates who were armed with lathis, iron rods, acid bulbs, etc. It is clearly said in ground No. 1 that he committed a riot and indiscriminately used acid bulbs, iron rods, lathis, etc., endangering human lives. This ground cannot be said to have reference merely to maintenance of order because it affects the locality and everybody who lives in the locality. Similarly, in the second ground, he along with his associates prevented the police constables from discharging their lawful duties and thus affected everybody living in the locality.

In ground No. 3, again the whole locality was in danger as the detenu and his associates were armed with deadly weapons and these were in fact used indiscriminately endangering human lives in the locality. The object of the detenu seems to have been to terrorise the locality and bring the whole machinery of law and order to a halt. We are unable to say that the Commissioner of Police could not in view of these grounds come to the conclusion that the detenu was likely to act in a manner prejudicial to the maintenance of public order in the future and it was necessary to prevent him from doing so. The fact that public order is affected by an act which was also an offence under the Indian Penal Code, seems to us to be irrelevant.

In the result the petition fails and is dismissed.

V.M.K.

Writ petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.

Bennett Coleman & Co. Pvt. Ltd.

... Appellant*

v.

Punya Priya Das Gupta

... Respondent.

Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, (XLV of 1955), sections 2, 5 (1) (d) and 17—Scope—"Newspaper employee" and "Working Journalist", definitions of (to be subject to a context to the contrary)—Respondent (an ex-employee), if entitled to maintain his application for gratuity.

Indian Evidence Act (I of 1872), section 115—Scope—Estoppel—Rule of evidence only, not of substantive right—Ingredients—Burden of proof—Representation to be clear and unambiguous and not indefinite.

Industrial Disputes Act (XIV of 1947), section 2 (rr) (i)—'Wages', meaning of—Monetary value of the free telephone and newspapers and also the car allowance, if could be included as part of wages.

The definition section 2 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 commences with the words "In this Act

¹ W.P. No. 179 of 1968, decided on 7th November, 1968.

* C As. No. 1702 of 1966.

2nd April, 1969.

unless the context otherwise requires" and provides that the definitions of the various expressions will be those that are given there. Similar qualifying expressions are also to be found in the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948 the C. P. and Berar Industrial Disputes settlement Act, 1947 and certain other statutes dealing with industrial questions. It is, therefore, clear that the definitions of "a news-paper employee" and "a working journalist" have to be construed in the light of and subject to the context requiring otherwise. Section 5 of the Act, which confers the right to gratuity, itself contemplates in clause (d) of sub-section 1 a case of payment of gratuity to the nominee or the family of a working journalist who dies while he is in the service of a newspaper establishment. Section 17(1) provides that where any amount is due under the Act to a newspaper employee from an employer, such an employee himself or a person authorised by him or, in case of his death, any member of his family can apply to the State Government or other specified authority for the recovery thereof. Similar provisions are also to be found in section 33-C (1) of the Industrial Disputes Act. Claims under that section include those for compensation in cases of retrenchment, transfer of an undertaking and closure under Chapter V-A of that Act, all of which would necessarily be claims arising after termination of service and the claimant would obviously be one in all those cases who would not be presently employed in the establishment of the employer against whom such claims are made. Likewise, the claim for gratuity under section 17 read with section 5 of the Act would itself be one which accrues after the termination of employment. These provisions, therefore, clearly indicate that it is not only a newspaper employee presently employed in particular newspaper establishment who can maintain an application for gratuity. The scheme of all these Acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provisions, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made. There can, therefore, be no doubt that the definitions of a newspaper employee" and "working journalist" being subject to a context to the contrary, the benefit of sections 5 and 17 is available to an ex-employee though he has ceased to be in the employment of that particular newspaper establishment at the time of his application for gratuity.

Having signed the receipt in full settlement of all his claims and having thereby induced the company to accept his resignation without insisting on a full month's notice, was he estopped from making claims in respect of his leave for one month, the car allowance and the free telephone and newspapers and for including them as part of his wages for calculating gratuity? Assuming that the rule of estoppel, as incorporated in section 115 of the Evidence Act, were to apply, the foundation of that rule is that it is inequitable and unjust to a person, that if another person by a representation induces him to act as he would not have otherwise acted, the person who made the representation should be allowed to deny the effect of his former statement to the loss and injury of the person who has acted on it. The burden of proving the ingredients of section 115 of the Evidence Act lies on the party claiming estoppel. The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted. The statement of account prepared at the time when the respondent gave the said receipt appears to indicate that the benefit of the free telephone and newspapers and the car allowance were not taken into account and gratuity due to the respondent was calculated on the amount of pay being comprised of basic wages and dearness allowance only. But the inference that the respondent had given up his aforesaid claims when he passed the said receipt appears to be rebutted by other facts. In these circumstances it becomes doubtful whether he could be said to have been estopped from making the said claims on the ground only of the said receipt, if that receipt was obtained, as alleged by him, under the stress of circumstances. In this connection the fact that he kept the said cheque uncashed is not totally without relevance. Under section 115 of the Evidence Act the representation which estops a person

making it from acting contrary to it is one on the belief of which the other person acts in a manner he would not have done but for it and on believing it to be true. Such a conclusion is difficult in face of the uncontradicted statements in the letter Exhibit W/4 that the management would not give him the letter of acceptance of his resignation unless he signed the said receipt in full settlement of all his claims. The plea of estoppel made on behalf of the company, therefore, cannot be accepted.

So far as the car allowance is concerned, there was nothing to suggest that it was paid to reimburse him of the expenses of conveyance which he would have to incur for discharging his duties as the special correspondent, or that it was anything else than an allowance within the meaning of section 2 (rr) of Industrial Disputes Act. It would, therefore, fall under the inclusive part (i) of the definition. Likewise, the benefit of the telephone and newspapers was allowed to the respondent not merely for the use thereof in connection with his employment or duties connected with it. Both the car allowance and the benefit of the free telephone and newspapers appear to have been allowed to him to directly reduce the expenditure which would otherwise have gone into his family budget and were therefore items relevant in fixation of fair wages. That being the position, the two items could on the facts and circumstances of the present case be properly regarded as part of the respondent's wages and had to be taken into calculations of the gratuity payable to him.

Appeal by Special Leave from the Award dated the 25th February, 1966 of the Labour Court, Delhi, in W. J. No. 2 of 1964.

G. B. Bai and *J. Mahanjan*, Advocates, and (*O. C. Mathur* and *J. B. Dadachanji*, Advocates of *J. B. Dadachanji & Co.*, for Appellant.

M. K. Ramamurti, Senior Advocate, (*Shyamla Pappu, J. Ramamurti, M. Mohan P. S. Khera, Miss B. Thaur* and *Vineet Kumar*, Advocate with him), for Respondent.

Appeal by Special Leave from the Award dated the 28th February, 1966 of the Labour Court, Delhi in W. J. No. 2 of 1964.

The Judgment of the Court was delivered by

Shelat, J.—This appeal, by Special Leave, is directed against the award of the Labour Court, Delhi in a reference made to it under section 17 (2) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (referred to hereinafter as the Act).

The relevant facts leading to the said reference may first be stated.

By its letter dated 16th January, 1953 the appellant-company appointed the respondent as a staff correspondent at Gauhati on a basic salary of Rs. 300 and dearness allowance at 40 per cent thereof in addition to a fixed conveyance allowance of Rs. 100 per month. Sometime thereafter the respondent was transferred to the company's branch office at Delhi where he worked as a special correspondent. By 1963 the remuneration payable to him came to Rs. 700 as basic pay, Rs. 497 as dearness allowance, Rs. 200 per month as car allowance in addition to a free telephone and free newspapers. On 8th October, 1963, while he was on leave, the respondent tendered his resignation. On 14th October, 1963 P. K. Roy, the company's General Manager, informed the respondent that his letter of 8th October, 1963 could not be considered as one of resignation as under the company's rules he would have first to report on duty and then to give a notice. On 21st October, 1963, however, the company accepted the resignation with effect from that date and thereupon the respondent joined the Indian Express on 23rd October, 1963. Meanwhile one V. G. Karnik on behalf of the company, informed the respondent by his letter dated 19th November 1963 that in the absence of a proper notice by him there could be no termination of

employment and that "your reported acceptance of another employment in the circumstances is in contravention of the terms and conditions of service of this company." The respondent had, in the meantime, claimed compensation for leave due to him, to which claim the said letter of Karnik replied that the company's rules did not permit any such compensation where an employee had resigned. On 21st November, 1963 the respondent wrote to the said Roy (Ex. W/4) that (1) after he had tendered his resignation there was a discussion between them when the matter of acceptance of his resignation was amicably settled and that it was thereafter that he joined the Indian Express, (2) the letter of Karnik that there was no termination of his employment was not correct, (3) after 21st October, 1963 he had gone to the company's office to settle his accounts and collect the dues payable to him as also the letter of acceptance of his resignation but he was told that the accounts were not yet ready and he was not then paid even his salary and dearness allowance due up to 20th October, 1963 although "I had asked for these amounts at least", (4) the letter accepting his resignation was held back until he was prepared to sign a document "purporting to waive all my rights to leave salary" which he had first refused to sign, (5) on receiving the said letter of Karnik, he had thought necessary to get a written acceptance of resignation, that, as apprehended by him, that letter was handed over to him on that day only after he accepted a cheque for Rs. 2,810.47 P. and had given receipt therefor "in full and final settlement of all my claims" and that he wanted to specify in that receipt that full and final settlement on his side did not include compensation for one month's leave due to him but the accountant did not allow him to do so. The statement of account which was given to the respondent on 21st November, 1963 and on which he signed the said receipt stated that he had received the said cheque "in full and final settlement of all my claims against the company subject to the bonus for 1963 if declared and payable to me. The statement of account mentioned Rs. 901.34 only as remuneration for 20 days of October, 1963 on the basis of his monthly remuneration being Rs. 1,397, comprised of Rs. 700 as basic salary, Rs. 497 as dearness allowance and Rs. 200 as car allowance. The Statement of account thus shows that though he was on leave in October 1963, the company included the car allowance while calculating his wages due for these 20 days. But it also shows that no compensation for leave due to him was paid and further that in calculating the gratuity payable to him the monetary value of free telephone and free newspapers and the car allowance were not included as part of his wages. In reply to the respondent's letter of 21st November, 1963, the said Roy, by his letter of 5th December, 1963, wrote that as the respondent had not taken away the company's letter of acceptance of resignation by the time Karnik addressed the said letter Karnik was "right on facts" but, in view of the settlement of his affairs and the subsequent settlement of accounts, "it was better to forget the past and part amicably." He also made it clear that the respondent's claim for leave compensation was not admissible under the company's rules. The respondent thereafter applied to the Delhi Administration and the latter as aforesaid, referred his claim to the Labour Court for adjudication. In his statement of claim before the Labour Court, the respondent claimed that the monthly wages payable to him were Rs. 700 basic, Rs. 497 as dearness allowance, Rs. 200 conveyance allowance and Rs. 50 being the estimated value of the benefit of a free telephone and newspapers, aggregating Rs. 1,447 per month. He claimed gratuity computable on the basis of Rs. 1,447 as being his monthly wages Rs. 1,447 as compensation for the month's leave, in all Rs. 6,000.34 P. He did not deduct from the said claim the said said of amount of Rs. 2,810.47 P. as he had not encashed the cheque given to him against the receipt dated 21st November, 1963. The company in its written statement denied the claim relying on the said receipt and further denied that the car allowance and the monetary value for the free telephone and newspapers could be included in the wages payable to the respondent either as due to him or for calculating gratuity. Before the Labour Court the company did not dispute the value of the benefit of the free telephone and newspapers estimated by the respondent, but it raised the question whether the said value and the car allowance formed part of the respondent's wages and whether the amount of gratuity payable to him could be

ascertained on the footing of their being part of his wages. The Labour Court held that there was no evidence that the car allowance was not payable to the respondent while he was on leave as was the case in respect of another working journalist, C.V. Vishwanath, whose claim also the Labour Court was trying along with that of the respondent. The Labour Court found this difference a significant one and held that the car allowance had to be taken as part of the wages. The Labour Court also held that the car allowance and the free telephone and newspapers were an allowance and an amenity respectively falling under the definition of section 2(rr) of the Industrial Disputes Act, 1947, both forming the component parts of monthly wages payable to the respondent. As regards the leave, the respondent was undoubtedly entitled to 30 days leave. But the company's plea was, firstly, that its rules did not permit compensation for such leave and secondly, that it was set off against the period of notice which the respondent was required to give. No rules, however, were produced to show that they contained any provision disallowing such compensation. As regards the notice period of one month, the Labour Court held that as the resignation dated 8th October, 1963 was accepted with effect from 21st October, 1963 there was compliance of 13 days only and therefore the management was not liable to pay for the balance of 17 days leave. The Labour Court rejected the company's plea that the receipt given by the respondent in full settlement of all his claims estopped him from making these claims on the ground that as these items were claimable under the Act there could be no estoppel against law. In the result, the Labour Court held that the respondent was entitled to claim car allowance of Rs. 200 per month Rs. 50 per month for telephone and newspapers and compensation for 13 days leave, that the first two were parts of his wages, that his monthly remuneration was, therefore Rs. 1,447 and gratuity equivalent to 5½ months wages would have to be calculated on the basis of Rs. 1,447 being his wages per month and directed the company to pay on the aforesaid calculations Rs. 2,002 over and above Rs. 2,810.47 for which the company had issued the said cheque.

The first contention raised by counsel for the company against the award was that the respondent, not being in the company's employment at the time he filed his claim in the Labour Court, was not a working journalist, and therefore, was not entitled to avail himself of the provisions of the Act. Section 2 (c) provides that:

"unless the context otherwise requires" a newspaper employee "means any working journalist, and includes any other person employed to do any work in, or in relation to, any newspaper establishment".

Clause (f) of that section defines a "working journalist" to mean a person whose principal avocation is that of a journalist and "who is employed as such in, or in relation to, any newspaper establishment." Clause (g) provides that all words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947 shall have the meanings respectively assigned to them in that Act. Counsel strenuously relied on the words "who is employed" as a journalist in, or in relation to, any newspaper establishment in clause (f) of section 2, his contention being that it is only a newspaper employee who is presently employed in a newspaper establishment who can resort to the Act and not an ex-employee whose employment has come to an end as a result of acceptance of his resignation. A question, similar to that raised by Counsel, also arose in *Western India Automobile Association v. Industrial Tribunal*¹. The contention there was that in the light of the definitions of "industrial dispute," and 'an employee' as they stood in the Industrial Disputes Act, 1947 before the Amending Act XXXVI of 1956 was passed, a dispute as to reinstatement of a discharged or dismissed workman could not fall within the scope of an industrial dispute. The contention was rejected. The Court observed that the definition of "industrial dispute" used the words "employment or non-employment", that whereas one was a positive, the other was a negative act of an employer, that such an act related

1. (1949) F.L.J. 154; (1949) F.C.R. 321.

to an existing employment or to an existing non-employment. After giving certain examples to illustrate the four stages when a dispute could arise, the Court at page 330 concluded thus :

“The failure to employ or the refusal to employ are actions on the part of the employer which would be covered by the term ‘employment or non-employment.’ Reinstatement is connected with non-employment and is therefore within the words of the definition. It will be a curious result if the view is taken that though a person discharged during a dispute is within the meaning of the word ‘workman’, yet if he raises a dispute about dismissal and reinstatement, it would be outside the words of the definition ‘in connection with employment or non-employment.’”

A similar question was canvassed in *Central Provinces Transport Services Ltd. v. Raghunath*¹ in connection with the C.P. and Berar Industrial Disputes Settlement Act XXIII of 1947. Section 2 (10) of that Act defined an ‘employee’ in terms indetical with those in the Industrial Disputes Act as it stood before the amendment in 1956, i.e., as meaning “any person employed by an employer to do any skilled or unskilled, manual or clerical work for contract or hire or reward in any industry and includes an employee discharged on account of any dispute relating to a change—whether before or after the discharge.” Section 2 (12) defined an ‘industrial dispute’ to mean “any dispute or difference connected with an industrial matter arising between employer and employee or between employers or employees.” It was not disputed that the question of reinstatement was an industrial dispute but the controversy was as to whether it was an industrial dispute as defined by section 2 (12) of that Act. The argument was that as the workman concerned was already dismissed and his employment had thereby come to an end, he could not be termed an employee as the intention of the Legislature could not be to include in the definition of an employee even those who had ceased to be in service as otherwise there was no need for the further provision in section 2 (10) which included those who were discharged from service on account of the dispute. The Court dismissed this contention following the decision in *Western India Automobile Association*² and held that a dispute between an employer and an employee regarding the latter’s dismissal and reinstatement would be an industrial dispute within section 2 (12) of that Act, that the inclusive clause in section 2 (10) was not an indication that dismissed employees would not fall within the meaning of ‘employee’ or that the question of their reinstatement would not be an industrial dispute and that that clause was inserted *ex abundanti cautela* to repeal a possible contention that employees discharged under sections 31 and 32 of the Act would not fall within the meaning of section 2 (10). Since the definitions of “an employee” in these two Acts were in language similar to the one used in the present Act, these decisions would be authorities for the view that an ex-employee would for the purposes of the present controversy be a working journalist.

It was, however, argued that though these two decisions considered a dismissed employee as a workman as defined by the Industrial Disputes Act and the C.P. and Berar Act, there are two decisions of this Court which express contrary views and that, therefore, there is a conflict of opinion which should be resolved by a larger bench. The two decisions relied on in this connection are: *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*³ and *Workmen v. The Management of Dimakuchi Tea Estate*⁴. In *Dharangadhara Chemical Works Ltd.*³ the appellants were lessees holding a licence for manufacturing salt on the demised lands. The salt was manufactured by a class of professional labourers, known as *ogaries*, from rain water that got mixed up with saline matter in the soil. The work was seasonal and commenced after the rains and continued till June when the *ogaries* left for their villages. The demised lands were divided into plots which were allotted to the

1. (1957) S.C.J. 58; (1956) S.C.R. 956.
2. (1949) F.C.J. 154; (1949) F.C.R. 321.

3. (1957) S.C.J. 208; (1957) S.C.R. 152.
4. (1958) S.C.J. 637; (1958) S.C.R. 1156.

agarias with a sum of Rs. 400 for each plot to meet the initial expenses. Generally the same plot would be allotted to the same *agarias* every year, but if the plot was extensive in area it would be allotted to two *agarias* in partnership. After the manufacture of salt these *agarias* were paid at the rate of 0-5-6 per maund. Accounts would be settled at the end of each season and the *agarias* would be paid the balance due to them. These *agarias* worked together with the members of their families and were also free to engage extra labour on their own account, the appellant company having no concern therewith. No hours of work were prescribed, no muster rolls were maintained nor were working hours controlled by the appellant company. There were also no rules as regards leave or holidays and the *agarias* were free to go out of the factory after making arrangements for the manufacture of salt. On these facts the question was whether the *agarias* were workmen as defined by section 2 (s) or independent contractors. Bhagwati J. speaking for the Court, after quoting section 2 (s) of the Industrial Disputes Act, as it stood prior to its amendment in 1956, said thus :

"The essential Condition of a person being a workman within the terms of this definition is that he should be employed to do the work in that industry, that there should be, in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the term as contained in the Act."

Relying in particular on the words "unless a person is thus employed", Counsel argued that this decision was at variance with what was said in the *Central Provinces Transport Services Ltd.*¹, and was, besides, an authority for the proposition that as the definition of a workman then stood, an ex-employee would not be a workman within the meaning of the Act. We are of the view that this decision does not warrant such a contention or that there is any conflict between this decision and the two earlier decisions. The question before the Court was the distinction between an employee and an independent contractor and it was only while describing the characteristics of the two relationships that the learned Judge observed that unless there was a relationship of master and servant and the person concerned "is employed" he could not be regarded as "a workman" as defined by the Act. The Court was not concerned in that case with the question posited in the *Central Provinces Transport Services Ltd.*², whether an employee who has been discharged or dismissed and who claims a relief such as reinstatement is a workman or not. Not having to consider such a question and being only concerned with the distinction between an employee and an independent contractor, the observations made by the Court to delineate the features of the two relationships cannot be regarded either as laying down that an ex-employee is not a workman or as being in conflict with the two earlier decisions which are specific decisions on the definition of "a workman" in the Act. In the case of *Workmen of Dimakuchi Tea Estate*³, the dispute related to the dismissal of one Dr. K.P. Bannerjee. The management in the written statement pleaded that Dr. Bannerjee was not a workman as defined by section 2 (s) of the Industrial Disputes Act, that therefore his dismissal could not be an industrial dispute as defined in section 2 (k) and the Tribunal could have no jurisdiction to decide whether the management were justified or not in dismissing the Doctor. The Tribunal as also the Labour Appellate Tribunal held, presumably because Dr. Bannerjee was not in the words of section 2 (s) a person employed in any industry to do any skilled or unskilled, manual or clerical work, that he was not workman within the meaning of section 2 (s), that the question of his dismissal was not an industrial dispute, and that therefore, his case was beyond the Tribunal's jurisdiction. The workman thereupon applied for Special Leave under Article 136 and though leave was granted, it was limited to the question whether a dispute in relation to a person who is not a workman was an industrial dispute as defined by section 2 (k) of the Industrial Disputes

1. (1957) S.C.J. 55; (1956) S.C.R. 956.

2. (1958) S.C.J. 637; (1958) S.C.R. 1158.

Act, 1947. In view of the Special Leave being so limited, the Court proceeded on the assumption that Dr. Bannérjee was not "a workman" under the definition of that word as it then stood. The problem was, whether even so, the dispute regarding his dismissal could still be an industrial dispute, the contention of the workmen being that it would be so as by the use of the expression 'of any person' in the third part of section 2 (k) a dispute relating to a person, though not a workman, would be an industrial dispute. In answering this problem the Court entered into an elaborate discussion of the several provisions and the scheme of the Act and came to the conclusion that though the clause defining "industrial dispute" had used the expression "of any person", that expression must be given a restricted meaning, namely, that the dispute must be a real dispute between the parties thereto so as to be capable of settlement or adjudication by one party to the dispute giving necessary relief to the other and the person regarding whom the dispute was raised must be one in whose employment, non-employment, terms of employment or conditions of labour the parties to the dispute had a direct or substantial interest. In the absence of such an interest the dispute could not be said to be a real dispute between the parties. At page 1172 of the Report, the Court however, has made certain observations which apparently appear to be in variance with the *Western India Automobile Association*¹, and in the *Central Provinces Transport Services Ltd.*². The observations relied on by Counsel are as follows:—

"It is clear enough that prior to 1956 when the definition of 'workman' in the Act was further widened to include a person dismissed, discharged or retrenched in connection with, or as a consequence of the dispute or whose dismissal, discharge or retrenchment led to the dispute, a workman who had been discharged earlier and not during the dispute was not a workman within the meaning of the Act. If the expression "any person" in the third part of the definition clause were to be strictly equated with 'any workman', then there could be no industrial dispute, prior to 1956, with regard to a workman who had been discharged earlier than the dispute. That seems to be the reason why the Legislature used the expression 'any person' in the third part of the definition clause so as to put it beyond any doubt that the non-employment of such a dismissed workman was also within the ambit of an industrial dispute."

These observations, however, were made to show that as the definition of the workman stood before the 1956 amendment there was a gap between a workman and an employee, that though all workmen would be employees, the *vice versa* would not be correct as the supervisory staff would not fall within the definition of workman and that that gap was reduced to a certain extent by the Amendment Act of 1956 and that it would not be always correct to say that the workmen would have a direct and substantial interest in questions relating to all kinds of employees. At page 1173 S.K. Das J. observed :

"The expression 'any person' in the definition clause means, in our opinion, a person in whose employment, or non-employment, or terms of employment, or conditions of labour the workmen as a class have a direct or substantial interest—with whom they have, under the scheme of the Act, a community of interest."

While dealing with the decisions in *Western India Automobile Association*¹ and *Central Provinces Transport Services Ltd.*², the learned Judge clearly stated at page 1176 that the problem in those cases was whether an industrial dispute included within its ambit a dispute with regard to reinstatement of certain dismissed workmen, a problem quite different from the one before them and that the illustrations given by Mahajan, J. (as he then was) in the *Western India Automobile Association*¹, "to elucidate a different problem", could not be taken as determinative of a problem which was not before the Court in that case. The problem in each of these decisions being different and in view particularly of the fact that the case proceeded on the

assumption that Dr. Bannerjee was not "a workman", it becomes difficult to agree that the observations relied on by Counsel were meant to be or are in fact in variance with those in the two earlier decisions, or that therefore, there is any conflict of opinion on the question that a workman whose services are terminated would still be a workman as defined by section 2 (a) before it was amended in 1956.

But assuming that there is such a conflict as contended, we do not have to resolve that conflict for the purposes of the problem before us. The definition section 2 of the present Act commences with the words "In this Act unless the context otherwise requires" and provides that the definitions of the various expressions will be those that are given there. Similar qualifying expressions are also to be found in the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948, the C.P. and Berar Industrial Disputes Settlement Act, 1947 and certain other statutes dealing with industrial questions. It is, therefore, clear that the definitions of "a newspaper employee" and "a working journalist" have to be construed in the light of and subject to the context requiring otherwise. Section 5 of the Act, which confers the right to gratuity, itself contemplates in clause (d) of sub-section 1 a case of payment of gratuity to the nominee or the family of a working journalist who dies while he is in the service of a newspaper establishment. Section 17 (1) provides that where any amount is due under the Act to a newspaper employee from an employer, such an employee himself or a person authorised by him, or, in case of his death, any member of his family can apply to the State Government or other specified authority for the recovery thereof. Similar provisions are also to be found in section 33-C (1) of the Industrial Disputes Act. Claims under that section include those for compensation in cases of retrenchment, transfer of an undertaking and closure under Chapter V-A of that Act, all of which would necessarily be claims arising after termination of service and the claimant would obviously be one in all those cases who would not be presently employed in the establishment of the employer against whom such claims are made. Likewise, the claim for gratuity under section 17 read with section 5 of the Act would itself be one which accrues after the termination of employment. These provisions, therefore, clearly indicate that it is not only a newspaper employee presently employed in a particular newspaper establishment who can maintain an application for gratuity. The scheme of all these acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provisions, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made. There can, therefore, be no doubt that the definitions of a "newspaper employee" and "working journalist" being subject to a context to the contrary, the benefit of sections 5 and 17 is available to an ex-employee though he has ceased to be in the employment of that particular newspaper establishment at the time of his application for gratuity. The contention that the respondent was not entitled to maintain his application as he was not in the service of the appellant company on the date of his claim before the Labour Court cannot be sustained.

The next contention was that the respondent, having signed the said receipt in full settlement of all his claims and having thereby induced the company to accept his resignation without insisting on a full month's notice, was estopped from making claims in respect of his leave for one month, the car allowance and the free telephone and newspapers and for including them as part of his wages for calculating gratuity. Certain decisions of this Court seem, however, to have expressed doubt whether technical pleas such as acquiescence, estoppel and waiver suitably apply to industrial adjudication. But assuming that the rule of estoppel, as incorporated in section 115 of the Evidence Act, were to apply, the foundation of that rule is that it is inequitable and unjust to a person, that if another person by a representation induces him to act as he would not have otherwise acted, the person who made the representation should be allowed to deny the effect of his former statement to the loss and injury of the person who has acted on it. [see *Sarat v. Gopal*].¹ The rule is one of evidence

only and does not create any substantive right or confer any cause of action on the other. It comes into operation if a statement as to the existence of a fact has been made with the intention that the other person to whom it is made should believe and act on it and that that another person does in fact act upon the faith of it. The question whether the respondent is estopped from making his said claims may be looked at firstly, as regards his leave period and secondly, as regards his claims for car allowance and free telephone and newspapers. As to the claim for leave due to him, the record of the case makes it clear that he had been making that claim from the very outset. Though the receipt given by him mentions that it was given in full settlement of all his claims, the respondent on that very day in his letter Exhibit W-4 to the said Roy protested that though he wanted to clarify in that receipt that it was in full settlement of his salary and dearness allowance for the 20 days of October 1963 and gratuity only, he was not allowed to make that reservation although he had already preferred his claim for compensation for one month's leave due to him. We must note that though this letter went in as Exhibit W-4 before the Labour Court the company led no evidence to controvert the statements made therein. The reason for not doing so seems to be that the respondent had made the claim before one Mitra, the accountant in the Delhi office, and that claim was a matter of dispute. This position emerges from Roy's reply dated 5th December, 1963 to the respondent's said letter of 21st November, 1963 wherein the stand taken by Roy was that the respondent was not entitled to compensation for leave, not because he had given up that claim when he had signed the said receipt, but because the company's rules did not permit such compensation. It is, therefore manifest that the respondent did not make an representation when he signed the said receipt that he had waived his claim for leave period or that the company did any act on any such representation which otherwise it would not have done. In spite of the letter Exhibit W-4, the company failed to produce before the Labour Court its rules under which it was said that such a claim was not permissible. In its special leave petition in this Court, the company, however, cited a rule but we could take no notice of it as no application for producing the rules or proving them as additional evidence was made and it was hardly fair or just to take notice of it at such a late stage without an opportunity to the respondent to verify or controvert it. Roy's reply also indicates that the company's case, that the respondent's claim for compensation for leave was at the time of preparing his statement of account adjusted or set-off against its claim for the notice period, could not be correct. For, if that was so, would have straightaway said so in his said reply, or in any event the company would have led evidence of its accountant to that effect before the Labour Court. The rule of estoppel thus could not be invoked against the claim for compensation for leave period.

We next examine the question whether the respondent was precluded from making the rest of his claim. The burden of proving the ingredients of section 115 of the Evidence Act lies on the party claiming estoppel. The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted. The statement of account prepared at the time when the respondent gave the said receipt appears to indicate that the benefit of the free telephone and newspapers and the car allowance were not taken into account and gratuity due to the respondent was calculated on the amount of pay being comprised of basic wages and dearness allowance only. But the inference that the respondent had given up his aforesaid claims when he passed the said receipt appears to be rebutted by the following facts : (1) though the resignation was accepted on 21st October, 1963 the letter of acceptance was not communicated to the respondent till 21st November, 1963 when the company obtained from the respondent the said receipt ; (2) in the meantime, the respondent received Karnik's said letter of 19th November, 1963 to the effect that there was no termination of the respondent's service in the absence of a month's notice, and on receipt of which, according to the respondent, he considered it necessary to secure the letter of acceptance of his resignation from the company. If the termination of his service depended on the giving of a month's notice, how was it that the company's manager,

D'Souza, had accepted the resignation and signed the letter of acceptance Exhibit W-1 on 21st October, 1963; (3) the company was aware, as Karnik's said letter (of 19th November, 1963 shows that) the respondent had joined the Indian Express on 23rd October, 1963. The respondent's case was that it was after he was told that his resignation had been accepted that he joined that Indian Express. But when he received Karnik's said letter he decided that he could not rest content without jeopardising his interests on the mere oral intimation of acceptance of his resignation, and therefore, went to the company's office to secure a written acceptance when he was told that unless he passed a receipt in full settlement of his claims, the letter of acceptance would not be issued to him. There appears to be two good reasons why the respondent's case cannot be easily discarded. Firstly, since his resignation was accepted with effect from 21st October, 1963 and even a letter to that effect was made ready and signed by the company's manager, it would ordinarily have been communicated to him. If the company had any claim against him or if it wanted that his account should be settled before the letter was issued to him, surely an intimation to that effect would have been given to him. Secondly, though the respondent had put on record his version as to how the said receipt was obtained from him as early as 21st November, 1963, i.e., on the very day that the said receipt was secured from him, no refutation of any of the allegations in that letter is to be found in Roy's reply to it dated 5th December, 1963 save that the respondent's claim for compensation for leave period was not admissible under the company's rules. It is significant that there was no denial in that reply that the receipt was obtained from the respondent in the manner alleged in the said letter dated 21st November, 1963. Even at the later stages the company did not examine its accountant before the Labour Court to refute the said allegations. The statements of the respondent in that letter having thus remained unchallenged, the Labour Court could not reject them. In these circumstances it becomes doubtful whether he could be said to have been estopped from making the said claims on the ground only of the said receipt, if that receipt was obtained, as alleged by him, under the stress of circumstances. In this connection the fact that he kept the said cheque uncashed is not totally without relevance. Under section 115 of the Evidence Act the representation which estops a person making it from acting contrary to it is one on the belief of which the other person acts in a manner he would not have done but for it and on believing it to be true. Such a conclusion is difficult in face of the uncontradicted statements in the letter Exhibit W-4 that the management would not give him the letter of acceptance of his resignation unless he signed the said receipt in full settlement of all his claims. The plea of estoppel made on behalf of the company, therefore cannot be accepted.

The third contention was that the monetary value of the free telephone and newspapers and the car allowance could not be included as part of his wages for calculating gratuity. The value in terms of money of the benefit of free telephone and free newspapers, as estimated by the respondent, was not in question. But the argument was that this benefit as also the car allowance were given to the respondent by way of reimbursement for expenses which as a special correspondent he would otherwise have had to incur for the proper and efficient discharge of his duties. The two items, therefore, were neither an allowance nor an amenity. The facts, however, are that the telephone was installed by the company at the respondent's residence and stood in his and not in the company's name. All payments connected with it, including charges for calls, were made by the company. There was no restriction that he could use the telephone only for his official work or that he could not use it for personal calls. He was not called upon to keep an account of personal calls, the payment of which he would be called upon to make. Nor was any estimated amount for such personal calls either demanded or deducted from his wages. The newspapers were subscribed by the respondent but the bills for them were paid by the company. It was not the case of the company that the bills for them would be paid by it provided they were made use of by the respondent for his work as a special correspondent. As regards the car allowance, the car belonged to and stood registered in his name but the company paid him a monthly allowance of Rs. 200. There was no evidence whatsoever, not even a suggestion in the correspondence, that that

amount was estimated as being equivalent to the expenses of conveyance which the respondent would incur in the discharge of his duties. No such indication is to be found in the company's evidence, nor was such a suggestion put to the respondent when he examined himself before the Labour Court.

Since wages has not been defined in the Act, its meaning is the same as assigned to it in the Industrial Disputes Act. Under section 2 (rr) of that Act, 'wages' means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes (i) such allowances (including dearness allowance) as the workman is for the time being entitled to; (ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food-grains or other articles; (iii) any travelling concession; but does not include any bonus and other items mentioned therein. Mr. Ramamurthi's argument was that the car allowance as also the benefit of the free telephone and newspapers would fall under the first part of the definition as they are remuneration capable of being expressed in terms of money. The argument, however, cannot be accepted as neither of them can be said to be remuneration payable in respect of employment or work done in such employment. Neither the car allowance nor the benefit of the free telephone was given to the respondent in respect of his employment or work done in such employment as the use of the car and the telephone was not restricted to the employment, or the work of the respondent as the special correspondent. There was no evidence that the car allowance was fixed after taking into consideration the expenses which he would have ordinarily to incur in connection with his employment or the work done in such employment. Even if the respondent had not used the car conveying himself to the office or to other places connected with his employment and had used other alternative or cheaper means of conveyances or none at all, the car allowance would still have had to be paid. So too, the bills for the telephone and the newspapers whether he used them or not in connection with his employment or his work as the special correspondent. Therefore, we have to turn to the latter part of the definition and see if the two items properly fall thereunder. So far as the car allowance is concerned, there was, as aforesaid, nothing to suggest that it was paid to reimburse him of the expenses of conveyance which he would have to incur for discharging his duties as the special correspondent, or that it was anything else than an allowance within the meaning of section 2 (rr) of that Act. It would, therefore, fall under the inclusive part (i) of the definition. Likewise the benefit of the telephone and newspapers was allowed to the respondent not merely for the use thereof in connection with his employment or duties connected with it. Both the car allowance and the benefit of the free telephone and newspapers appear to have been allowed to him to directly reduce the expenditure which would otherwise have gone into his family budget and were therefore items relevant in fixation of fair wages. (See *Hindustan Antibiotics Ltd. v. Workmen*¹). That being the position, the two items could on the facts and circumstances of the present case be properly regarded as part of the respondent's wages and had to be taken into calculations of the gratuity payable to him.

These were the only points raised before us and since in our judgment none of them can be upheld the appeal must fail and has to be dismissed with costs.

V. M. K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.

Workmen of Orient Paper Mills Ltd.

... Appellants*

v.

M/s. Orient Paper Mills Ltd.

... Respondent.

Industrial Disputes Act (XIV of 1947), section 2 (rr), Schedule 3, item 1—Wages—Regions—Com industry Principle inapplicable—Procedure to be followed in fixing wages.

Industrial Disputes Act (XIV of 1947)—Dearness allowance—Linking with Price index—Discretion of the Tribunal.

Industrial Disputes Act (XIV of 1947)—Wages—Casual worker cannot expect same wages as permanent employee.

Industrial Disputes Act (XIV of 1947)—Bonus—Calculation of—Accounts not completed at the time of reference—Full Bench formula inapplicable—Tribunal is expected to decide dispute only as referred to it.

On facts held, that the region-cum-industry Principle laid down in the case of *French Motorcar Co., Ltd. v. Workmen*, (1963) 2 S.C.R. (Supp.) 16 could not have been applied by the Tribunal when fixing the wages in the company. In such a case the principle laid down in (1963) 2 S.C.R. (Supp.) 16 that the wages paid in that region in other industries as are nearly similar as possible to the line of business carried on by the concern should be taken into account. When applying the principles of fixing the minimum wage primarily on the basis of comparison between different industries to the same regions, wages payable in same industry in other parts of the country should not be considered.

An industrial Tribunal has the discretion in appropriate cases, of making a direction linking the dearness allowance element of a wage to the price index; but, at the same time, the Tribunal is entitled to choose the alternative course of fixing the wage at the prevailing price index and leaving the labour to raise a fresh demand and, if necessary a fresh industrial dispute for further rise in wages, in case there is marked variation in the Price index and the wage fixed in the award becomes outdated.

By the very nature of employment being casual, it can be presumed that a casual worker is on a lower footing and cannot expect the same wages as a permanent employee.

At the time of the reference, there could be no question of applying the Full Bench formula for calculation of surplus, because there were no completed accounts for the two years 1962—63 & 1963—64. This circumstance makes it clear that the claim for higher bonus could not, at the time of reference, have been based on the availability of surplus according to the Full Bench formula. The Tribunal was, therefore quite correct in not trying to work out the surplus according to the Full Bench formula and in awarding bonus on that basis. The Tribunal was expected to decide the dispute only as referred to it and at the time of reference at least there was not and there could not possibly be a claim for higher bonus on the basis of the application of the Full Bench formula.

Appeal by Special Leave from the Award dated the 11th and 13th January, 1964 of the Industrial Tribunal, Orissa, Cuttack in Industrial Dispute Case No. 8 of 1962.

D. L. Sengupta, Janardan Sharma, Anil Das Chowdhury and S. K. Nandy, Advocates, for Appellants.

H. R. Gokhale, Senior Advocate, (K. Gobind Das, N. C. Shah, Miss Krishna Sen and T. Gopalakrishnan, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—The workmen of Orient Paper Mills Ltd., Brajrajnagar, have come up in this appeal by Special Leave against an award of the Industrial Tribunal, Orissa. An industrial dispute between these workmen and the management of Orient Paper Mills Ltd., (hereinafter referred to as "the Company") was referred by the State Government under section 10 (1) (d) of the Industrial Disputes Act (hereinafter referred to as "the Act") for adjudication by the Tribunal enumerating 30 different items of dispute. The Tribunal gave its award on all the thirty items. The Special Leave in this Court was sought and granted in respect of two matters covering some of these items. The first matter related to fixation of wages, including minimum wages, and this was covered by items Nos. 1, 3, 4, 22 and 26 in the schedule attached to the Order of Reference. The second matter in the appeal related to bonus covered by item No. 2 of that schedule. In the course of the hearing of the appeal, learned Counsel appearing on behalf of the workmen further gave up some of the points which were the subject-matter of the items mentioned above, so that in this judgment we need deal with only those points which were argued by him in support of the appeal.

The first and the main point argued with regard to wages was that the Tribunal, after holding that there was no identical industry in this region comparable with the Company, came to the view that there were other industries in the region in which minimum wages were higher than the minimum wages paid by the Company, but failed to fix the minimum wages in the award in accordance with the minimum wages being paid in those industries. Instead, what the Tribunal did was to work out the minimum wages, which should be paid, on an entirely different basis. It was also urged in the alternative that, even in adopting the latter course, the Tribunal committed an error inasmuch as, in making the calculation, the Tribunal only tried to neutralise about 36 per cent of the cost of living on the basis of the rise in price Index instead of permitting neutralisation to the extent of at least 90 per cent, which should have been done fixing the minimum wages for the lowest class of workmen.

The principle for fixation of minimum wages that should ordinarily be adopted was laid down by this Court in the case of *French Motor Car Co. Limited v. Workmen*¹, where it was held :—

"It is now well-settled that the principle of industry-cum-region has to be applied by an Industrial Court, when it proceeds to consider questions like wage structure, dearness allowance and similar conditions, of service. In applying that principle industrial Courts have to compare wage scales prevailing in similar concerns in the region with which it is dealing, and generally speaking similar concerns would be those in the same line of business as the concern with respect to which the dispute is under consideration. Further even in the same line of business, it would not be proper to compare (for example) a small struggling concern with a large flourishing concern."

The Tribunal, in giving its decision, took this principle in view, but came to the finding of fact that there were no other concerns in the same line of business as the Company in the region which could be compared with the Company. The Tribunal found that there are only two other paper mills, in the region. They are the Titaghur Paper Mill No. 3 situated at Chaudwar, and the J. K. Paper Mills at Rayagada. The Tribunal found that the Company is an old established business carrying on manufacture of paper on a very large scale. The Titaghur Paper Mills No. 3 started production only in April 1960, while the J. K. Paper Mills at Rayagada started production in 1961-62. These two paper mills were, therefore, both of very recent origin compared with the company. The strength of their labour-force and the annual production were also very much lower. Even the profits earned were much smaller. On these facts, the Tribunal held that it would not be proper to compare the wage structure for these paper mills with that of the Company. This is a finding of fact recorded by the Tribunal and nothing has been shown by learned

Counsel for the Company which would induce us to interfere with this finding of fact. In fact, learned Counsel was unable to urge that this finding of fact suffered from any error at all. On this finding, it is clear that the region-*cum*-industry principle laid down in the case of *French Motor Car Co. Ltd.*¹ could not have been applied by the Tribunal when fixing the wages in the company.

This Court in the same case of *the French Motor Car Co.*¹, further indicated what principles should be adopted in such a situation where there is no concern in the same industry in the region comparable with the concern in which wages have to be fixed. That situation was envisaged as occurring whenever the particular concern in question happens to be already paying the highest wages in its particular line of business. It was held that in such a case :

“there should be greater emphasis on the region part of the industry-*cum*-region principle, though it would be the duty of the industrial Court to see that for purposes of comparison such other industries in the region are taken into account as are as nearly similar to the concern before it as possible. Though, therefore, in a case where a particular concern is already paying the highest wages in its own line of business, the industrial Courts would be justified in looking at wages paid in that region in other lines of business, it should take care to see that the concerns from other lines of business taken into account are such as are as nearly similar as possible, to the line of business carried on by the concern before it. It should also take care to see that such concerns are not so disproportionately large as to afford no proper basis for comparison.”

In the light of these views which were brought to the notice of the Tribunal, the Tribunal proceeded to consider the minimum wages paid by three collieries, Orient Colliery, Ibe Colliery and Hingiri-Rampur Colliery, the Rourkela Steel Plant, the Cement Factory at Rajgangpur and the Indian Aluminium Company, Hirakud which the Tribunal found were situated not very far away from the place where the Company had its factory. The Tribunal mentioned that, according to the Coal Award, the minimum wage in the collieries at the then existing price index was Rs. 93-7-0; in the cement factory Rs. 96.83 in the Steel Plant Rs. 95 and in the aluminium company Rs. 97.84 nP. The Tribunal then also took into account the minimum wages being paid by the other paper mills situated outside the region and thereafter recorded its own decision in the following words :—

“The conclusion that flows from these figures is that the lowest paid worker in the paper mill at Brajrajnagar gets more than what is paid as minimum wage in the other two Paper Mills of Orissa, but it is less than what is paid to the lowest paid worker in some of the Paper Mills outside the State. In other industries, which are comparatively close to the paper industry of at Brajrajnagar, the minimum wage is above Rs. 90 in almost all the cases.”

On the basis of this finding of fact, the Tribunal held that, if the minimum wage in the Company is to be fixed more on the basis of the minimum wage prevailing in other industries in that region which, in its opinion, would be appropriate under the circumstances of the case, then, a revision was really necessary. We think that the criticism of learned Counsel for the workmen that the Tribunal committed an error at this stage in merely holding that the facts found by it justified a revision and in not proceeding to fix minimum wages on the basis of the other industries in the region, is fully justified. It is to be noted that there is no mention in the award of the Tribunal that the company at any stage put forward the case that the collieries, the steel plant, the cement factory, and the aluminium company were concerns which were not comparable with the Company. In fact, in the course of arguments before us, we asked learned Counsel for the Company to point out whether such a plea was taken at any stage by the Company and whether evidence was led to show that these concerns were not comparable with the Company. Learned Counsel had to admit that no specific plea was taken by the Company in this behalf and at least no evidence

at all was led to show that these concerns were not comparable with the Company. The workmen in their written statement had relied on the wage structure in these concerns obviously on the basis that they were comparable. Since the Company never took the plea that they were not comparable, no occasion arose for the workmen to give evidence of the concerns being comparable. In fact, the Tribunal also accepted them as being comparable and that is why, in its conclusion, the Tribunal held that, in its opinion, it would be appropriate under the circumstances of the case to fix the minimum wage in the Company on the basis of the minimum wage prevailing in other industries in that region. By the expression "other industries in the region" the Tribunal was obviously referring to these concerns. Having come to this view, it is clear that, to give full effect to the principle laid down by this Court in the case of *French Motor Car Co.*¹, the Tribunal should have proceeded to fix the minimum wage in the Company on the basis of the average minimum wage prevailing in these concerns. We have already quoted the figures of the minimum wage prevailing in these concerns. On their basis, it appears to us that there will be full justification for fixing the minimum wage in the company at Rs. 95 per mensem which is about the average of the wages prevailing in all those concerns. In this connection, we may take notice of the fact that, in the written statement of the workmen, the minimum wages prevailing in these concerns were shown at figures lower than those mentioned by the Tribunal; but it appears that those lower figures were given, because the wages mentioned in the written statement were based on a lower price index. The Tribunal considered the minimum wages in these concerns on the basis of the prevailing Price Index of 441 at Sambalpur taking too as the basic price index for the year 1939. Even when fixing the minimum wage for the company, on the basis of the alternative calculation made by the Tribunal, the Tribunal has proceeded on the assumption that the minimum wage is being fixed for the Price Index No. 441 prevailing at the time of the award taking 100 as the basic index for the year 1939. In these circumstances we think that the minimum wage in the Company should have been fixed by the Tribunal at Rs. 95 per mensem, following the principle laid down by this Court in the case of *French Motor Car Co.*¹. The Tribunal should not have proceeded to make the alternative calculation on some other basis so as to arrive at a lower figure of Rs. 73 per mensem as the wage covering the basic wage and the dearness allowance, in addition to Rs. 11 per mensem payable as production bonus.

Learned Counsel for the Company urged before us that the principle of fixation of wages on the basis of comparison in the region laid down in the *French Motor Car Co.'s case*¹ is not rigid, and it is not necessary that the minimum wage in the Company must be fixed at the average level of wages in the other comparable industries in the region. According to him note should be taken of the fact that, at least in the paper industry in this area, the other concerns are paying much lower wages. This point has to be rejected straightaway in view of the finding that those concerns are very small and not comparable with the company. It was also urged that, in fixing the minimum wage, the wages payable in the paper industry in other parts of the country should also be kept in view. We do not think that such a consideration should be taken into account when applying the principle of fixing the minimum wage primarily on the basis of comparison between different industries in the same region. Finally, it was argued that other amenities being provided by the Company should also be taken into account when fixing the minimum wage. In this case, however, there is nothing to show that the Company is providing any such amenities which are different from the amenities that are being provided by those concerns in the region which are being compared with the Company for the purpose of fixation of the minimum wage. Consequently, we do not think that there is any justification for departing from the figure of Rs. 95 which is the average minimum wage paid by those industries.

We may, at this stage, take notice of the fact that, in considering the question of minimum wage, the Tribunal had in view the total wage packet to be received by

1. (1964) 1 S.C.J. 335 : (1963) 2 S.C.R. (Supp.) 16.

each workman and, in the opinion of the Tribunal, it consisted of three elements. These elements are basic wage, dearness allowance and production bonus. The Tribunal in its award, held that the minimum wage, insofar as it consists of basic wage and dearness allowance, should be fixed at Rs. 73 and there should be paid, in addition, production bonus to the extent of Rs. 11 in each case. Thus, the total minimum wage packet which a workman should be entitled to receive was fixed by the Tribunal at Rs. 84. It is for this figure of Rs. 84 that we think the Tribunal should have substituted the figure of Rs. 95. From the facts noted in the Award or appearing on the record, it appears that production bonus, in addition to the minimum wage, is payable in the case of Aluminium Company, Hirakud ; but there does not appear to be any production bonus payable in the three Collieries, in the Steel Plant and in the Cement Factory. In the majority of the industries, which are being compared with the Company in the region, consequently, the minimum wage is the total wage packet receivable by the workman and there is no extra amount received as production bonus. There is only an exception in the case of Indian Aluminium Company. That particular Company, it appears, has some special features which have been brought out in the evidence of the Management's witness, B.B. Panda. He has stated that the Aluminium Factory at Hirakud carries on its work with the help of highly automatic machines and is supplied electricity by the Government at subsidised rates. The nature of work is such that the total number of workmen employed does not exceed 125 which is a very small number as compared with the number of workmen employed by the Company. It is clear that, in the Aluminium Factory the number of workmen who have to be paid production bonus is very small and almost insignificant as compared with the number in the Company. In these circumstances, it would be more appropriate to compare the total wage packet of the Company with the wage packet received by the workmen of other industries in the region, viz., the three Collieries, the Rourkela Steel Plant, and the Cement Factory at Rungtampur. Comparing with them, there is justification for fixing the total wage packet of the workmen in the Company at Rs. 95 which would include production bonus. So far as annual profit bonus is concerned, it is payable in the Company also as in those other concerns. Consequently, in varying the award of the Tribunal, we would direct that the total minimum wage packet of a workman in the Company shall be fixed at Rs. 95 consisting of the three elements of basic wage, dearness allowance and production bonus.

The break-up of this wage into the three elements is of some importance in this case because of the principle on which the profit bonus is paid by this Company. The profit bonus that is paid is three months basic wage and does not take into account the dearness allowance and the production bonus elements of the total wage. The Company has always treated the total wage of a workman as consisting of these three elements in the proportion of 3:3:1. On behalf of the workmen, it was urged before the Tribunal that the proportion should be 3:1:1, so that the production bonus and the dearness allowance would both be equal and 1/3rd of the basic wage. This plea of the workmen was rejected by the Tribunal primarily on the ground that the other break-up urged on behalf of the Company was the break-up which had been accepted by mutual consent between the workmen and the Company in an earlier settlement which had been arrived at in the year 1959. We are unable to hold that the Tribunal committed any error in arriving at this decision and, consequently, the total minimum wage fixed by us must also be deemed to have the same break-up. As a result, it would have to be held that the total minimum wage of Rs. 95. will consist of Rs. 41 as basic wage, Rs. 41 as dearness allowance and Rs. 13 as production bonus.

In connection with the fixation of minimum wage, one point vehemently argued by learned Counsel for the workmen was that at least the dearness allowance element of the wage should have been made variable with the Price Index, so that the labour could automatically be compensated for further rise in the cost of living subsequent to the making of the award. Learned Counsel was, however, unable to show to us that this Court or any other Tribunal has ever laid down the principle that, where the dearness allowance forms a part of the consolidated wage fixed, there should be such

linking so as to bring in continuous variation of the wage, depending on the variation in the Price Index. It appears to us that an Industrial Tribunal has the discretion, in appropriate cases, of making a direction linking the dearness allowance element of a wage to the Price Index; but, at the same time, the Tribunal is entitled to choose the alternative course of fixing the wage at the prevailing Price Index and leaving the labour to raise a fresh demand and, if necessary, a fresh industrial dispute for further rise in wages, in case there is marked variation in the Price Index and the wage fixed in the award becomes out-dated. Reference in this connection may be made to the decision of this Court in *Hydro (Engineers) Pvt. Ltd. v. The Workmen*¹, where also the Court did not hold that it was compulsory to link minimum wage with the cost of living index and only envisaged that such linking may be permissible by holding:

"It is thus clear that the concept of minimum wage does take in the factor of the prevailing cost of essential commodities whenever such minimum wage is to be fixed. The idea of fixing such wage in the light of cost of living at a particular juncture of time and of neutralising the rising prices of essential commodities by linking up scales of minimum wages with the cost of living index cannot, therefore, be said to be alien to the concept of a minimum wage."

In the present case, the Tribunal chose the course of leaving it to the workmen to ask for increase in minimum wage on any further rise in Price Index and did not consider it advisable to link the wages with it. In fact, from the Award, it appears that, so far as the Tribunal was concerned, the workmen did not press for such linking when the award was being given. Consequently, we are unable to hold that the Tribunal has committed any error and that, in this respect, any interference by us is called for.

The only other point argued before us in respect of wages by learned Counsel was that casual workers should also be paid minimum wages on the same basis as the permanent workers for whom the minimum wage was fixed by the Tribunal which is being varied by us by increasing it to a total wage packet of Rs. 95. It appears that the Tribunal did not accept this demand primarily on the ground that the distinction between casual workers and the permanent workers was recognised by both the parties in the agreement of 1959. It may be noticed that, by the very nature of employment being casual, it can be presumed that a casual worker is on a lower footing and cannot expect the same wages as a permanent employee. Therefore the decision by the Tribunal not to equate the casual workers with the permanent employees cannot be held to be incorrect and must be upheld.

The Tribunal had directed that the increase of Rs. 12 per mensem in the total minimum wage packet allowed by it will ensure to the benefit of the lowest paid female, Badli and permanent daily-rated workers also. This principle will remain effective with the modification that these workers will be entitled to the increase of Rs. 23 per mensem substituted by us for the increase of Rs. 12 allowed by the Tribunal.

Learned Counsel appearing for the Company drew our attention to the fact that the revised wages are payable with effect from 13th December, 1962 and, by this time, a period of 5 to 6 years has elapsed, so that the Company will have to pay arrears of wages for this long period. It was urged that this would cast a very heavy burden on the Company. We do not think that this reason advanced on behalf of the Company will justify our making a direction that the increase in wages should be effective from some later date. The previous agreement of 1959 was binding only up to 12th December, 1962, and we think that the Tribunal was right in directing that the revised wages must take effect from 13th December, 1962. Even though arrears will have to be paid for about 6 years, it has to be kept in view that, since then, there has been a very considerable rise in the Price Index and the labour has not so far raised a fresh dispute for a further revision of wages over and above the wages fixed by the Tribunal which are being now re-fixed by us. In all these circumstances, we think that the revised wages should take effect from 13th December, 1962.

1. Since reported in (1969) 1 S.C.J. 519.

The only other dispute raised in this appeal related to the bonus for the year 1962-63. Initially, the workmen had challenged the decision of the Tribunal with regard to bonus for all the five years from 1959-60 to 1963-64, but in the course of arguments, at the last stage before us, learned Counsel for the workmen confined his arguments to the bonus for the year 1962-63 only. The main point urged by learned Counsel was that, in giving the decision with regard to bonus for this year, the Tribunal committed the error of not making calculation of surplus available on the basis of the Full Bench Formula approved by this Court in the case of *The Associated Cement Companies Ltd., Dwarka Cement Works, Dwarka v. Its Workmen and another*¹. The Company is paying profit bonus equivalent to three months' basic wage of each workman. The demand made by the workmen was for bonus equivalent to six months' wages, and the argument was that, if the Tribunal had worked out the surplus available on the correct basis, that surplus would have certainly justified grant of profit bonus at six months' wages.

This argument fails, because it appears to us that the demand, as put forward before the Tribunal for bonus equivalent to six months' wages, was, in fact, never made by the workmen on the basis that the surplus calculated under the Full Bench Formula would justify bonus being granted at that rate. The Tribunal, in this connection, has quited the pleading of the workmen in their written statement before it. The pleading makes it clear that the claim for six months' wages was not based on the Full Bench Formula, but on the ground that certain clerical staff was, being paid bonus which, in effect, amounted to about six months' basic wages, because the bonus was calculated in their case by taking into account the consolidated wages, including dearness allowance, while in the case of the workmen, the dearness allowance element of the wages was being ignored and bonus was calculated only by taking into account basic wages. We agree with this interpretation of the pleadings of the workmen. Further, there is one very significant circumstance, viz., that this dispute was raised by the workmen before the expiry of the year 1962-63. Initially, there was an attempt that the dispute be referred to the Industrial Tribunal under section 10 (2) of the Act on the basis of an agreed enumeration of subjects of dispute drawn up by the workmen and the Company together. That reference under section 10 (2) of the Act, however, failed due to some technical defect. The reference was ultimately made by the Government under section 10 (1) of the Act, but it was made in the same form in which the parties had agreed to refer it. The reference was made by the Government on the 4th October, 1962. At that time, the year 1962-63 was still running and the accounts for that year could not possibly have been closed and made available. The balance-sheet and the profit and loss account of that year could only be prepared after the closure of the year on 31st March, 1963. In fact, the reference included a dispute even for the year 1963-64, which year had not even started running. On the face of it, at the time of the reference, there could be no question of applying the Full Bench Formula for calculation of surplus, because there were no completed accounts for the two years 1962-63 and 1963-64. This circumstance makes it clear that the claim for higher bonus could not, at the time of reference, have been based on the availability of surplus according to the Full Bench Formula. The Tribunal was, therefore, quite correct in not trying to work out the surplus according to the Full Bench Formula and in awarding bonus on that basis. In this connection, learned Counsel for the workmen urged that, at least by the time when the Award was given, the completed accounts for the year 1962-63 were available; but it seems to us that this circumstance is of no assistance. The award had to cover the year 1963-64 also and at least for that year the accounts could not possibly have been completed, as that year was still running when the award was given by the Tribunal on the 11th January, 1964. Further, the Tribunal was expected to decide the dispute only as referred to it and, at the time of reference at least, there was not and there could possibly not be a claim for higher bonus on the basis of the application of the Full Bench Formula.

The claim was, in fact, based on the circumstance that, according to the workmen, the bonus, in their case was being calculated as equivalent to three months' basic wages, while, in the case of some clerical staff, the calculation was made on the basis of their consolidated wages consisting of basic wages and dearness allowance. The argument is incorrect. In the case of even the lowest paid clerical staff, to whom dearness allowance is separately payable, the bonus is only calculated on the basis of basic wages, and the dearness allowance is ignored. There is some clerical staff which does not get any dearness allowance at all and it is only in those cases that the bonus is worked out on the basis of the total wages paid. In such cases, the calculation is still on the basis of basic wage, because it cannot be assumed that their wage is a consolidated wage consisting of the two elements of basic wage and dearness allowance lumped together. In fact, the principle which is being applied is the simple one of calculating the bonus payable at three months' basic wage in each case and in no case is the dearness allowance taken into account. There is, therefore, no discrimination or inequality as urged on behalf of the workmen.

Finally, it was urged that even the casual and Badli workers should be allowed bonus on the same basis as the permanent workers. The Tribunal rejected this demand on the ground that, under the Agreement of 1959, the workmen and the Company had agreed specifically to exclude these classes of workers in regard to payment of bonus. We are unable to hold that the Tribunal committed any error of law, requiring interference by us, in basing its decision on the principle contained in the earlier Agreement of the parties and in holding that there was no justification to introduce a new element of payment of bonus to casual and Badli workers at this stage. The claim in this respect also fails.

As a result, the appeal is only partly allowed inasmuch as the minimum wage fixed by the Tribunal in the Award is varied as indicated by us above. The rest of the Award of the Tribunal is upheld. Since, in this appeal, the principal dispute related to the fixation of minimum wage of the workmen and we are allowing the appeal of the workmen in that respect, we direct that the workmen, will be entitled to their costs of this appeal from the Company.

S.V.J.

Appeal partly allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C.A. VAIDIALINGAM, JJ.

The Workmen of the Motor Industries Co., Ltd.

... *Appellants**

v.

The Management of Motor Industries Co., Ltd. and another

... *Respondents.*

Industrial Disputes Act (XIV of 1947), section 2 (p) and 18 (3)—Settlement, before conciliation officer between, management and Association of workmen—Settlement in representative capacity—Binding on workmen.

Industrial Disputes Act (XIV of 1947), sections 23 (1), 24 and 29—Distinction between strikes envisaged by section 23 (c) and section 25.

Industrial Disputes Act (XIV of 1947)—Strike by workers—Management dismissing three workers for misconduct by incitement, intimidation and riotous and disorderly behaviour considering them as 'very grave nature'—Whether amounts to victimisation and discrimination.

The settlement was a Package settlement by which the management and the workmen, through their association, arrived at certain terms in the presence of the conciliation officer. The settlement arrived at by the Association must be regarded as one made by it in its representative character and therefore, binding on the workmen. If a lightening strike without notice is illegal under any provi-

sion of Law, standing order 22 would come into operation and starting or joining such a strike and inciting others to join it would amount to misconduct for which disciplinary action by the management would be possible.

Held, the settlement, was one as defined by section 2 (p) of the Industrial Disputes Act and was binding on the workmen under section 18 (3) of the Act until it was validly terminated and was in force when the said strike took place. The strike was a lightening one, was resorted to without notice and was not at the call of the Association and was, therefore, in breach of the settlement.

There is a distinction between a strike envisaged by section 23 (1) in respect of a matter covered by a settlement and a strike in breach of a settlement envisaged by section 29. A strike in breach of a contract during the operation of a settlement and in respect of a matter covered by that settlement falls under section 23 (c). But whereas section 26 punishes a workman for going on an illegal strike or for any act in furtherance of such a strike, section 29 lays down the penalty for a person, not necessarily a workman, who commits breach of a term of a settlement which is binding under the Act. Thus, commencing a strike or acting in furtherance of it in breach of a settlement binding on the person who so commences it or acts in its furtherance is an offence punishable under section 29.

On facts held, The strike was in the matter of the suspension of a workman pending a domestic enquiry against him, a matter which obviously was not one of the matters covered by the said settlement. It was, therefore, not a strike illegal under section 24 read with section 23 (c). However, the strike was in contravention of the settlement and that settlement being binding on the workmen concerned and in operation at the time was punishable under section 29, and therefore, illegal under that section. The strike was illegal not under section 24 but because it was in contravention after settlement binding on the workmen concerned. Consequently, standing order 22 would apply and participating in or inciting others to join such a strike would amount to misconduct for which the management were entitled to take disciplinary action.

The management took action only in respect of Acts falling under Clause 3 and 13 of the standing order 22 evidently for the reason that they considered incitement "intimidation and directions and disorderly behaviour as every grave in in nature." It cannot be said in taking this view the management discriminated against the three workmen were concerned as against the rest or that they dismissed with the object of victimising. An act of discrimination can only occur if amongst those equally situated an unequal treatment is meted out to one of more of them. Having been found to be the leaders of the crowd action against them cannot on any principle be regarded as discriminatory or unequal. Once a misconduct graver than that of the rest was found proved against these three workmen and for which the punishment is dismissal victimisation cannot legitimately be attributed to the management. So far as their participation in the strike and loitering about is concerned...no action was taken against these three workmen on the ground that those acts were common with those of the rest of the workmen. *Held*, the order of dismissal cannot be characterised as acts of victimisation.¹

Appeal by Special Leave from the Award dated the 23rd March, 1968 of the Labour Court, Bangalore in Reference No. 39 of 1967.

M. K. Ramamurthi, Senior Advocate (*B. R. Dolia, S. Pappu and Vineet Kumar*, Advocates, with him), for Appellants.

H. R. Gokhale, Senior Advocate, (*C. Doraswamy and D. N. Gupta*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Shelat, J.—This appeal, founded on Special Leave, arises out of an industrial dispute between the respondent company and the Motor Industries Company Employees Association which the Government of Mysore referred to the Labour Court, Bangalore, for adjudication under section 10 (1) (c) of the Industrial Disputes Act, 1947. The dispute related to the dismissal by the management of three workmen, Sandhyavoo, G. Prabhakar and M. V. Vasudevan out of the five workmen

against whom the management had held a domestic enquiry at which they were found guilty of acts of misconduct charged against them.

The facts leading to the said dispute and the reference are as follows :

On 24th August, 1964, the said association handed over to the management a charter of demands. Negotiations between the parties having failed, the demands were taken before the conciliation officer when the parties arrived at a settlement dated 23rd December, 1964. On 29th April, 1966, the management issued a notice suspending for a day, i.e., 4th May, 1966, one B. G. Shenoy as and by way of penalty. In consequence of the protest by the association, the said suspension was postponed and on 10th May, 1966, the management served a charge-sheet on Shenoy and suspended him pending an enquiry. On 11th May, 1966, the association demanded withdrawal of the said suspension and the said charge-sheet. Discussions took place on that day from 9.45 A.M. to 12-30 P.M. between the association and the management and the parties thereafter adjourned at 1 P.M. for lunch having decided to resume the talks at 2.30 P.M. At 2 P.M. the first shift ended and the workers of the second shift began to come in. The workmen of the first shift, however, stayed on and those of the second shift along with the workmen of the general shift joined them and all of them went on strike. The discussions which were resumed at 2-30 P.M. ended in an agreement at 5 P.M. and the workmen returned to work. On 18th May, 1966, the assistant establishment officer submitted a complaint to the chief personnel officer alleging certain acts of misconduct by a crowd of workmen mentioning therein the names of five of them including the said three workmen. On 25th May, 1966, charge-sheets alleging stoppage of work, abandoning the place of work, inciting clerks and officers of G. 2 department to join the said strike, disorderly behaviour including intimidation and assault on one. A Lakshman Rao, were served upon those five workmen. Correspondence thereafter ensued between the association and the management wherein the association protested against the management's decision to adopt disciplinary action against the said five workmen despite the agreement arrived at on 11th May, 1966. Thereafter, a domestic enquiry was held on 30th June, 1966, which was completed on 27th July, 1966, when the enquiry officer made his report holding the said three workmen, Sandhyavoo, Prabhakar and Vasudevan, guilty of acts of misconduct under standing order 22 (2) (3), (13) and (18). He exonerated the other two workmen except on the charge of participating in the strike and loitering about under clauses (2) and (18) of the said standing order on 12th August, 1969. Management, agreeing with the report, passed orders of dismissal against the said three workmen which gave rise to the said reference. On 23rd March, 1968, the Labour Court gave its award holding that the said enquiry was validly held and that the management were justified in passing the said orders of dismissal.

Mr. Ramamurthi, appearing for the association, challenged the said award on the following grounds : (1) that the said association not having given a call for the said strike, the said charges were misconceived and the orders of dismissal were consequently not sustainable ; (2) that the said strike, which was spontaneously staged by the workmen, was not illegal under section 24 of the Industrial Disputes Act, nor was it in contravention of any law as required by standing order 22 (2) and (3) ; (3) that the said disciplinary proceedings were in contravention of the agreement arrived at on 11th May, 1966, and therefore, the dismissal following such disciplinary proceedings amounted to unfair labour practice ; (4) that the orders of dismissal were passed on charges including that of intimidation though the misconduct of intimidation was not found proved by the enquiry officer and hence the said orders were illegal (5) that to punish only three workmen when a large number of workmen had taken part in staging the strike and in inciting others to join it constituted victimisation ; and (6) that the findings of the enquiry officer were based on no evidence or were perverse in that no reasonable body of persons could have arrived at them on the evidence before him.

The argument on which the first contention was based was that the settlement dated 23rd December, 1964, was arrived at between three parties, the management,

the association and the workmen ; and that the association being the union registered under the Trade Unions Act was an entity distinct from the workmen. Under clause 5 of the settlement it was the association which was obliged to give four days notice if it decided to resort to strike, go slow tactics or other coercive action. The said clause did not impose any such obligation on the workmen. The workmen thus having no such obligation and the said strike being a spontaneous one, without any call for it from the association, it could not be said to be in breach of the said settlement, and therefore, would not fall under the mischief of section 23 of the Act, the first condition of which is that to be illegal under section 24 read with section 23 it must be in breach of a contract. Standing order 22 requires that participating in a strike would be misconduct if it is in breach of some provision of law. But as the strike was not in contravention of section 23, it would not constitute misconduct under that standing order. Therefore, the charges against the said three workmen were misconceived and the orders of dismissal passed against them on the basis that they stood established were bad. In our view this argument cannot be sustained. The construction of clause 5 of the settlement suggested by Mr. Ramamurthi is contrary to (a) the tenor of that settlement and (b) the provisions of the Industrial Disputes Act under which a settlement arrived at between an employer and a union representing the employees during conciliation proceedings is binding not only on such union but also the workmen whom it represents and (c) the principles of collective bargaining recognised by industrial law. The settlement was a package settlement by which the management and the workmen, through their association, arrived at certain terms in the presence of the conciliation officer. The settlement, besides settling the demands contained in the said charter of demands, sets out the necessity of harmonious relations and of co-operation between the management and the workmen so as to promote higher and better production. It was to achieve this object that direct action on the part of either of them such as a strike by the workmen and a lock-out by the employer without notice was prohibited. Evidently the provision for four days' notice before any direct action was taken by either of them was provided for so that during that period if there was any grievance it could be ironed out by negotiation. Clause 5 of the settlement falls in two parts; (1) the substantive part, and (2) the corollary thereof. The first part *inter alia* provided that neither the association nor the management would resort to any direct action, such as strike, go-slow tactics or lock-out or any such coercive action without giving to the other a four days' notice. The second part provided an undertaking on the part of the association to co-operate with the management, if there was any strike by workmen without any call therefor from the association, if the management were to take disciplinary action against the workmen. If the construction of clause 5 suggested by Mr. Ramamurthi were to be accepted it would lead to a surprising result, namely, that though a strike at the instance of the association required four days' notice, a strike by the workmen without any call from the association would not require any such notice and that the settlement left complete liberty to the workmen to launch a sudden strike. Such a construction appears on the very face of it contrary to the object and purpose of the settlement and particularly clause 5 which envisaged a notice period of four days to enable the parties to resolve a dispute before direct action on its account is resorted to by either of them. The suggested construction is also untenable, for, surely the association irrespective of the workmen cannot by itself resort to any direct action. How can, for instance, the association resort to go-slow tactics without giving a call for it to the workmen. It is obvious, therefore, that clause 5 does not contemplate any dichotomy between the association and the workmen as suggested by Mr. Ramamurthi, besides being repugnant to the principle that a settlement arrived at by the association must be regarded as one made by it in its representative character, and therefore, binding on the workmen. Therefore, although the settlement mentions in clause 5 the management, workmen and the association, the expression "workmen" therein was unnecessary, for, without that expression also it would have been as efficaciously binding on the workmen as on the association. This conclusion is strengthened by the fact that the settlement mentions the management and the association on behalf of the workmen only as the parties thereto and the signatories thereto also are only the representatives of the

two bodies. None of the workmen, nor any one separately representing them affixed his signature to it. If a lightening strike without notice is illegal under any provision of law (a question which we shall presently consider) standing order 22 would come into operation and starting or joining such a strike and inciting others to join it would amount to misconduct for which disciplinary action by the management would be possible.

The next question is whether the management could validly take disciplinary action against the workmen concerned in respect of the said strike. The recitals of the said settlement show that as a result of the association presenting the said charter of demands negotiations between the management and the association took place on the said demands as also on certain proposals made by the management, that on their failure conciliation proceedings took place in the course of which the parties arrived at the said settlement which, as aforesaid, was signed by the representatives of the management and the association in the presence of the conciliation officer. The settlement thus was one under section 12 (3) of the Industrial Disputes Act and rule 59 of the Rules made thereunder by the Government of Mysore. It was to come into force as from 1st January, 1965, and was to remain in force for three years and was thereafter to continue to be in force until its termination by either side. It is clear from Part I thereof that the object with which it was made was to promote harmonious relations and co-operation between the company, the association and the workmen so that the company may on the one hand be able to achieve increased production and on the other be in a position to afford maximum opportunity for continued employment. To accomplish these aims it was agreed that the company on its part should be managed on sound and progressive lines and the association and the workmen on their part should combat any wasteful practices adversely affecting workmanship and production and assist the management in apprehending persons responsible for acts such as theft, sabotage and other subversive activities. As clause 5 of the settlement itself states it was "in order to ensure continuation of smooth working" that the company and the association agreed that in no case would either of them resort to direct action such as lock-outs, strikes, go-slow and other coercive action without four days' notice and that should one or more workmen resort to any such direct action without the approval of the association, the association would cooperate with the company in any disciplinary action which the company would take against such workmen. Then follows the agreement on the said demands of the workmen, and the proposals made by the management in the details of which it is not necessary to go, and finally, the agreement that the parties would adhere to the code of discipline and the grievance procedure annexed as annexure IV to the settlement. The said code also *inter alia*, provided that there should be no strike or lock-out without notice, that neither party should resort to coercion, intimidation, victimisation or go-slow tactics, that they would avoid litigation, sit-down and stay-in strikes and lock-outs and would not permit demonstrations which are not peaceful or rowdyism. Read in the context of the other provisions of Part I of the settlement of which it is part, clause 5 was intended to prohibit (a) direct action without notice by or at the instance of the association, and (b) strikes by workmen themselves without the approval of the association. The words "in no case" used in the clause emphasist that direct action by either party without notice should not be resorted to for any reason whatsoever. There can be no doubt that the settlement was one as defined by section 2 (p) of the Industrial Disputes Act and was binding on the workmen under section 18 (3) of the Act until it was validly terminated and was in force when the said strike took place. The strike was a lightening one, was resorted to without notice and was not at the call of the association and was, therefore, in breach of clause 5.

Could the management then take disciplinary action against the concerned workmen in respect of such a strike standing order 22 enumerates various acts constituting misconduct. Clauses 2, 3, 13 and 18 provide that striking either singly or in combination with others in contravention of the provisions of any Act, inciting any other workmen to strike in contravention of any law, riotous or disorderly behaviour or any act subversive of discipline and loitering within the company's premises while

on duty or absence without permission from the appointed place of work constitute misconduct. The point is whether participation in and incitement to join the said strike were in respect of a strike which was in contravention of any Act or law. Section 23 provides that no workman employed in an industrial establishment shall go on strike in breach of contract and during the period in which a settlement is in operation, in respect of any of the matters covered by such a settlement. The prohibition against a workmen going on strike thus envisages two conditions ; (a) that it is in breach of a contract and (b) that it is during the period in which a settlement is in operation and is in respect of any of the matters covered by such settlement. The said settlement was a contract between the company and the association representing the workmen and it was in operation on 11th May, 1966. But was it in respect of a matter covered by the settlement ? Under section 24 a strike is illegal if it is commenced in contravention of section 23. Section 26 *inter alia* provides that any workman who commences, continues or otherwise acts in furtherance of a strike which is illegal under the Act shall be punished with imprisonment for a term extending to one month or with fine which may extend to Rs. 50 or with both. Section 27 provides punishment of a person who instigates or incites others to take part in or otherwise acts in furtherance of an illegal strike. The strike envisaged by these two sections is clearly the one which is illegal under section 24 read with section 23. A strike in breach of a contract during the operation of a settlement and in respect of a matter covered by that settlement falls under section 23 (c). But whereas section 26 punishes a workman for going on an illegal strike or for any act in furtherance of such a strike, section 29 lays down the penalty for a person, not necessarily a workman who commits breach of a term of a settlement which is binding under the Act. It is, therefore, an offence for any person on whom a settlement is binding under the Act to commit a breach thereof and the Legislature has viewed it to be a more serious offence, for, it has a higher punishment of imprisonment extending to six months than the punishment for commencing, etc., an illegal strike under section 26. Thus, commencing a strike or acting in furtherance of it in breach of a settlement binding on the person who so commences it or acts in its furtherance is an offence punishable under section 29.

It is clear that there is a distinction between a strike envisaged by section 23 (c) in respect of a matter covered by a settlement and a strike in breach of a settlement envisaged by section 29. That position was conceded by Mr. Gokhale for the management. But his argument was that the strike in question was, firstly, in respect of a matter covered by the said settlement, namely, its prohibition without notice while that settlement was in force and secondly that it was in breach of that settlement. That settlement was in force and secondly that it was in breach of that settlement. This contention and consequently, it was illegal both under section 24 and section 29. This contention does not seem correct, firstly, because though an agreement not to resort to a strike without notice would be the subject matter of a settlement a strike in contravention of such an agreement is not in respect of any of the matters covered by such settlement. Secondly, such a construction would mean as if Parliament intended to provide two different penalties, one under a section 26 and the other under section 29, for the very same offence, one higher than the other, an intention difficult to attribute. The strike was in the matter of the suspension of the said Shency pending a domestic enquiry against him, a matter which obviously was not one of the matters covered by the said settlement. It was, therefore, not a strike illegal under section 24 read with section 23 (c). However, the strike was in contravention of clause 5 of the said settlement and that settlement being binding on the workmen concerned and in operation at the time was punishable under section 29, and, therefore, illegal under that section.

The question whether a strike in contravention of a similar clause in a settlement was illegal arose in *The Tata Engineering and Locomotive Co., Ltd. v. C.B. Mitter and another*¹. As in clause 5 of the settlement before us, the settlement there also provided that "in no case" would the parties thereto resort to direct action such as lockouts, strikes, go-slow and other direct action without four days' notice. The strike in question was commenced in respect of a demand by a workman for a pair

of gum-boots, a demand not covered by the settlement. It was common ground that the strike would not fall within the ambit of section 24 but the controversy was whether it was otherwise illegal, the workmen's contention being that it was not, as the said clause against a strike without notice applied only to one declared for enforcing one or the other demands which formed the subject matter of the settlement and since the strike arose out of a matter not covered by the settlement, that clause was inapplicable. This Court negatived the contention and held that the words "in no case" in that clause meant a strike for whatever reason and though it was conceded that it was not illegal under section 24, it was nevertheless held to be illegal not because it was in respect of a matter covered by the said settlement but because it was in contravention of the settlement which was binding on the concerned workmen which meant that the Court held the strike to be illegal under section 29. In our view the decision in the present case must be the same. The strike was illegal not under section 24 but because it was in contravention of the settlement binding on the workmen concerned. Consequently, standing order 22 would apply and participating in or inciting others to join such a strike would amount to misconduct for which the management were entitled to take disciplinary action.

But against that position, the argument was that the agreement dated 11th May, 1966, under which the workmen called off the strike also provided that no disciplinary action would be taken against any workmen in respect of the strike on that day and that therefore the proceedings taken against the three workmen in violation of that agreement amounted to unfair labour practice. The agreement was oral. According to Bernard, Secretary of the association, the agreement was that (a) the charges and the suspension order passed against the said Shenoy should be withdrawn (b) the company should pay the wages for the 3½ hours period of the strike provided the workmen made good the loss of production during that period, and (c) the management would take no action against any one for going on strike. The evidence of Martin, the company's technical director, on the other hand, was that the company agreed only not to punish the said Shenoy and to consider paying wages for the hours of the strike. The Labour Court on this evidence held that the association failed to prove that the management had agreed not to take action against any of the workmen in connection with the strike though it may be that they might have agreed not to victimise any workman for participating in the strike. In fact, the management did not impose any penalty against any workman for joining the strike, not even against the three concerned workmen. This finding being purely one of fact and the Labour Court having given cogent reasons for it we would not interfere with it without the utmost reluctance. We have been taken through the evidence and the correspondence between the parties but we fail to see any error on the part of the Labour Court in reaching that finding.

The next contention was that the orders of dismissal were bad as they took into account the charge of intimidation of the company's officers although the enquiry officer had found that charge was not proved. The chargesheets, exs. M/4-A M/5-A and M 6/A against the three workmen alleged in express terms disorderly behaviour and intimidation. The report of the enquiry officer against the said Vasudevan clearly stated that the enquiry officer accepted the evidence of the management's witnesses and that on that evidence all the charges against him stood proved. While summarising those charges, he, no doubt, did not in so many words use the expression "intimidation". But the evidence which he, as aforesaid accepted, was that Vasudevan along with other workmen entered the G. 2 department at about 3 P. M. on that day and thumping his hand on the table of the said Lakshman Rao threatened that officer in the following words: "now I am in the forefront of the crowd. You cannot do anything. You ask your people to come out and you also come-out. Otherwise you can see what we can do for you now". The said Lakshman Rao had also deposed that he was surrounded by the workers who started pushing and pulling him. The evidence of other officers was that as the crowd which forced its way into this department got unruly they were also forced to leave their places of work. The evidence against Prabakar was that he too was in the forefront of that crowd which squeezed Lakshman Rao and some members thereof inflicted

kicks on him. Similarly, there was the evidence of one Raja, the assistant personnel officer, and others that Sandhyavoo was one of those in the forefront of that crowd. According to Raja, Sandhyavoo tried to lift him from his seat with a view to force him to leave his table and finding that the crowd had become restive he left his place. Acceptance of this evidence by the enquiry officer must necessarily mean acceptance of the version of these officers that they were intimidated by the crowd which forced its way into their department led by these three workmen. Though the enquiry officer has not, in so many words, used the expression intimidation his finding of disorderly behaviour must be held to include acts of intimidation.

Lastly, were the orders of dismissal against the three workmen acts of victimisation on the part of the management when admittedly a large number of workmen had staged the strike and also incited others to join that strike? The orders against the three workmen being identical in terms we take the order passed against Vasedevan as a specimen. That order sets out four acts of misconduct by him; (1) striking or stopping work, (2) inciting, (3) riotous and disorderly behaviour and (4) loitering about in the company's premises. Though each one of these acts, according to the order, was misconduct punishable with dismissal, the order states that so far as acts 1 and 4 were concerned, the management did not wish to take a serious view of them as a large number of "misguided" workmen had stopped work and left their places of work without permission. The management, therefore, took action only in respect of acts falling under clauses 3 and 13 of standing order 22 evidently for the reason that they considered incitement, intimidation and riotous and disorderly behaviour as "very grave in nature." We do not think that in taking this view the management discriminated against the three workmen concerned as against the rest or that they dismissed them with the object of victimising. The evidence in the enquiry clearly disclosed that when the crowd forced its way into the G. 2 department it was led by these three workmen, all of whom were in the forefront thereof and two of them had defiantly forced the officers to leave their tables. One of them had threatened as to what he and the others who were behind him in that crowd could do to him if he did not comply and the other had tried even to lift another officer from his chair to compel him to leave his place of work. In these circumstances the management cannot be blamed if they took a serious view of these acts of the three workmen concerned, who had taken up their position in the forefront of that crowd, a position indicative of their having led that crowd into that department and having acted as its leaders. An act of discrimination can only occur if amongst those equally situated an unequal treatment is meted out to one or more of them. Having been found to be the leaders of the crowd, action taken against them cannot on any principle be regarded as discriminatory or unequal. The decision in *Burn and Co. Ltd. v. Workmen*¹, relied on by Mr. Ramamurthi has no bearing on the facts of this case and cannot assist him. Once a misconduct graver than that of the rest was found proved against these three workmen and for which the punishment is dismissal, victimisation cannot legitimately be attributed to the management. It is relevant in this connection to remember that so far as their participation in the strike and loitering about were concerned, no action was taken against these three workmen on the ground that those acts were common with those of the rest of the workmen. In view of these facts it is not understandable how the impugned orders of dismissal could be characterised as acts of victimisation. It is also not possible to say that the finding of incitement and disorderly behaviour of these three workmen was perverse or such as no reasonable body or person could come to on the evidence on record on the ground only that the others also were guilty of those acts. For, there would be nothing wrong if those who misled or misguided other workmen were selected for disciplinary action and not the victims of their persuasion, who in following their precept did similar acts.

In our judgment the orders of dismissal, based on the findings in the domestic enquiry which did not suffer from any infirmity, could not be successfully impeached and therefore, the Labour Court was right in upholding them. The appeal fails and is dismissed. There will be no order as to costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.

Commissioner of Wealth-Tax, West Bengal II

... Appellant*

v.

Tungabhadra Industries Ltd., Calcutta

... Respondent.

Wealth-tax Act (XXVI of 1957), sections 7 (2) (a) and 27 (6)—Wealth-tax—Net Wealth—Business assets—Valuation—Global valuation—Written down value or balance-sheet value—Value shown by assessee in the balance-sheet, if inflated—Onus of proof on assessee—Balance-sheet value to be adopted in the absence of such proof.

Reference—Judgment of Supreme Court or High Court—Duty of Tribunal to pass orders in conformity with the judgment.

In computing the net wealth of the assessee the Officer proceeded under section 7 (2) (a) of the Act and included the full value of the fixed assets as shown by the assessee in the balance-sheet without any adjustment, after rejecting the contention that the fixed assets should be assessed at their written down value as computed for the purposes of the income-tax. But the Tribunal in appeal held that the written down value may be adopted as the value. The High Court in reference also upheld the view. The Revenue appealed.

Held, that the appeal has to be remanded to the Tribunal.

Under section 7 (2) (a) of the Act the Officer may determine the net value of the assets of the business as a whole, having regard to the balance-sheet of such business as on the valuation date and make such adjustments therein as the circumstances of the case may require. The power conferred upon the Officer to make adjustments as the circumstances may require is also for the purpose of arriving at the true value of the assets of the business.

It is open to the assessee in any particular case to establish after producing relevant materials that the value given of the fixed assets in the balance-sheet is artificially inflated. It is also open to the assessee to establish by acceptable reasons that the written down value of any particular asset represents the proper value of the asset on the relevant valuation date. The onus of proof is on the assessee who must produce reliable material to show that the written down value of the assets and not the balance-sheet value is the true value. In the absence of any such material, the Officer would be justified in a normal case in taking the value given by the assessee itself in its balance-sheet as the real value of the assets for the purposes of the Act.

Section 27 (6) of the Act requires the Tribunal on receiving a copy of the judgment of the Supreme Court or the High Court as the case may be, to pass such orders as are necessary to dispose of the case conformably to such judgment. The scope of the hearing must of course depend upon the nature of the order passed by the Supreme Court. If the Supreme Court agrees with the view of the Tribunal the appeal may be disposed of by a formal order. But if the Supreme Court disagrees with the Tribunal on a question of law, the Tribunal must modify its order in the light of the order of the Supreme Court. If the Supreme Court has held that the judgment of the Tribunal is vitiated because it is based on no evidence or because the judgment proceeds upon a misconception of the statute, the Tribunal would be under a duty to dispose of the case conformably with the opinion of the Supreme Court and on the merits of the dispute and re-hear the appeal. In all cases, however, opportunity must be afforded to the parties of being heard.

Appeals from the Judgment and Order dated the 29th January, 1965, of the Calcutta High Court in Wealth-tax Matter No. 372 of 1961.¹

* C. As. Nos. 1629 to 1631 of 1968.

8th August, 1969.

1. (1965) 1 I.T.J. 769; 60 I.T.R. 447.

B. Sen, Senior Advocate, (*T.A. Ramachandran, R.N. Sachthey* and *B.D. Sharma*, Advocates, with him), for Appellant (In all the Appeals).

M.C. Chagla, Senior Advocate, (*R.K. Choudhury* and *B.P. Maheshwari*, Advocates, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate granted under section 29 (1) of the Wealth-tax Act, 1957 (hereinafter referred to as the Act) against the judgment of the Calcutta High Court dated 29th January, 1966 in Wealth-tax Matter No. 372 of 1961.

The respondent is a company which is assessed to wealth-tax for the assessment years 1957-58, 1958-59 and 1959-60. In computing the net wealth of the respondent on the respective valuation dates the Wealth-tax Officer proceeded under section 7 (2) (a) of the Act and included the full value of the fixed assets as shown by the respondent in the respective balance-sheets without any adjustment, after rejecting its contention that the fixed assets should be assessed at their written down value as computed for the purposes of income-tax. In the assessment order for 1957-58 the Wealth-tax Officer gave his reasons as follows :—

“The assessee claimed that since the full amount of depreciation which was admissible under the Income-tax Act was not provided in the balance-sheet the amount of depreciation not provided for earlier should now be deducted from the value of the assets in order to arrive at the net wealth. This contention can hardly be accepted. The depreciation allowable under the Income-tax Act does not determine the market value of the assets. The object of allowing depreciation in the income-tax assessment is quite different. For the purpose of the Wealth-tax assessment the value of the assets as estimated by the assessee itself in its balance-sheet has been accepted.”

Similarly in his assessment order for 1958-59 the Wealth-tax Officer stated as follows :—

“Excluding the value of land, the total value of the fixed assets as per balance-sheet amounts to Rs. 60,53,811 whereas the assessee has shown in its return the value of the same at Rs. 7,69,435. These values have been shown by the assessee on the basis of income-tax written down value and not on the basis of the balance-sheet values as required under the global system of valuation. It is common knowledge that the values of imported machinery has increased considerably during the last few years and, on the valuation date, I do not think that their value should be less than that provided for in the balance-sheet.”

On appeal the Appellate Assistant Commissioner confirmed the valuation of the fixed assets. On further appeal the Income-tax Appellate Tribunal held that it would be fair in the circumstances of the case to adopt the written down value of the assets as value thereof for all the years under appeal. In the course of its order the Appellate Tribunal said :

“In income-tax assessment depreciation is calculated upon the original cost in a scientific and systematic manner with due regard to the nature of the asset. Therefore, the written down value as determined in the income-tax assessment may be taken as the fair index of the net value of the business assets in most cases. It cannot however be laid down as an inflexible rule of law that in every case the written down value must be taken to be the net value of the business assets. If that were so, the Legislature would have said so in clear terms instead of indulging in the circumlocution in section 7 (2) (a). In this particular case, it appears, the assessee did not make any reserve for depreciation and the assets are old dating back from the inception of the business long ago. In these circumstances, in our opinion, it would be fair to adopt the written down value of the assets as the value thereof for all the years under appeal.”

At the instance of the Commissioner of Income-tax, the Appellate Tribunal stated a case to the High Court under section 27 (1) of the Act on the following question of law :

“Whether on the facts and in the circumstances of the case, for the purpose of determining the net value of the assets of the assessee under section 7 (2) of the Wealth-tax Act, 1957, the Tribunal was right in directing that the written down value of the fixed assets of the assessee should be adopted as the value thereof, instead of their balance-sheet value ?”

By its judgment dated 29th January, 1965 the High Court answered the question in the affirmative and in favour of the respondent.

Section 7 of the Act stood as follows at the material time :

"(1) The value of any asset, other than cash, for the purposes of this Act, shall be estimated to be price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date.

(2) Notwithstanding anything contained in sub-section (1),—

(a) where the assessee is carrying on a business for which accounts are maintained by him regularly, the Wealth-tax Officer may, instead of determining separately the value of each asset held by the assessee in such business, determine the net value of the assets of the business as a whole having regard to the balance-sheet of such business as on the valuation date and making such adjustments therein as the circumstances of the case may require.

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In *Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth-tax, (Central) Calcutta*¹, the appellant-company had shown in its balance-sheet for the period ending 31st March, 1957, the appreciated value on revaluation of its assets, after making certain adjustments, at Rs. 2,60,52,357 and had introduced in the capital reserve surplus a corresponding balancing figure of Rs. 1,45,87,000 representing the increase in the value of the assets upon re-valuation. For the purposes of wealth-tax, the officer took the sum of Rs. 2,60,52,357 as the value of the assets, whereas the company contended that an adjustment ought to be made in view of the increase in the value shown in the balance-sheet on revaluation. It was held by this Court that as no one could know better the value of the assets than the assessee himself, the Wealth-tax Officer was justified in accepting the value of the assets at the figure shown by the appellant-company itself. It was open to the appellant-company to convince the authorities that that figure was inflated for acceptable reasons; but it did not make any such attempt. It was also open to the Wealth-tax Officer to reject the figure given by the appellant-company and to adopt another figure if he was, for sufficient reasons, satisfied that the figure given by the appellant was wrong.

It is argued on behalf of the appellant in the present case that the High Court was not right in holding that the principle laid down by this Court in *Kesoram Industries*¹ case is not applicable. In our opinion there is justification for this argument. Under sub-section (1) of section 7 of the Act the Wealth-tax Officer is authorised to estimate for the purpose of determining the value of any asset, the price which it would fetch, if sold in the open market on the valuation date. But this rule in the case of a running business may often be inconvenient and may not yield a true estimate of the net value of the total assets of the business. The Legislature has, therefore, provided in sub-section (2) (a) that where the assessee is carrying on business for which accounts are maintained by him regularly, the Wealth-tax Officer may determine the net value of the assets of the business as a whole, having regard to the balance-sheet of such business as on the valuation date and make such adjustments therein as the circumstances of the case may require. The power conferred upon the tax officer to make adjustments as the circumstances of the case may require is also for the purpose of arriving at the true value of the assets of the business. It is of course open to the assessee in any particular case to establish after producing relevant materials that the value given of the fixed assets in the balance-sheet is artificially inflated. It is also open to the assessee to establish by acceptable reasons that the written down value of any particular asset represents the proper value of the asset on the relevant valuation date. In the absence of any material produced by the assessee to demonstrate that the written down value is the real value, the Wealth-tax Officer would be justified in a normal case in taking the value given by the assessee itself to its fixed assets in its balance-sheet for the relevant year as the real value of the assets for the purposes of the wealth-tax. It is a question of fact in each case as to whether the depreciation has to be taken into account in ascertaining the true value of the assets. The onus of proof is on the assessee who must produce reliable material to show that the written down value of the assets and not the balance-sheet value is the true value. If, therefore, the assessee merely claims that the written down value of the assets should be adopted but fails to produce any material to show that the written down value is the true value, the Wealth-tax Officer is justified in

1. (1966) 59 I.T.R. 767 : (1966) 1 I.T.J. 277 : A.I.R. 1966 S.C. 1370.
1966) 1 Comp. L.J. 154 : (1966) 1 S.C.J. 312 :

rejecting the claims and adopting the values shown by the assessee himself in his balancesheet as the true value of his assets. In our opinion the High Court should have based its decision on the principle of *Kesoram Industries case*¹ and the question of law should be answered in the manner stated by us in this judgment.

But it is necessary to give certain effective directions in this case. Section 27 (6), of the Act requires the Tribunal on receiving a copy of the judgment of the Supreme Court or the High Court as the case may be to pass such orders as are necessary to dispose of the case conformably to such judgment. This clearly imposes an obligation upon the Tribunal to dispose of the appeal in the light and conformably with the judgment of the Supreme Court. Before the Tribunal passes an order disposing of the appeal there would normally be a hearing. The scope of the hearing must of course depend upon the nature of the order passed by the Supreme Court. If the Supreme Court agrees with the view of the Tribunal the appeal may be disposed of by a formal order. But if the Supreme Court disagrees with the Tribunal on a question of law, the Tribunal must modify its order in the light of the order of the Supreme Court. If the Supreme Court has held that the judgment of the Tribunal is vitiated because it is based on no evidence or because the judgment proceeds upon a misconstruction of the statute, the Tribunal would be under a duty to dispose of the case conformably with the opinion of the Supreme Court and on the merits of the dispute and re-hear the appeal. In all cases, however, opportunity must be afforded to the parties of being heard. In *Income-tax Appellate Tribunal, Bombay v. S. C. Cambatta & Co., Ltd.*², the Bombay High Court has explained the procedure followed in the disposal of an appeal conformably to the judgment of the High Court. Chagla, C. J., in delivering the judgment of the Court observed :

".....when a reference is made to the High Court either under section 66 (1) or section 66 (2) the decision of the Appellate Tribunal cannot be looked upon as final ; in other words, the appeal is not finally disposed of. It is only when the High Court deciding the case, exercises its advisory jurisdiction, and gives directions to the Tribunal on questions of law, and the Tribunal reconsiders the matter and decides it, that the appeal is finally disposed of.....it is clear that what the Appellate Tribunal is doing after the High Court has heard the case is to exercise its appellate powers under section 33. The shape that the appeal would ultimately take and the decision that the Appellate Tribunal would ultimately give would entirely depend upon the view taken by the High Court."

This passage was quoted with approval by this Court in *Esthuri Aswathiah v. Commissioner of Income-tax*.³ In the present case, therefore, the answer we have furnished to the question in the reference means that the Appellate Tribunal must now, in conformity with the judgment of this Court, act under section 27 (6) of the Act, that is to say, dispose of the case after rehearing the respondent-company and the Commissioner in the light of the evidence and according to law.

There will be no order as to costs.

V. S.

Remanded.

1. (1966) 1 I.T.J. 277 : (1966) 1 Comp. L.J. 509.
154 : (1966) 1 S.C.J. 312.

2. (1956) 29 I.T.R. 118, 120 : I.L.R. (1956) Bom. 254 : 58 Bom. L.R. 259 : A.I.R. 1956 Bom.

3. (1967) 66 I.T.R. 478 (S.C.) : (1967) 2 I.T.J. 729 : (1967) 2 S.C.J. 776 : A.I.R. 1968 : S.C. 36.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—SHAH, *Acting Chief Justice*, V. RAMASWAMI AND GROVER, JJ.

Commissioner of Income-tax, West Bengal-I

.. Appellant*

v.

India Discount Co., Ltd.

.. Respondent.

Income-tax Act (XI of 1922), sections 10, 12 —Business income or income from other sources—Shares and arrears of dividend—Assessee, dealer in shares—Purchase of shares—Contract to purchase shares and arrears of dividend—Consideration paid for shares and arrears of dividend—Arrears dividend—Receipt by assessee—Not income—Receipt not otherwise income—Not to constitute income by erroneous crediting into profit and loss account.

Company—Shares—Purchase of—Purchaser's right to arrear dividend.

The assessee-company dealing in shares and securities, purchased shares of a company in 1955 under a contract which provided that the registered shareholders should sell the shares to the assessee with arrears of dividends relating to the period 1936-45. The assessee first credited the arrears of dividend to the profit and loss appropriation account and thereafter transferred the same to a reserve fund in the relevant accounting year. No adjustment was made in the share purchase account on account of the receipt of the dividend. The value of the shares which represented the stock-in-trade of the assessee remained the same both in the opening and the closing stocks. The department and the Tribunal held that the dividend was income and assessable. But the High Court in reference held that no part of the arrear dividend was income. The department appealed.

Held that, the consideration paid by the assessee was given not only for the shares but also for share dividends. This is capital purchase by the assessee of the shares together with arrear dividends due on the shares for the years 1936 to 1945. The arrear dividend would not constitute income liable to be taxed either as profit under section 10 of the Act or as dividend under section 12 of the Act.

Where a company declares dividend the same can only be paid to the person who is then the registered holder. A purchaser of shares becomes entitled to all dividends declared since his purchase but not before. If the purchase is made on the eve of declaration of dividends but the purchaser does not get his name mutated in the records of the company in time to have dividend warrant issued in his own name he is entitled to call upon his vendor to make over the dividend to him if and when received. It is well settled that after a sale of the shares and as long as the purchaser does not get his name registered, the vendor is for certain purposes considered a trustee for the purchaser of the rights attaching to the shares or accruing thereon, including the voting rights.

It is well established that a receipt which in law cannot be regarded as income cannot become so merely because the assessee erroneously credited it to the profit and loss account.

On facts: since the arrear dividends are not claimable by the assessee by virtue the right as purchaser they could not become the income of the assessee. They were the income of the vendor. Where the assessee purchased not only the share scripts but also the arrear dividends, the arrear dividends would not constitute income in the hands of the assessee.

Appeal from the Judgment and Order, dated the 6th January, 1965, of the Calcutta High Court in Income-tax Reference No. 145 of 1961.¹

* C.A.No. 2115 of 1968.

7th August, 1969.

1. (1965) 2 I.T.J. 777: 64 I.T.R. 301.

B. Sen, Senior Advocate (*S. A. L. Narayana Rao*, *R. N. Sachthay* and *B. D. Sharma*, Advocates, with him), for Appellant.

S. Mitra, Senior Advocate (*P. K. Mukherjee*, Advocate with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—The respondent is a private limited company (hereinafter referred to as the assessee). The appeal relates to the assessment year 1956-57 for which the previous year is the year ending 30th September, 1955. The business of the assessee was to deal with shares and securities. On 30th September, 1954 the assessee purchased 11,900 shares of Kedarnath Jute Manufacturing Co., Ltd., in two lots, one at the rate of Rs. 9-8-0 per share and the other at Rs. 9-4-0 per share from one Beharilal Nathani, Share broker, for a total consideration of Rs. 1,12,575. When the assessee purchased the said shares a large amount of dividends was in arrear as the previous owners had not claimed the dividends declared between 1936 and 1945, although a large part of the dividend, on the said shares in respect of the years 1945 to 1954 had been collected by the previous owners of the said shares. A letter addressed by Beharilal Nathani to the assessee bearing the date 30th September, 1954 goes to show that the shares had been "sold with arrear dividends". It is admitted that the dividends which had been declared between the years 1936 and 1945 and were received by the assessee during the accounting period amounted to Rs. 43,925. The assessee first credited this sum to the profit and loss appropriation account and thereafter transferred the same to a reserve fund in the accounting year ending 30th September, 1955. No adjustment was made in the share purchase account on account of the receipt of dividend. The value of the shares which represented the stock-in-trade of the assessee remained the same both in the opening and the closing stocks. Before the Income-tax Officer it was contended on behalf of the assessee that as the arrear dividends pertained to the years 1936 to 1945, the arrear dividend received by the assessee was not in the nature of income liable to income-tax as it was merely realisation of capital. The Income-tax Officer rejected the contention of the assessee and treated the amount of arrear dividend as the business income of the assessee liable to tax. On appeal by the assessee the Appellate Assistant Commissioner of Income-tax examined the question whether the amount of Rs. 43,925 should be treated as dividend and should, therefore, be assessed under section 12 of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act) or whether it should be treated as profits and gains of business arising to the assessee and taxed under section 10 of the Act. He, however, held that the amount could not be regarded as "dividend" as the assessee was not the registered shareholder in the years for which the arrear dividends were declared. But he held that since the shares were purchased by the assessee with the knowledge that it would be entitled to receive the arrear dividends which represented profits arising on the acquisition of such shares, the assessee could be deemed to have entered into a scheme of profit-making, an adventure in the nature of trade. The assessee brought a second appeal to the Appellate Tribunal but the appeal was dismissed. The Appellate Tribunal confirmed the findings by the Income-tax authorities and held that the assessee acquired the shares on which the arrear dividends were received in the course of its share-dealing business and that the sum of Rs. 43,925 so received by the assessee formed an integral part of its income arising from business which was liable to tax. At the instance of the assessee the Appellate Tribunal stated a case to the High Court on the following question of law:

"Whether on the facts and in the circumstances of the case the sum of Rs. 43,925 received by the assessee represented business income arising under section 10 from an adventure in the nature of trade or it was a dividend within the meaning of section 12 of the Income-tax Act."

After looking into the statement of case and also the application of the assessee under section 66 (1) of the Act the High Court held that the question which the Tribunal had referred did not correctly and accurately describe the stand and contention taken by the assessee throughout which was that no part of the arrear dividend received by the assessee was income at all liable to tax. The High Court thereafter addressed itself to the real issue between the parties and ultimately held that the

amount of Rs. 43,925 was not liable to tax. This appeal is brought on behalf of the Commissioner of Income-tax against the judgment of the High Court dated 6th January, 1965, by a certificate granted under section 66-A (2) of the Act.

It is necessary that the question referred to by the High Court should be reframed in the following manner in order to bring out the real point in controversy between the parties :

“ Whether in the facts and circumstances of the case the assessee had purchased the arrears of dividend ? If so, whether the said sum of Rs. 43,925 could at all be assessed either as dividend or as profit.”

It is manifest that dividends declared by Kedarnath Jute Manufacturing Co., between the years 1936 and 1945, were the property of the persons whose names stood on the share register on the relevant dates. When a company declares dividend the same can only be paid to the person who is then the registered holder. A purchaser of shares becomes entitled to all dividends declared since his purchase but not before. If the purchase is made on the eve of declaration of dividend, but the purchaser does not get his name mutated in the records of the company in time to have the dividend-warrant issued in his own name he is entitled to call upon his vendor to make over the dividend to him if and when received. It is well settled that after a sale of the shares and so long as the purchaser does not get his name registered, the vendor is for certain purposes considered a trustee for the purchaser of the rights attaching to the shares or accruing thereon, including the voting rights. In the present case there was a contract between the assessee and the registered shareholders to sell the shares to the assessee with arrear dividends. In other words the assessee entered into the contract with the registered shareholders not only to purchase share scrips but the dividends which had been declared but not collected by him or paid over to shareholders. As the dividends had been declared long ago there was no uncertainty as to the exact amount receivable in respect of them. It is, therefore, clear that both the purchaser and the vendor knew exactly what sum of money would come to the vendor by way of such dividend. In other words the purchase consideration included the amount of the arrear dividends and as the dividends had been declared long ago there was no uncertainty as to the exact amount receivable in respect of them. The existence of a contract binding the vendors to make over to the purchaser the arrear dividends clearly implied that the price paid by the purchaser was not only for the value of the share scrips but also for the sum of Rs. 43,925 which was going to be realised in the form of arrear dividends by the purchaser. The High Court held upon an examination of the evidence that such an arrangement implied that the value of Rs. 9-8-0 and Rs. 9-4-0 per share as settled into the broker's bills was not the real value of the share scrips alone but also included the element of the arrear dividends agreed to be receivable by the purchaser. The legal position, therefore, is that the arrear dividends were not claimable by the purchaser by virtue of his right as such purchaser and could not become his income from the shares. He was to get the same because the vendor had contracted to pass the arrear dividends on to him. They were the income of the vendors, i.e., the registered holders but they could not become the income of the purchaser. In fact the assessee had purchased the amount of arrear dividends for a price which was included in the total consideration of Rs. 1,12,575. What the assessee acquired in the form of share scrip represented its stock-in-trade, which consisted of the shares and the dividends potential which had to be realised. In this state of facts it is manifest that the assessee paid the amount of Rs. 1,12,575 not only for the share scrips but also for the arrear dividends which was inextricably connected with the purchase of the share scrips. In our opinion the High Court rightly held that the amount of Rs. 43,925 was not income which could be assessed in the hands of the assessee.

It was said that the assessee had itself credited the amount of Rs. 43,925 to the profit and loss appropriation account and thereafter transferred the same to a reserve fund in the accounting year ending 30th September, 1966. No adjustment was made in the share purchase account on account of the receipt of dividend. But it is well established that a receipt which in law cannot be regarded as income cannot

become so merely because the assessee erroneously credited it to the profit and loss account. (See *Commissioner of Income-tax Bombay City-I v. M/s. Shoorji Vallabhadas and Co*¹). The assessee's case had all along been that the amount of arrear dividends received could not be treated as income of the assessee liable to tax for the assessment year 1956-57. As we have already shown the consideration paid by the assessee was given not only for the shares but also for share dividends amounting to Rs. 43,925 and the amount of Rs. 1,12,575 was paid not only for the share scrips but also for the arrears dividends. In other words there was capital purchase by the assessee of the shares together with arrear dividends due on the shares for the years 1936 to 1945. It is therefore not possible to treat the payment of Rs. 43,925 as income liable to tax either as profit under section 10 of the Act or as dividend under section 12 of the Act.

For the reasons expressed we hold that there is no merit in this appeal. It is accordingly dismissed with costs.

Appeal dismissed.

V.S. THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.

Income-tax Officer, Alleppey

... *Appellant**

v.

M.C. Ponnose and others

... *Respondents.*

Income-tax Act, (XLIII of 1961), section 2 (44)—Finance Act, (XIII of 1963), section 4—"Tax Recovery Officer"—Substitution of new definition with retrospective effect—State Government empowered to invest any State Revenue Officer with powers of Tax Recovery Officer by notification—Whether State Government can notify with retrospective effect—Action taken by State Revenue Officer prior to date of notification—Validity.

Section 4 of the Finance Act, 1963, substituted a new definition for the original definition of "Tax Recovery Officer" in section 2 (44) of the Income-tax Act, 1961, and also provided that the new definition shall be and shall be deemed always to have been substituted. The new definition empowered the State Government to authorise by notification any State Revenue Officer to exercise the powers of a Tax Recovery Officer. The Government of Kerala issued a notification dated 14th August, 1963, under section 2 (44) (ii) of the Act, authorising various revenue officials including the Taluka Tahsildar to exercise the powers of a Tax Recovery Officer. The notification was published in the Kerala Gazette dated 20th August, 1963, and the concluding portion of the notification stated: "This notification shall be deemed to have come into force on the first day of April, 1962." A Tahsildar effected attachment of shares towards recovery of arrears of income-tax subsequent to first April, 1962, but prior to 14th August, 1963. The High Court, on a petition under Article 226 of the Constitution, held that the notification was invalid and this was affirmed by a division bench in appeal. On appeal to the Supreme Court,

Held, that the action taken by the Tahsildar in attaching the shares was unsustainable.

The exercise of the power under sub-clause (ii) of clause (44) of section 2 of the Income-tax Act 1961, is more of an executive than a legislative Act. Therefore the Taluka Tahsildar could not be authorised by the notification to exercise powers of a Tax Recovery Officer with effect from a date prior to the date of the notification.

The only effect of the substitution made by the Finance Act, 1963, was to make the new definition a part of the Income-tax Act, 1961, from the date it was enacted. The legal fiction that the new definition "shall be and shall be deemed always to have been substituted" could not be extended beyond its legitimate field and construed as conferring power for a retrospective authorisation by the State in the absence of any express provision in section 2 (44) of the Act itself.

Appeals by Special Leave from the Judgment and Order dated the 18th June, 1965 of the Kerala High Court in Writ Appeals Nos. 139 and 140 of 1964.

Jagdish Swarup, Solicitor-General of India (*T.A. Ramachandran* and *B.D. Sharma*, Advocates, with him) for Appellant (In both the Appeals).

S.T. Desai, Senior Advocate (*M.C. Chacko* and *A.K. Verma*, Advocates, and *J.B. Dadachanji* and *O.C. Mathur*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him) for Respondent No. 1 (In C.A. No. 942 of 1966).

A.G. Pudissery, Advocate, for Respondents Nos. 2. and 3 (In C.A. No. 942 of 1966).

J.B. Dadachanji & Co., for Respondents Nos. 1 and 2 (In C.A. No. 943 of 1966).

A. G. Pudissery, Advocate, for Respondents Nos. 7 and 8. (In C. A. No. 943 of 1966.)

The Judgment of the Court was delivered by

Grover, J.—These two appeals by special leave involve a common question relating to the validity of a notification issued by the Government of Kerala in August, 1963, empowering certain revenue officials including the Taluka Tahsildar to exercise the powers of a Tax Recovery Officer under the Income-tax Act, 1961, hereinafter called the Act. The notification was expressly stated to be effective from 1st April 1962—a date prior to the date of the notification.

The facts in one of the appeals (C.A. No. 942 of 1966) may be stated: One Kunchacko of Alleppey allowed the income-tax dues from him to fall into arrears. The Income-tax Officer took steps to recover the arrears through the Tahsildar. Certain shares standing in the name of the assessee were attached by the Tahsildar. The first respondent Ponnose claimed to have obtained a decree for a certain sum against the assessee. He also got the shares standing in the name of the assessee attached in execution proceedings. Ponnose filed a petition under Article 226 of the Constitution in the High Court of Kerala in which he challenged the action taken by the revenue officials including the Tahsildar for getting the shares, which had been attached, sold for satisfaction of the income-tax dues of the assessee.

The learned Single Judge held that the notification empowering the Tahsildar to exercise the powers of a Tax Recovery Officer under the Act with retrospective effect was invalid. Consequently the attachments made by the Tahsildar were quashed. This view was affirmed by a division bench in appeal.

The Act came into force on first April 1962. Section 2 (44) defined the expression "Tax Recovery Officer" in the following terms :—

" 'Tax Recovery Officer,' means—

(i) a Collector ;

(ii) an additional Collector or any other officer authorised to exercise the powers of a Collector under any law relating to land revenue for the time being in force in a State ; or

(iii) any Gazetted Officer of the Central or a State Government who may be authorised by the Central Government by notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer."

Section 4 of the Finance Act, 1963, substituted a new definition for the original definition of Tax Recovery Officer. It was provided that the new definition "shall be and shall be deemed always to have been substituted." The new definition was as follows :

“Tax Recovery Officer” means—

(i) a Collector or an Additional Collector ;

(ii) any such officer empowered to effect recovery of arrears of land revenue or other public demand under any law relating to land revenue or other public demand for the time being in force in the State as may be authorised by the State Government, by general or special notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer.

(iii) any Gazetted Officer of the Central or a State Government who may be authorised by the Central Government, by general or special notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer.”

The impugned notification dated 14th August, 1963, which was published in the Kerala Gazette dated 20th August, 1963 referred to the powers conferred by sub-clause (ii) of clause (44) of section 2 of the Act read with sub-rule (2) of rule 7 of the Income-tax (Certificate Proceedings) Rules, 1962 and authorised the various revenue officials mentioned therein including the Taluka Tahsildar to exercise the powers of a Tax Recovery Officer under the Act in respect of the arrears, etc. The concluding portion was, “this notification shall be deemed to have come into force on the first day of April 1962.” The Tahsildar had effected attachment of the shares subsequent to first April 1962 but prior to 14th August, 1963. In other words on the date on which he had effected attachment he was not a Tax Recovery Officer but he got the powers of a Tax Recovery Officer by virtue of the notification dated 14th August, 1963. The short question for determination, therefore, was and is whether the State Government could invest the Tahsildar with the powers of a Tax Recovery Officer under the aforesaid provisions of the Act with effect from a date prior to the date of the notification, i.e., retroactively or retrospectively.

Now, it is open to a sovereign Legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are—in the words of Willies, J. in *Phillips v. Eyre*¹—

“no doubt *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.”

The Courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the Legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect ; (see Subba Rao J., in *Dr. Indramani Pyarelal Gupta v. W.R. Nathu & others*²—the majority not having expressed any different opinion on the point; *Modi Food Products Ltd. v. Commissioner of Sales-tax, U.P.*³; *India Sugar Refineries Ltd. v. State of Mysore*⁴ and *General S. Shivdev Singh and another v. The State of Punjab and others*⁵.)

It can hardly be said that the impugned notification promulgates any rule, regulation or bye-law all of which have a definite signification. The exercise of the power under sub-clause (ii) of clause (44) of section 2 of the Act is more of an executive than a legislative act. It becomes, therefore, all the more necessary to consider how such an act which has retrospective operation can be valid in the absence of any power conferred by the aforesaid provision to so perform it as to give it retrospective operation. In *Strawboard Manufacturing Co. Ltd. v. Gutta Mill Worker's Union*⁶,

1. (1870) L.R. 6 Q.B. 1 : 40 L.J. Q.B. 28.

326.

2. (1963) 2 S.C.J. 59 : (1963) 1 S.C.R. 721.

5. I.L.R. (1959) Punj. 1445 : (1959) P.L.R.

3. (1955) 6 S.T.C. 257 : I.L.R. (1955) 2 All.

514.

612 : A.I.R. (1956) All. 35.

6. (1953) S.C.J. 104 : (1953) S.C.R. 439 :

4. (1960) Mys. L.J. 635 : A.I.R. 1960 Mys.

(1953) 1 M.L.J. 427.

an industrial dispute had been referred by the Governor to the Labour Commissioner or a person nominated by him with the direction that the award should be submitted not later than 5th April, 1950. The award, however, was made on 13th April, 1950. On 26th April, 1950, the Governor issued a notification extending the time up to 30th April. It was held that in the absence of a provision authorising the State Government to extend from time to time the period within which the Tribunal or the adjudicator could pronounce the decision the State Government had no authority to extend the time and the award was, therefore, one made without jurisdiction and a nullity. This decision is quite apposite and it is difficult to hold in the present case that the Taluka Tahsildar could be authorised by the impugned notification to exercise powers of a Tax Recovery Officer with effect from a date prior to the date of the notification.

It may next be considered whether by saying that the new definition of "Tax Recovery Officer" substituted by section 4 of the Finance Act 1963 "shall be and shall be deemed always to have been substituted" it could be said that by necessary implication or intendment the State Government had been authorised to invest the officers mentioned in the notification with the powers of a Tax Recovery Officer with retrospective effect. The only effect of the substitution made by the Finance Act was to make the new definition a part of the Act from the date it was enacted. The legal fiction could not be extended beyond its legitimate field and the aforesaid words occurring in section 4 of the Finance Act 1963 could not be construed to embody conferment of a power for a retrospective authorisation by the State in the absence of any express provision in section 2 (44) of the Act itself. It may be noticed that in a recent decision of the Constitution Bench of this Court in *B.S. Vadera, etc. v. Union of India & others*¹, it has been observed with reference to rules framed under the proviso to Article 309 of the Constitution that these rules can be made with retrospective operation. This view was, however, expressed owing to the language employed in the proviso to Article 309 that "any rules so made shall have effect subject to the provisions of any such Act." As has been pointed out the clear and unambiguous expressions used in the Constitution, must be given their full and unrestricted meaning unless hedged in by any limitations. Moreover when the language employed in the main part of Article 309 is compared with that of the proviso it becomes clear that the power given to the Legislature for laying down the conditions is identical with the power given to the President or the Governor, as the case may be, in the matter of regulating the recruitment of Government servants and their conditions of service. The Legislature, however, can regulate the recruitment and conditions of service for all times whereas the President and the Governor can do so only till a provision in that behalf is made by or under an Act of the appropriate Legislature. As the Legislature can legislate prospectively as well as retrospectively there can be hardly any justification for saying that the President or the Governor should not be able to make rules in the same manner so as to give them prospective as well as retrospective operation. For these reasons the ambit and content of the rule making power under Article 309 can furnish no analogy or parallel to the present case. The High Court was consequently right in coming to the conclusion that the action taken by the Tahsildar in attaching the shares was unsustainable.

The appeals therefore fail and are dismissed with costs. One hearing fee.

T.K.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

The State of Andhra Pradesh

.. Appellant *

v.

Yedla Perayya

.. Respondent.

Andhra Pradesh Forest Act (V of 1882) as amended by Act (XI of 1963), sections 43 and 47—Scope—Forest offence—Confiscation of the vehicle made obligatory upon the Magistrate, but no such restriction upon the power of the appellate Court—Power of the appellate Court to set aside the order of confiscation, if in any way restricted—Code of Criminal Procedure (V of 1898), section 520.

Section 43 of the Andhra Pradesh Forest Act (V of 1882) as amended by Act (XI of 1963) made it obligatory upon the Magistrate to confiscate the property or vehicle used in the commission of any forest offence. But, this section does not restrict the power of the appellate Court to pass any appropriate order as may be just regarding disposal of the property. There is no warrant for implying that the power conferred by section 47 of the Act upon the appellate Court is subject to some unexpressed limitation.

Appeal from the Judgment and Order dated the 25th February, 1966 of the Andhra Pradesh High Court in Criminal Revision Case No. 382 of 1964.

P. Ram Reddy, Senior Advocate (*G. S. Rama Rao*, Advocate, with him), for Appellant.

A. V. Rangam, *Miss Sen*, *Miss A. Vedavalli* and *Miss Subhashini*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Motor Lorry No. A.P.P. 4695 belonging to the respondent Yedla Perayya was seized by the Forest Range Officer, Gokavaram, early in the morning of 25th December, 1962, when it was being used without a license for carrying eight *Tegisi* logs on Rajahmundry-Gokavaram Road. The driver of the motor lorry and another person were tried before the 2nd Additional, 2nd Class Magistrate, Rajahmundry on a complaint by the Forest Range Officer for offence under sections 35 and 36 of the Andhra Pradesh Forest Act and the rules framed thereunder. The two accused admitted that they had committed the offence of illicit transportation of timber, and on their plea of guilty they were convicted. The respondent applied to the Trial Magistrate for an order releasing the motor lorry on the plea that the offence of transportation of timber was committed without his knowledge and that the value of the timber seized was not more than Rs. 50 at the relevant time. The learned Magistrate observed:

“After careful perusal of the deposition of P.W. 1, I find that there is nothing in it to indicate that the petitioner knowingly lent his lorry for the illicit transport of timber on the night of 24th December, 1963. There is also nothing in the case records to show that the petitioner allowed the lorry to illicitly transport the timber on the above date. I accordingly hold that the petitioner cannot be said to have knowingly allowed his lorry to illicitly transport the timber.”

But the learned Magistrate was of the view that by section 43 of the Andhra Pradesh Forest Act, where it was proved that the value of the timber transported exceeded Rs. 50, he was enjoined to direct confiscation of the vehicle in which the forest produce was being transported without a license. In his view the value of eight logs of timber seized from the lorry was Rs. 311 at the market rate in Rajahmundry.

In appeal by the respondent to the Court of Session at Rajahmundry the order of confiscation was set aside and the High Court of Andhra Pradesh confirmed the order of the Court of Session. The State of Andhra Pradesh has appealed to this Court with certificate granted under Article 134 (1) (c) of the Constitution.

The Andhra Pradesh (Andhra Area) Forest Act (V of 1882) provides by section 41 that when there is reason to believe that a forest offence has been committed in respect of any timber or forest produce, such timber or produce together with all tools, ropes, chains, boats, vehicles and cattle used in committing any such offence may be seized by any Forest Officer or Police Officer. Section 43 as amended by Act (XI of 1963) provides:

“Where a person is convicted of any forest offence, the Court sentencing him shall order confiscation to the Government of the timber or the forest produce in respect of which such offence was committed, and also any tool, boat, cattle and vehicle and any other article used in committing such offence:

Provided that it shall be open to such Court not to order confiscation of any tool, boat, cattle, vehicle or any other article used in committing such offence when the value of the timber or the forest produce in respect of which such offence was committed does not exceed fifty rupees.”

It may be observed that before the Forest Act was amended by Act (XI of 1963) the Magistrate was not obliged to direct confiscation of the articles, vehicles, cattle, tools or boats used for committing a forest offence.”

The Trial Magistrate was of the view that after the amendment of the Forest Act by Act (XI of 1963) he had no option and he was bound on conviction of the offender in respect of any forest offence to direct confiscation of the vehicle used in the commission of such offence. Counsel for the respondent contended that if the interpretation put by the Trial Magistrate upon section 43 as amended is correct the enactment imposes an unreasonable restriction upon the fundamental right of the owner of the vehicle declared by Article 19 (1) (c) of the Constitution, and is on that account void. Counsel urged that a statute which imposes upon a person who has himself not committed any offence or infraction of the law liability to forfeit his valuable property must be regarded as unreasonable. It was urged that if a vehicle is stolen and then used for commission of a forest offence, or is borrowed by some person for a legitimate purpose and then used without the consent or knowledge of the owner for committing an offence under the forest Act, or where with a view to involve the owner of the vehicle into a forest offence, forest produce is surreptitiously introduced into the vehicle, and the vehicle is liable to be forfeited, the provision making it obligatory to impose the penalty of forfeiture of the vehicle must be deemed to impose an unreasonable restriction on the owner of the vehicle and is *ultra vires* on that account. It is not necessary for the purpose of this case to express any opinion on that part of the case. Assuming that the statute which enjoins the Magistrate to confiscate the vehicle used in the commission of the forest offence, even when it is used without the knowledge or consent of the owner, is valid, in our judgment, section 47 of the Act enables the Court of Session and the High Court to make an appropriate order with regard to the vehicle which is just. That section provides:

“Any person claiming to be interested in property seized under section 41, may, within one month from the date of any order passed under section 43, 44 or 45 present an appeal therefrom which may be disposed of in the manner provided by section 419 Code of Criminal Procedure.”

The reference to S. 419 is to the Code of Criminal Procedure of 1872 in force when the Andhra Pradesh Forest Act (V of 1882) was enacted. Section 419 of the Code of 1872 is now substituted by section 520 of the Code of Criminal Procedure, 1898, and by section 520 power is conferred, *inter alia* upon the Court of appeal to direct that any order passed under sections 517, 518 or 519 by the Court subordinate

thereto be stayed pending consideration by the Court of Appeal, and that Court may modify, alter or annul such order and make any further order that may be just. Section 43 of the Ardhra Pradesh Forest Act does not restrict the power of the appellate Court to pass any appropriate order as may be just regarding disposal of the property. The Court of Session in the present case has on the finding recorded by the Magistrate and confirmed by it passed an order which is essentially a just order, and that has been confirmed by the High Court.

The Legislature had originally conferred a discretion both upon the Magistrate and the Court of Appeal to pass appropriate order with regard to the disposal of property used in the commission of the offence as may be just. The Legislature has thereafter amended section 43 by Act XI of 1963 and made it obligatory upon the Magistrate to confiscate the property or the vehicle used in the commission of such offence. No such restriction has, however, been placed upon the power of the appellate Court and we will not be justified, having regard to the clear expression of the legislative intent, that the power is to be limited in the manner provided by section 43. There is no warrant for implying that the power conferred by section 47 of the Act upon the appellate Court is subject to some unexpressed limitation.

The High Court was, therefore, right in holding that the motor lorry belonging to the respondent, on the finding recorded by the Magistrate, was not liable to be confiscated.

The appeal therefore fails and is dismissed.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.

Agra Electric Supply Co., Ltd.

.. *Appellant**

v.

The Labour Court, Meerut and another

.. *Respondents.*

Uttar Pradesh Industrial Disputes Rules (1957), Rule 16, sub-rules (1) and (2)—Interpretation—Labour Court—Absence of the party, having notice of the date of hearing—Court, enjoined to proceed with the case under rule 16 (1) passing order in the absence of the party on merits—Application to be filed for setting aside under rule 16 (2)—Rule 16 (2) if applies to an order dismissing the case for default.

The second respondent, along with certain others, had filed an application on 31st December, 1961, claiming identical relief that is claimed in Case No. 217 of 1965. That application was dismissed as not having been prosecuted, on 22nd February, 1964. The second application was filed on 1st January, 1965.

The question that arises for consideration in whether the view of the Labour Court that the second application filed by the second respondent herein is maintainable, is correct.

*Held :—*Sub-rule (1) of rule 16 of the U. P. Industrial Disputes Rules, 1957 refers to a party being absent on the date fixed, or on any other date to which the hearing has been adjourned, and such party having been duly served or having notice of the date of hearing. The said sub-rule (1) indicates as to what is to be done under such circumstances. Rule 12 provides for what the Labour Court or Tribunal should do at the first hearing. Neither the Act nor the rules empower a Tribunal or Labour Court to dismiss an application for default of appearance of a party. Rule 16 (1) is the only provision providing for what is to be done when a party is absent. That provision, which clearly enjoins the Labour Court or Tribunal in the circumstances mentioned therein "to proceed with the case in his absence," either on the date fixed or on any other date to which the hearing may be adjourned, coupled with the further direction "and

pass such order as it may deem fit and proper," clearly indicates that the Tribunal or Labour Court should take up the case and decide it on merits and not dismiss it for default. The necessity for filing an application for setting aside an order passed in the case in the absence of a party, as contemplated under sub-rule (2) of rule 16 will only arise when an order on merits affecting the case has been passed in the absence of a party, under sub-rule (1) of rule 16. An order dismissing a case for default or non-prosecution, does not come under sub-rule (1) of rule 16 and to such an order sub-rule (2) has no application.

Appeal by Special Leave from the order dated the 11th May, 1967 of the Allahabad High Court in Civil Misc. Writ Petition No. 1647 of 1967.

S. V. Gupte, Senior Advocate (*D. N. Mukherjee*, Advocate with him), for Appellant.

M. K. Ramamurthi, *Mrs. Shayamla Pappu* and *Vineet Kumar*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Vaidialingam, J.—In this appeal, by Special Leave, the appellant challenges the order of the Allahabad High Court dated 11th May, 1967, dismissing Civil Miscellaneous Writ Petition No. 1647 of 1967.

The facts leading upto the filing of the said writ petition by the appellant under Article 226 of the Constitution may be briefly stated. The appellant is an existing company under the Companies Act, 1956, and has its registered office at Calcutta. The company was and is being managed by Martin Burn Ltd., Secretaries and Treasurers. The company carries on the business of generation, distribution and supply of electricity within its licensed area in the city of Agra and its environs in the State of Uttar Pradesh. On a reference made by the Government of Uttar Pradesh regarding a dispute that had arisen between the electricity undertakings managed by Martin Burn Ltd., of which the appellant was one, and their workmen about the demand of the workmen for supply of uniforms, free of charge, the Chairman, Martin Electricity Supply Company Adjudication Board made an award on 20th February, 1947 in and by which certain types of workmen were directed to be supplied with uniforms. The said award remained operative till 15th April, 1950 on which date it was terminated. Though the award had been terminated, the appellant continued practice of supplying uniforms to its workmen. Subsequently, again, a dispute was raised by the employees of the electricity undertakings managed by Martin Burn Ltd., regarding the supply of uniforms to some categories of workers. The said dispute was referred by the Government of Uttar Pradesh, by order dated 15th March, 1951, for adjudication to the State Industrial Tribunal, Uttar Pradesh, Allahabad. The said Industrial Tribunal passed an award dated 29th November, 1952, holding that the same categories of workmen to whom uniforms had to be supplied as per the award dated 20th February, 1947 were entitled to be supplied with uniforms. Though this award remained in operation only for a period of one year, the appellant continued to supply uniforms till 1953 after which year the supply of uniforms was discontinued. Nevertheless, the appellant again resumed supplying uniforms from May, 1961.

On 31st December, 1961 twenty-three employees of the appellant, including the second respondent herein filed a joint petition before the Labour Court, Meerut, under section 6-H (2) of the Uttar Pradesh Industrial Disputes Act, 1947 (hereinafter referred to as the Act), claiming that they were entitled to recover the money equivalent to the cost of uniforms which had not been supplied to them during the period 1954 to 1960. The said petition was numbered as Case No. 1 of 1962. According to these employees, the employer had failed to supply them uniforms which they were entitled to get and in consequence of such failure the workmen had been put to expense by purchase of clothes to be used while rendering service in the company. They claimed that the benefits which they were entitled to get should be computed in terms of money to enable them to recover the cost of uniforms from the appellant. The appellant filed a written statement on 27th January, 1962,

disputing the claim of the workmen and denying its liability to either supply uniform or pay the money value of the same.

On 22nd February, 1964, the application filed by the workmen was taken up by the Labour Court for hearing, but as none appeared on behalf of the workmen who were the applicants when the case was called on for hearing, the Labour Court, Meerut, dismissed the application for non-prosecution. The actual order passed by the Labour Court was as follows:

“Case called on for hearing. No one is present on behalf of the applicant, nor any request for adjournment has been received.

The application is dismissed as not having been prosecuted. No order as to costs.”

On or about 1st January, 1965, seven employees of the appellant, including the second respondent herein, filed seven separate applications before the Labour Court, Meerut, again under section 6-H (2) of the Act. The seven applications had been numbered as Case Nos. 217 to 223 of 1965. The application filed by the second respondent was Case No. 217 of 1965. The second respondent, in particular claimed that he was a mains cooly from 13th April, 1950 to 15th September, 1959, and that he was entitled to be supplied uniform by the appellant. As the uniform had not been so supplied, he pleaded that he was entitled to recover a sum of Rs. 330 as cost of the uniforms which the management should have supplied during these years. All the applicants, including the second respondent, had also stated in their respective applications that they had moved before, the Labour Court a similar application, under section 6-H (2) of the Act, but unfortunately that had been dismissed for default on 21st February, 1964 and hence the fresh applications were being filed.

The appellant filed, on or about 7th April, 1965, separate objections denying the claim made by the applicants. We are not, at this stage, concerned with the various pleas taken either by the employees, in support of their claim, or by the appellant, in denial thereof. It is only necessary to state that the appellant pleaded that the fresh applications, filed by the workmen, were not maintainable in view of the fact that identical applications, claiming the same reliefs, had been dismissed on 21st February, 1964 by the Labour Court. If the workmen were aggrieved by the said order, the proper remedy that should have been adopted by them was by taking action under rule 16 (2) of the Uttar Pradesh Industrial Disputes Rules, 1957 (hereinafter referred to as the Rules). Not having adopted the procedure indicated therein the management pleaded that it was no longer open to the workmen to file a second application and the Labour Court had no jurisdiction to entertain the same.

The Labour Court had, by its order dated 27th August, 1965, consolidated all the seven applications. On the basis of the objection raised by the appellant to the maintainability of the applications filed, issue No. 5 was framed in the following terms:—

“Whether the present applications of the workmen under section 6-H (2) are not maintainable for the reasons given in para. 5 of the written statement of the employers?”

and this issue was treated as a preliminary issue and arguments heard on the same. By order dated 10th February, 1967, the Labour Court held that the applications filed by the seven workmen, including the second respondent were maintainable. The Labour Court has expressed the view that the order passed on 21st February, 1964 was one dismissing the applications, filed by the workmen, for default and such an order was not contemplated by sub-rule (1) of rule 16 of the rules, and hence the workmen were not bound to take action under sub-rule (2) of rule 16. In consequence the Labour Court held that the applications filed by the workmen were competent and directed the applications to be posted for further hearing.

Though the order had been passed in Case No. 217 of 1965, the Labour Court directed that the finding given on issue No. 5 would govern Cases Nos. 218 to 223 of 1965 also. The appellant challenged this finding of the Labour Court before the High Court of Allahabad in Civil Writ No. 1647 of 1967. A Division Bench of the High Court, by its order dated 11th May, 1967, summarily dismissed the writ petition.

Mr. Gupte, learned Counsel for the appellant and Mr. Ramamurthy, learned Counsel for the second respondent, urged the same contentions that were urged on behalf of their clients before the Labour Court. Therefore the question that arises for consideration is whether the view of the Labour Court that the second application filed by the second respondent herein is maintainable, is correct.

Section 6-H of the Act deals with recovery of money due from an employer. Section 6-H more or less corresponds to section 33-C of the Industrial Disputes Act, 1947. Sub-section (2) of section 6-H, with which we are concerned, is as follows:

“(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the State Government, and the amount so determined may be recovered as provided for in sub-section (1).”

As we have already mentioned the second respondent, along with certain others, had filed an application on 31st December, 1961 claiming identical relief that is now claimed in Case No. 217 of 1965. That application was dismissed as not having been prosecuted on 22nd February, 1964. The second application was filed on 1st January, 1965.

We shall now refer to the relevant rules. Rule 9 empowers a Tribunal or Labour Court to accept, admit or call for evidence at any stage of the proceedings before it and in such manner as it may think fit. Rule 10 relates to the issue of summons for production of any books, papers or other documents as the Labour Court, Tribunal or Arbitrator feels necessary for the purpose of investigation or adjudication. Rule 12 relates to procedure at the first hearing. It states that at the first sitting of a Labour Court or Tribunal, the Presiding Officer shall call upon the parties in such order as he may think fit to state their case. Rule 16 provides for the Labour Court or Tribunal or Arbitrator proceeding *ex parte*, as follows :

“(1) If, on the date fixed or on any other date to which hearing may be adjourned, any party to the proceedings before the Labour Court or Tribunal or an Arbitrator is absent, though duly served with summons or having the notice of the date of hearing, the Labour Court or Tribunal or the Arbitrator, as the case may be, may proceed with the case in his absence and pass such order as it may deem fit and proper.

(2) The Labour Court, Tribunal or an Arbitrator may set aside the order passed against the party in his absence if within ten days of such order, the party applies in writing for setting aside such order and shows sufficient cause for his absence. The Labour Court, Tribunal or an Arbitrator may require the party to file an affidavit, stating the cause of his absence. As many copies of the application and affidavit, if any, shall be filed by the party concerned as there are persons on the opposite side. Notice of the application shall be given to the opposite parties before setting aside the order.”

Sub-rule (1) deals with the absence of a party on the date fixed, of any other date to which the hearing may be adjourned, though he has been served with summons or he has notice of the date of hearing. Under those circumstances it provides that the Labour Court, Tribunal or Arbitrator, as the case may be “may proceed with the case in his absence and pass such order as it may deem fit and proper.” It is to the

setting aside of such an order that may have been passed under sub-rule (1), that the procedure is indicated in sub-rule (2). According to Mr. Gupte, learned Counsel for the appellant, the order passed on 22nd February, 1964, by the Labour Court is one contemplated by sub-rule (1) of rule 16, in which case the provisions of sub-rule (2) are attracted and the second respondent, if he felt aggrieved by that order, should have filed an application under sub-rule (2), within time, to set aside that order.

We are not inclined to accept this contention of Mr. Gupte. As pointed out earlier by us, the order passed on 22nd February, 1964, is one dismissing the application as not having been prosecuted, for default of appearance of the second respondent. We will presently show that the order of 22nd February, 1964 cannot be considered to be one contemplated to have been passed under sub-rule (1) of rule 16. Sub-rule (1) refers to a party being absent on the date fixed, or on any other date to which the hearing has been adjourned, and such party having been duly served or having notice of the date of hearing. The said sub-rule (1) indicates as to what is to be done under such circumstances. We have referred to rule 12 which provides for what the Labour Court or Tribunal should do at the first hearing. Neither the Act nor the rules empower a Tribunal or Labour Court to dismiss an application for default of appearance of a party. Rule 16 (1) is the only provision providing for what is to be done when a party is absent. That provision, which clearly enjoins the Labour Court or Tribunal in the circumstances mentioned therein "to proceed with the case in his absence", either on the date fixed or on any other date to which the hearing may be adjourned, coupled with the further direction "and pass such order as it may deem fit and proper", clearly indicates that the Tribunal or Labour Court should take up the case and decide it on merits and not dismiss it for default. Without attempting to be exhaustive, we shall just give an example. Where a workman, after leading some evidence in support of his claim, absents himself on the next adjourned date with the result that he does not lead further evidence, the Tribunal is bound to proceed with the case on such evidence as has been placed before it. It cannot dismiss the application on the ground of default of appearance of the workman. This will be an instance of "proceeding with the case in the absence of a party" and giving a decision on merits. If such an order is passed by the Tribunal in the absence of one or other of the parties before it, a right is given to such party to apply, under sub-rule (2) for setting aside the order that has been passed in his absence in the case in terms of sub-rule (1). The application must be filed within the period mentioned in sub-rule (2) and the party will have also to satisfy the Tribunal or Labour Court that he had sufficient cause for his absence. The necessity for filing an application for setting aside an order passed in the case in the absence of a party, as contemplated under sub-rule (2) of rule 16 will only arise when an order on merits affecting the case has been passed in the absence of a party, under sub-rule (1) of rule 16. An order dismissing a case for default or non-prosecution, does not come under sub-rule (1) of rule 16 and to such an order sub-rule (2) has no application.

We have already indicated that the order passed on 22nd February, 1964 by the Labour Court cannot be considered to be an order contemplated under sub-rule (1) of rule 16. If that is so, the second respondent was not bound to file an application within the time mentioned in sub-rule (2) for setting aside the order dated 22nd February, 1964. Therefore the fact that a previous application, filed by the second respondent, was dismissed for non-prosecution on 22nd February, 1964 is no bar under rule 16 (2) to the filing of the present application, Case No. 217 of 1965. It follows that the objections raised by the appellant to the maintainability of the application filed by the second respondent have been rightly rejected by the Labour Court and the High Court.

The appeal fails and is dismissed. The appellant will pay the costs of the second respondent.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S.M. SIKRI AND K.S. HEGDE, JJ.

B. C. Mohindra

.. Appellant*

v.

The Municipal Board, Saharanpur

.. Respondent.

U.P. Municipalities Act (II of 1916), section 97—Scope—Contract on behalf of the Municipal Board to be in writing and to be signed by the President and by the Executive Officer—List of bids duly signed and resolution sanctioning the auction sale, if in compliance with section 97.

Section 97 of the U.P. Municipalities Act, 1916, *inter alia* provided that (i) every contract made by or on behalf of a Board whereof the value of the amount exceed Rs. 250 shall be in writing and (ii) "every such contract shall be signed by the President or Vice-President and by the Executive Officer or a Secretary, or" In the public auction the *theka*, the defendant made the bid of Rs. 53,025 which was accepted. The list of bids at the auction sale held is signed by the defendant, the Chairman and the Executive Officer. This auction was held before the Board and a resolution sanctioning auction to the highest bidder. After the entire proceedings were over, it was duly signed in the original proceedings book by the Executive Officer of the Municipal Board and Chairman. It is not necessary for the purpose of complying with section 97 of the Act that the contract should be contained in one document signed by both the parties.

Appeal by Special Leave from Judgment and the Decree dated the 15th March 1965 of the Allahabad High Court in First Appeal No. 268 of 1953.

G.B. Agarwala, Senior Advocate, (*K.P. Gupta*, Advocate, with him), for Appellant.

R.K. Garg, *D.K. Agrawal* and *M.V. Goswami*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This is an appeal by Special Leave, and while granting it this Court, confined it only to the point arising under section 97 of the U.P. Municipalities Act 1916—hereinafter referred to as the Act.

The facts relevant to the point are as follows: The Municipal Board, Saharanpur respondent before us and hereinafter referred to as the plaintiff—brought a suit for the recovery of Rs. 12,044-0-9 and future interest upto date of realisation from B.C. Mohindra, appellant before us and hereinafter referred to as the defendant. In brief the case of the plaintiff was that there was an auction on 29th March, 1950, of the *theka* for collecting *tahbazari* dues of the *mandi* in Mazahir Gang alias Ganj Jadid Saharanpur, for one year from 1st April, 1950 to 31st March, 1951, subject to the conditions of sale entered in the amended sale proclamation. The defendant bid Rs. 40,000 subject to the confirmation by the Board. The Board did not confirm the auction sale, and on 8th April, 1950, the *tahbazari* was re-auctioned. The defendant bid Rs. 53,025. At the time of the auction sale a meeting of the Board was also held in which the auction aforesaid was confirmed under Resolution No. 26 dated 8th April, 1950, in the presence of the defendant, and only the condition relating to the payment of auction money was amended to provide for payment in four instalments. The defendant had to deposit 1/4th of the bid on 8th April, 1950. He failed to deposit this instalment on 8th April, 1950, but on 10th April, 1950, he deposited the instalment and took charge of the *mandi* aforesaid and began to collect *tahbazari* dues. The defendant was asked to execute and complete an agreement in favour of the plaintiff according to the conditions and the rules but he continued to put off the matter. As the defendant failed to deposit the amount of the second instalment and execute the agreement, the plaintiff cancelled the *theka* of the defen-

dant and began collecting *tahbazari* dues through its own staff and re-auctioned the *theka* on 3rd July, 1950. After taking into account the money received from the re-auction on 3rd July, 1950, and the money deposited by the defendant, according to the plaintiff there was a shortage of Rs. 12,044-0-9.

The defendant did not dispute the fact that an auction was held and that he made the last bid of Rs. 53,025 which was accepted. He also admitted that he had deposited Rs. 13,256-4-0. But he alleged that the plaintiff had committed various breaches of the contract in contravention of the rules, contract and the bye-laws as the result of which the defendant suffered a loss of Rs. 9,685.

The Trial Court framed various issues arising out of the pleadings but no issue was raised regarding non-compliance with section 97 of the Act. It appears that an argument was raised before the Trial Court regarding section 97. The Trial Court observed :

“ On the basis of this decision (A.W.R. 1951 page 560), it was urged on behalf of the defendant that it was necessary in the present case that a written contract should have been obtained by the plaintiff under section 97 of the Municipalities Act..... In a public auction, the various bidders give their bids which may be called offers and the moment the auctioneer knocks the hammer down at a particular bid, that bid is to be taken as accepted between the parties. It is the knock of the hammer which concludes the contract. The list of bidders is the only evidence of the contract showing that out of various offers, the highest bid was accepted. In this particular case, the list of bidders bears the signature of the defendant and of the Chairman of the plaintiff Board, thus reducing the contract into writing vide Exhibit 17.

The contract in this case is therefore, a written contract evidence from paper Exhibit 17.....According to the provision of section 97 of the Municipalities Act, such a contract should have been only in writing and this condition was fulfilled by drawing up the list of bidders and obtaining the signature of the highest bidder in whose favour the auction was concluded on such a list.”

The Trial Court decreed the suit.

The defendant appealed to the High Court, and the High Court (Srivastava and Jagadish Sahai, JJ.) by its order dated 5th October, 1961, remanded the case on two issues :

(1) Whether the agreement relied upon by the plaintiff was in accordance with sections 96 and 97 of the U.P. Municipalities Act of 1916? If not, what is the effect?

(2) Whether section 65 of the Indian Contract Act applied? If so, what compensation, if any, could be recovered by the plaintiff from the defendant on account of any advantage the latter may have received under the agreement?

While passing the order of remand the High Court observed :

“ While hearing arguments in this appeal we discovered that a very important point was apparently missed both by the parties and by the learned Civil Judge. We feel that the case cannot be properly decided without having findings of the learned Civil Judge on that point. The point involves two questions.”

We are in agreement with the contention of the learned Counsel for the plaintiff that there was no justification in remanding the case. The Trial Court had dealt with the question of section 97 of the Act and this apparently escaped the notice of the High Court.

Be that as it may, the Trial Court, in a very careful and reasoned order, dated 24th August, 1962, held that on the facts sections 96 and 97 of the Act had been fully complied with.

The High Court (Jagdish Sahai and Broom, JJ.) came to the conclusion that section 97 of the Act did not apply to the facts of the case. The High Court observed,

“The suit, therefore, is one for the failure to execute the contract deed and to pay the amounts which have become due from him by way of damages. Section 97 of the Act deals with contracts which have been executed. It is for this reason that we have come to the conclusion that the provisions of section 97 of the Act are not attracted to the present case.”

Section 97 of the Act reads as follow :

“*Execution of Contracts* (1) Every contract made by or on behalf of a Board where of the value of the amount exceeds Rs. 250 shall be in writing ; Provided that unless the Contract has been duly executed in writing, no work including collection of materials in connection with the said contract shall be commenced or undertaken.

(2) Every such contract shall be signed

(a) by the President or a Vice-President and by the Executive Officer or a Secretary, or

(b) by any person or persons empowered under sub-section (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the Board.”

It seems to us that on the facts of the case it is clearly proved that there was a contract in writing within the meaning of proviso to section 97 (1) and the provisions of sub-section (2). We agree with the conclusion of the Trial Court in this respect. The list of bids, Exhibit 17, at the auction sale held on 8th April, 1950, is signed by the defendant the Chairman and the Executive Officer. This auction was held before the Board and Resolution No. 26 dated 8th April, 1950, was passed on that day, which reads as follows :

“Auction of the *tahbazari* contract of *Mandi Mazahar Gunj* for the year 1950-51 (Boards Reso. No. 431 dated 30th March, 1950).

“Auction held before the Board. Terms of auction were announced. During the auction, at the request of the bidders, the Board unanimously, passed the following amendment in the terms of auction :—

“One fourth of the auction money will be deposited at the fall of hammer and the remaining amount in three equal instalments at the interval of two months each *i.e.*,

1st instalment today	8-4-50.
2nd instalment on	8-6-50
3rd instalment on	8-8-50
4th instalment on	8-10-50”

“Auction sanctioned to the highest bidder Shri B.C. Mohindra for Rs. 53,025 with effect from 9th April, 1950 to 31st March, 1951. Chairman Finance Committee to please deliver the possession and to decide the disputes, if any.”

The original proceedings book was produced before the Trial Court and it was proved by Ram Swarup, clerk. He proved that after the entire proceedings were over, it was signed before him by Madho Prashad, Executive Officer of the Municipal Board, and Shri Jamshed Ali Khan, the Chairman.

In our opinion the list of bids and the Resolution No. 26 dated 8th April, 1950, Exhibit 18, constituted a contract in writing within the meaning of section 97 of the Act. It was held by this Court in *Union of India v. Rallia Ram*¹, that for the

1. (1964) 3 S.C.R. 164, 173; A.I.R. 1963 S.C. 1685.

purposes of section 175 (3) of the Government of India Act, 1935, a valid contract could be spelt out of correspondence. It seems to us that similarly it is not necessary for the purpose of complying with section 97 of the Act that the contract should be contained in one document signed by both the parties.

In view of our conclusion it is not necessary to consider what would have been the rights of the plaintiff if there had been no such contract in writing.

In the result the appeal fails and is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S.M. SIKRI AND R.S. HEGDE, JJ.

Durga Prasad

.. *Appellant**

v.

The Chief Controller of Imports and Exports and others

.. *Respondents.*

Constitution of India (1950), Article 226—Scope—Relief under—Discretionary—Petitioner to exhaust the remedies provided by law with utmost expedition—Delay—Unsatisfactory explanation—Effect.

It is well-settled that the relief under Article 226 is discretionary, and one ground for refusing relief under Article 226 is that the petitioner has filed the petition after delay for which there is no satisfactory explanation. The appellant in this case had claimed a *mandamus* or a direction to the respondents to issue to the appellant import licence for art silk yarn of the value of Rs. 8,03,530-45. It is well-known that the exchange position of this country and the policy of the Government regarding International Trade varies from year to year and it would be rather odd for the Court to direct that an import licence be granted in the year 1968 in respect of alleged default committed by the Government in 1959 or 1962. In these matters it is essential that persons who are aggrieved by orders of the Government should approach the High Court after exhausting the remedies provided by the law, rule or order with utmost expedition.

Appeal from the Order dated the 26th August, 1964 of the Punjab High Court in Civil Writ No. 498-D of 1964.

M.G. Chagla, Senior Advocate, (Sardar Bahadur, Ajit Prasad Jain, Vishnu B. Saharya, and Miss Yousindra Kaushalani, Advocates, with him), for Appellant.

Dr. V. A. Seyid Muhammad, Senior Advocate (S. P. Nayar, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Sikri, J.—The appellant, Durga Prasad, filed a petition under Article 226 of the Constitution against the respondents. The High Court of Punjab, Circuit Bench, Delhi, dismissed the petition *in limine*. Thereupon the appellant applied for a certificate under Article 133 (1) (a) of the Constitution. The High Court gave this certificate on the ground that the value of the subject-matter directly involved in the petition exceeds Rs. 20,000.

In our opinion this appeal must fail on the ground that the petition under Article 226 of the Constitution was filed after great delay. The relevant facts are as under. The appellant was carrying on business of export and import, and exported goods of the value of Rs. 8,10,325, F.O.B. value Rs. 8,03,530-45, during the period 25th August, 1958 to 29th September, 1958. On 12th November, 1958, the appellant applied for an import licence for art silk yarn of the F.O.B. value of Rs. 8,03,530-45 under the Export Promotion Scheme. The Export Promotion Scheme was dis-

* C.A. No. 1116 of 1965.

continued with effect from 6th March, 1959. On 9th October, 1959, import licence of the value of Rs. 3,27,841 only was issued to the appellant by the Joint Chief Controller of Imports and Exports, Bombay. His appeal against this order was rejected by the Joint Chief Controller on 4th March, 1960. It is alleged by the appellant that he was not given a hearing. The appellant filed a second appeal to the Chief Controller of Imports and Exports, and this was dismissed on 22nd April, 1961. Here again it is alleged that no hearing was given to the appellant. He filed a representation against the order dated 22nd April, 1961, and on that representation a supplementary import licence for import of art silk yarn of the value of Rs. 30,000 was issued to the appellant. This exhausted all the remedies he had under para. 85 of the order relating to the Export Promotion Scheme, but he instead of filing a writ chose to wait. The appellant apparently approached the Minister of International Trade by letter dated 6th April, 1964—this is the letter referred to in the letter of the Private Secretary to the Minister of International Trade—and the Private Secretary, vide his letter dated 16th April, 1964, wrote to him saying that his letter had been passed on to the Chief Controller of Imports and Exports, New Delhi, and if so desired the appellant may see him in the matter. Apparently the Chief Controller invited him and on 22nd June, 1964, he was informed that no further licence would be issued to him. On 24th August, 1964, the appellant filed the petition above-mentioned in the High Court. No explanation has been given in the petition for the delay in filing the petition and it has not been explained what the appellant was doing between 5th March, 1962, when the supplementary licence was issued, and 6th April, 1964.

It is well-settled that the relief under Article 226 is discretionary, and one ground for refusing relief under Article 226 is that the petitioner has filed the petition after delay for which there is no satisfactory explanation.

Gajendragadkar, C.J., speaking for the Constitution Bench, in *Smt. Narayani Debi Khaitan v. The State of Bihar*,¹ observed :

“It is well-settled that under Article 226, the power of the High Court to issue an appropriate writ is discretionary. There can be no doubt that if a citizen moves the High Court under Article 226 and contends that his fundamental rights have been contravened by any executive action, the High Court would naturally like to give relief to him; but even in such a case, if the petitioner has been guilty of laches, and there are other relevant circumstances which indicate that it would be in appropriate for the High Court to exercise its high prerogative jurisdiction in favour of the petitioner, ends of justice may require that the High Court should refuse to issue a writ. There can be little doubt that if it is shown that a party moving the High Court under Article 226 for a writ is, in substance, claiming a relief which under the law of limitation was barred at the time when the writ petition was filed, the High Court would refuse to grant any relief in its writ jurisdiction. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court, in this matter too discretion must be exercised judiciously and reasonably.”

Relying on the judgment of this Court in *Maharashtra State Road Transport Corporation v. Shri Balwant Regular Motor Service, Amravati*², the learned Counsel for the appellant contends that the delay should not debar him from seeking relief because the respondents have not suffered in any manner because of the delay. In this case Ramaswami, J., speaking for the Court, referred to an earlier decision in *Moon Mills v. Industrial Court*³. In that case Ramaswami, J., speaking for the Court, observed :

1. C. A. No. 140 of 1964 ; Judgment dated 3. (1968) 1 S.C.J. 364 : A.I.R. 1969 S.C. 22nd September, 1964. 1450, 53, 54.
2. (1969) 1 S.C.J. 805. (Since reported)

"It is true that the issue of a writ of *certiorari* is largely a matter of sound discretion. It is also true that the writ will not be granted if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The principle is to a great extent, though not identical with, similar to the exercise of discretion in the Court of Chancery."

It would be noticed that Ramaswami, J., had first examined the question of delay and came to a finding that in fact there was no delay. Ramaswami, J., observed :

"On behalf of the respondent Mr. B. Sen, however, pointed out that the conduct of the appellant does not entitle it to the grant of a writ, because it has been guilty of acquiescence or delay. It was pointed out that the award of Mr. Bhat was given on 25th April, 1958, but an application to the High Court for grant of a writ was made long after on 16th November, 1959. We do not think there is any substance in this argument, because the second respondent had made an application, dated 19th August, 1958 to the Labour Court for enforcement of the award and the appellant had contested that application by a Written Statement, dated 15th September, 1958. The Labour Court allowed the application on 4th August, 1959 and the appellant had preferred an appeal to the Industrial Court on 31st August, 1959. The decision of the Industrial Court was given on 24th October, 1959 and after the appeal was dismissed the appellant moved the High Court for grant of a writ on 16th November, 1959."

The appellant in this case had claimed a *mandamus* or a direction to the respondents to issue to the appellant import licence for art silk yarn of the value of Rs. 8,03,530.45. It is well-known that the exchange position of this country and the policy of the Government regarding International Trade varies from year to year and it would be rather odd for this Court to direct that an import licence be granted in the year 1968 in respect of alleged default committed by the Government in 1959 or 1962. In these matters it is essential that persons who are aggrieved by orders of the Government should approach the High Court after exhausting the remedies provided by law, rule or order with utmost expedition.

The learned Counsel for the appellant contends that this matter involved fundamental rights and this Court atleast should not refuse to give relief on the ground of delay. But we are exercising our jurisdiction not under Article 32 but under Article 226, and as observed by Gajendragadkar, C.J., in the passage extracted above, even in the case of alleged breach of fundamental rights the matter must be left to the discretion of the High Court.

In the result the appeal fails. Parties to bear their own costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

K. Brahma Suraiha and another

.. Appellants*

v.

.. Respondent

Laxminarayana

Mysore Village Panchayats and Local Boards Act (X of 1959), section 220 and the Mysore Panchayat Secretaries' Powers and Duties Rules (1961), rule 16—Interpretation—Contravention of section 220 by the members of the Panchayat—Private complaint, if could be entertained.

It would be the panchayat that would be largely interested in taking action against any of its members and employees for the contravention of section 200 of

the Mysore Village Panchayats and Local Boards Act, 1959. The scheme of the Act also supports the view that it is the Secretary of the Panchayat and no one else who could file a complaint under rule 16 of the Mysore Panchayat Secretaries' Powers and Duties Rules, 1961.

Appeal by Special Leave from the Judgment and Order, dated the 30th March, 1966 of the Mysore High Court in Criminal Revision Petition No. 384 of 1965.

R. B. Datar, Advocate, for Appellants.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the Mysore High Court in which the only point involved is whether a private complaint could be entertained for the commission of an offence under section 220 of the Mysore Village Panchayats and Local Boards Act, 1959, hereinafter called the "Act". The appellants who were the Vice-Chairman and the Chairman of the Keladi village panchayat were convicted under the aforesaid section and sentenced to pay a fine of Rs. 50 and Rs. 40 and in default to undergo 7 days and 5 days' simple imprisonment respectively.

A private complaint was filed against the appellants alleging that they gave bids at an auction held at the village panchayat and appellant No. 1 purchased a radio belonging to the panchayat for Rs. 35. Appellant No. 2 also bid at the same auction for the radio. According to section 220 of the Act no member or an employee of a panchayat shall directly or indirectly bid for or acquire interest in any movable or immovable property sold at such sale in connection therewith. If any person contravenes this provision he is to be punished, on conviction, with a fine which may extend to Rs. 500. Under rule 16 of the Mysore Panchayat Secretaries' Powers and Duties Rules, 1961 promulgated under the provisions of the Act, only the Secretary of the Panchayat has the power to file a complaint on behalf of the Panchayat. The High Court was of the view that this rule did not preclude persons other than the Secretary from filing a complaint but it only debarred complaints being made by other on behalf of the Panchayat. Now Rule 16 may be reproduced:

"The Secretary shall have power to file complaints and suits on behalf of the Panchayat and to conduct the proceedings on its behalf under the orders of the Panchayat."

In *K. M. Kanavi v. The State of Mysore*¹, the appellant Kanavi, who was the president of Municipal Borough of Gadag Betgeri had been removed from Presidentship. He refused to hand over the charge of all the papers and property which were in his possession relating to the Borough to the new President in spite of an order made by the Government under section 23-A of the Bombay Municipal Boroughs Act, 1925, hereinafter called the "Bombay Act" to that effect. Pursuant to orders made by the Divisional Commissioner and the Deputy Commissioner the new President filed a complaint against Kanavi for an offence punishable under section 23-A (3) of the Bombay Act. The appellant was convicted and sentenced to pay a fine of Rs. 50. A question arose whether the complaint filed by the new President was competent as it was not filed in accordance with the procedure laid down in that Act. Section 200 of the Bombay Act provided that the Standing Committee and subject to the provisions of sub-section (3) the Chief Officer may order proceedings to be taken for the recovery of any penalties and for the punishment of any persons offending against the provisions of the aforesaid Act. This Court was of the opinion that the complaint which had been filed by the new President was for initiating the proceedings for the punishment of Kanavi who had offended against the provisions of sub-section (2) of section 23-A and as the new President was not the Chief Officer and he had not filed the complaint under any direction made by the Standing Committee the complaint could not be entertained. In that case also the High Court had taken the view that section 200 (1) was only an enabling section which gave the power to the Standing Committee and the Chief

1. Crd. A. No. 145 of 1955, dated 18th April, 1968.

Officer to make a direction for taking of proceedings and it could not be held to be exhaustive of the authorities who could make directions for initiation of proceedings. The High Court had taken notice of the fact that there was no provision in that Act forbidding cognizance of offences being taken except on a complaint made under a direction of the Standing Committee or the Chief Officer. This is what was observed by this Court:—

“ We are unable to accept the interpretation put by the High Court on section 200 (1) of the Act. It is true that there is no specific provision in the Act laying down that cognizance of an offence under the Act is not to be taken except on a complaint filed in accordance with a direction made under section 200 (1), but the scheme of the Act and the purpose of this provision in section 200 (1) makes it clear that the Legislature intended that such proceedings should only be instituted in the manner laid down in that sub-section. The word “ may ” was used only because the Legislature could not have enacted a mandatory provision requiring the Standing Committee or the Chief Officer to make a direction for institution of proceedings in all cases. This word was intended to give a discretion to the Standing Committee or the Chief Officer to make directions for taking proceedings only when they considered it appropriate that such a direction should be made and to avoid compelling the Standing Committee or the Chief Officer to make such directions in all cases. The use of this word “ may ” cannot be interpreted as laying down that, if a proceeding for punishment of any person for contravention of any of the provisions of the Act is to be instituted, it can be instituted in any manner without complying with the requirements of section 200 (1) of the Act. If the interpretation put by the High Court on this provision is accepted, it would mean that this provision was totally unnecessary, because there would be no need to confer power on the Standing Committee or the Chief Officer to make such directions if such directions could be made or proceedings instituted at the instance of any private individual. We cannot accept the submission that this provision was made in the Act simply by way of abundant caution. In fact, if the provision had been made with such an object in view, there is no reason why the power should have been expressed to be conferred on the Standing Committee and the Chief Officer only and not on the President of the Municipality. We, consequently, hold that, if any proceeding for punishment of any person for contravention of any of the provisions of the Act is to be instituted, it must be instituted in the manner laid down in section 200 (1) of the Act and in that manner only.”

It may be mentioned that the expression of the above opinion was based on a consideration of the previous decisions of this Court. Following the ratio of the above decision it would be legitimate to hold that the complaint, in the present case, could be filed under Rule 16 only by the Secretary of the Panchayat and by no one else. It may be pointed out that in the Act section 213 (3) is analogous to section 23-A (3) of the Bombay Act. On a parity of reasoning it could not be suggested that if there had been any contravention of section 213 (3) any voter or member of the public could have filed a complaint in the matter. The other provisions also of the Act which follow, namely, sections 214 to 219 indicate that it was never contemplated that a complaint for infringement or contravention of the prohibition contained therein could be lodged before a magistrate having jurisdiction under section 233 by any private individual in the presence of a specific rule that the Secretary shall have the power to file a complaint on behalf of the Panchayat. Most of these sections *i.e.*, sections 217 and 218 postulate infractions of orders of the Panchayat for which the Panchayat alone would be interested in filing a complaint. We are satisfied that the scheme of the Act also supports the view which we are taking that a complaint could be filed only under rule 16 of Mysore Panchayat Secretaries' Powers and Duties Rules, 1961 and could not have been filed by a private complainant.

The High Court seems to have relied on section 236 of the Act which deals with powers of police officers. This section provides that any police officer may

arrest any person committing in his presence any offence against any of the provisions of the Act or of any rule, regulation or bye-law made thereunder. The person arrested has to be produced before the nearest magistrate within a period of 24 hours of arrest. The police officer effecting the arrest must give immediate information to the Chairman or the Secretary of the Panchayat of the commission of such offence and give all assistance in the exercise of his lawful authority. The High Court was of the view that under the provision of this section the police officer could submit a charge-sheet under section 173 of the Criminal Procedure Code after necessary investigation for offences committed under the Act. Chapter II of the Act relates to establishment and constitution of Panchayats. There are certain sections in it which by express words make offences committed under them cognizable but in the same Chapter there are other sections which do not contain any such provision; for instance, sections 15, 17, 21 and 22 expressly provide that the offences committed under them would be cognizable but sections 16, 18, 19 and 20 do not contain any such provision. In other words the offences committed under them must be deemed to be not cognizable. Section 23 in the same Chapter says that no Court shall take cognizance of an offence punishable under section 16 or section 17 or under section 19 (2) (a) unless there is a complaint made by an order of or under authority from the Deputy Commissioner. The High Court was, therefore, not right in saying that all offences committed under the various provisions contained in the Act would be cognizable owing to the general powers conferred on police officers by section 236. Indeed that section gives only a limited power to the police officer to effect arrest if an offence is committed in his presence. There is authority for the view that this will make an offence cognizable within the meaning of section 4 (f) of the Criminal Procedure Code; vide *Public Prosecutor v. A. V. Ramiah*¹. In the absence of any express provision in section 220 with which we are concerned we doubt whether the offence committed under it would be cognizable and a police officer could carry on investigation in respect of it under Chapter XIV of the Criminal Procedure Code and finally submit a charge-sheet under section 173 of that Code.

It may also be pointed out that in the present case we are not concerned with the powers which a police officer can exercise in respect of an offence committed under section 220 of the Act. What has to be seen is whether a private person or an individual could file a complaint. In the presence of rule 16 and for the reasons given in *K. M. Kanavi v. Stats of Mysore*², we are of the opinion that it was the Secretary of the Panchayat who alone was competent to file the complaint. It must be remembered that it would be the panchayat that would be largely interested in taking action against any of its members and employees for the contravention of section 220. The Secretary would, therefore, be entitled to file a complaint on behalf of the panchayat. The difficulty felt by the High Court that a Secretary who is subordinate to the Chairman may find it embarrassing to file a complaint against him can hardly be accepted as serious hurdle in the way of coming to the conclusion at which we have arrived. The Secretary has to act on behalf of the panchayat and it is the panchayat that would be vitally interested in preventing and stopping any contravention of provisions like section 220 of the Act. The Secretary acts on behalf of the panchayat and the question of his subordination to any of its office-bearers is of no consequence.

In the view we have taken the appeal is allowed and the conviction and sentence imposed on each of the appellants is set aside.

V.M.K.

*Appeal allowed ;
convictions set aside.*

1. (1958) 1 An.W.R. 145 : (1958) M.L.J. (Cal.) 189; A.I.R. 1958 A.P. 392.

2. Cr.L. A. No. 145 of 1965, decided on 18th April, 1968.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT AND V. BHARGAVA, JJ.

Workmen of Indian Express Newspaper Private Ltd.

.. Appellants*

v.

The Management of Indian Express Newspaper Private Ltd. .. Respondent.

Labour Law—Individual dispute—Espousal by an outside union before the date of reference—Representative character—Claim of 25 per cent. of the Workmen of the establishment, if could give the union a representative character.

The question for determination is whether the Delhi Union of Journalists can be said to have espoused the dispute of the two workmen; if so, whether it did in time, and whether the union not being exclusively a union of the workmen employed in the respondent-company, could espouse the said cause.

Held that, the resolution dated 1st December, 1960, passed by the executive committee of the union was not disbelieved by the Tribunal. That, coupled with the fact that the union authorities initiated the conciliation proceeding, must mean that the union had espoused the cause of the two workmen. The dispute arose in July, 1959 when the management refused to treat the two workmen as proof-readers. Thereafter the executive committee, after considering a representation made to it by the employees of the respondent-company, as the resolution reads, passed the said resolution authorising the office-bearers of the union to initiate proceedings in the matter of the said dispute and the Secretary accordingly initiated proceedings before the conciliation officer. In these circumstances, it is not possible to appreciate how the espousal by the union can be said to be beyond time as such espousal can only take place after and not before the dispute arose, or the cause of action arose.

If the number of working journalists in the respondent-company were to be taken as 68, membership of the union by as many as 31 working journalists would certainly confer on the union a representative character. Even if the number of working journalists were to be taken 131, it would not be unreasonable to say that 31 i.e., about 25 per cent. of them would, by becoming the members of the union, give a representative character to the union. It is clear from the evidence that at the material time there was no union of working journalists employed by the respondent-company. Therefore, in accordance with the decision in *The Workmen v. M/s. Dharampal Premchand*, (1965) 3 S.C.R. 394 : (1965) 2 S.C.J. 818 the union can be said to have representative character *qua* the working journalists employed in the respondent-company. Though the grievance of the two workmen arose in July, 1959 when the management declined to accept them as proof-readers the union has sponsored their cause before the date of reference as laid down in the case of *Hinhu, Bombay*, (1962) 3 S.C.R. 893 : (1962) 2 S.C.J. 107. That being the position it cannot be gainsaid that the dispute was transformed into an industrial dispute as it was sponsored by a union which possessed a representative character *vis-a-vis* the working journalists in the employ of the respondent-company.

Appeal by Special Leave from the Award dated the 10th April, 1967 of the Industrial Tribunal, Delhi in Reference I.D. No. 241 of 1961.

M. K. Ramamurthi, Mrs. Shyamla Pappu, Vinet Kumar and Madan Mehan, Advocates, for Appellants.

S. V. Gupte, Senior Advocate, (Lalit Bhasin, S. K. Mehta and K. L. Mehta, Advocates, with him), for Respondent.

26th November, 1968.

The Judgment of the Court was delivered by

Shelat, J.—Two workmen, Gulab Singh and Satya Pal, were appointed by the respondent-company in December, 1956, and February, 1955 respectively under the designation of copy-holders. It was alleged that they were entrusted with the duties of proof-readers and therefore they claimed that they should be treated as such. In July, 1959 the management issued an order in which the two workmen were described as copy-holders. It was alleged that in spite of this order the management continued to give the workmen the work of proof-readers. A dispute whether the two workmen should be treated as proof-readers having arisen and having been espoused by the Delhi Union of Journalists, the Delhi Administration, by a notification dated 2nd August, 1961 referred it to the Industrial Tribunal, Delhi.

The management contended that the said dispute was an individual dispute and not an Industrial dispute and that being so it was wrongly referred to the Tribunal and the Tribunal had no jurisdiction to adjudicate it. The Tribunal raised the preliminary issue, namely, whether the dispute relating to the said two workmen was an industrial dispute. The Tribunal held that it was not an industrial dispute but was only an individual dispute of the two workmen and therefore it had no jurisdiction to adjudicate the said reference. The workmen obtained Special Leave from this Court and that is how this appeal has come up before us for disposal.

Apart from the oral evidence, the appellants relied on two documents, Exhibit WW1/A, which purported to be the minutes of a meeting held on 15th November, 1960 of 17 working journalists and Exhibit WB/1 purporting to be the minutes of a meeting of the executive committee of the Delhi Union of Journalists held on 1st December, 1960. The Union maintained that these two resolutions were proof of espousal of the dispute, the first by an appreciable number of the co-workers of the two aggrieved workmen and the second by the union and therefore the dispute though originally an individual dispute was converted into an industrial dispute. The Tribunal rejected Exhibit WW1/A, namely, the minutes of the alleged meeting of the 17 working journalists in the employ of the respondent-company as unreliable. The Tribunal next considered whether, even assuming that the said 17 working journalists espoused the cause of the two workmen that espousal transformed the dispute in question into an industrial dispute, in other words, whether they constituted an appreciable number sufficient to change the dispute into an industrial dispute. At the material time the Branch office of the respondent-company at Delhi consisted in all of 388 employees, out of whom 140 were working in the Press. The working journalists numbered 131, out of whom 63 were outstation correspondents and the remaining 68 were working journalists performing their duties in Delhi and New Delhi. The Tribunal held that though the said 63 working journalists were outstation journalists they nevertheless belonged to the staff of the respondent-company's Delhi Branch, and therefore, could not be excluded from consideration. The question which the Tribunal posed to itself was whether 17 out of the said 131 working journalists could be said to be an appreciable number. According to the Tribunal, even if those 63 outstation correspondents were excluded and only 68 working journalists were considered, 17 of them would not constitute an appreciable number sufficient to convert the said dispute into an industrial dispute. It also held that mere passing of a resolution without anything done to follow it up was not sufficient to constitute espousal. There was no evidence that after passing the said alleged resolution on 15th November, 1960, anything further was done. On these facts the Tribunal did not consider the aforesaid resolution, assuming that it was passed, as constituting espousal.

As regards the resolution dated 1st December, 1960 the minutes of the meeting of the executive committee of the Delhi Union of Journalists were produced before the Tribunal. The minutes stated that the meeting after considering the representation made to it by the employees of the Indian Express decided to take up the case

of the two workmen and authorised the office bearers of the union to initiate the necessary proceedings. The Tribunal found that the union initiated a fresh dispute before the Conciliation Officer and that there was no pending case initiated earlier, *i.e.*, before 1st December, 1960, by another union as alleged by the appellants which could have been continued by the union. A copy of the statement of claim filed by the union before the Conciliation Officer was also produced before the Tribunal. There was evidence that 31 working journalists employed in the respondent-company had become the members of the Delhi Union of Journalists. But they had joined the union after the said order of July, 1959. The Tribunal's view was that the said 31 working journalists having joined the Delhi Union of Journalists after the cause of action had arisen in July, 1959, the said resolution of the union's executive committee would not constitute espousal as there would be no nexus between the dispute and the union, and therefore, the resolution dated 1st December, 1960, did not have the effect of converting the said dispute into an industrial dispute.

Mr. Ramamurti, for the appellants, contended that the resolution dated 1st December, 1960, coupled with the fact that the union initiated conciliation proceedings in respect of the demand of the said two workmen was sufficient to transform the dispute into an industrial dispute. On the other hand, Mr. Gupte, appearing for the company, contended that a dispute which is *prima facie* an individual dispute may assume the character of an industrial dispute if it is taken up or espoused by an appreciable body of the workmen of the establishment. Espousal by a union is regarded as sufficient, for, that means that it is an espousal by an appreciable number of workmen in that establishment. If such a dispute is espoused by an outside union, the workmen of the establishment, appreciable in number, must be members of such a union. On these contentions, the question for our determination is whether the Delhi Union of Journalists can be said to have espoused the dispute of the two workmen; if so, whether it did in time, and whether the union not being exclusively a union of the workmen employed in the respondent company, could espouse the said cause.

The resolution dated 1st December, 1960 passed by the executive committee of the union was not disbelieved by the Tribunal. That, coupled with the fact that the union authorities initiated the conciliation proceeding, must mean that the union had espoused the cause of the two workmen. The dispute arose in July, 1959 when the management refused to treat the two workmen as proof-readers. Thereafter the executive committee, after considering a representation made to it by the employees of the respondent company, as the resolution reads, passed the said resolutions authorising the office bearers of the union to initiate proceedings before the conciliation officer. In these circumstances, it is not possible to appreciate how the espousal by the union can be said to be beyond time as such espousal can only take place after and not before the dispute arose, or as counsel put it, the cause of action arose. In *The Bombay Union of Journalists v. The Hindu, Bombay*¹, this Court in clear terms laid down that the test of an industrial dispute is whether at the date of the reference the dispute was taken up and supported, by a union, or by an appreciable number of workmen. There being no doubt of the union having taken up the cause of the two workmen before the reference the first two parts of the question must be answered in the affirmative.

The next question is whether the cause of a workman in a particular establishment in an industry can be sponsored by a union which is not of workmen of that establishment but is one of which membership is open to workmen of other establishments in that industry. In *Central Provinces Transport Services Ltd. v. Raghunath Gopal Patwardhan*², this Court noted that decided cases in India disclosed their views as to the meaning of an industrial dispute: (1) a dispute between an employer and a single workman cannot be an industrial dispute, (2) it can be an industrial dispute and (3) it cannot *per se* be an industrial dispute but may become one if taken up by a trade union or a number of workmen. After discussing the scope of

1. (1962) 3 S.C.R. 893; (1962) 2 S.C.J. 58. 2. (1956) S.C.R. 956; (1957) S.C.J. 58.

industrial dispute as defined in section 2 (k) of the Act it observed that the preponderance of judicial opinion was clearly in favour of the last of the three views and that there was considerable reason behind it. In *the Newspapers Ltd. v. The State Industrial Tribunal, U.P.*¹, the third respondent was employed as a lino typist by the appellant company. On an allegation of incompetence he was dismissed from service. His case was not taken up by any union of workers of the appellant company, nor by any of the unions of workmen employed in similar or allied trades. But the U. P. Working Journalists Union, Lucknow, with which the third respondent had no concern, took the matter to the Conciliation Board. On a reference being made to the Industrial Tribunal by the Government the legality of that reference was challenged by the appellant company on the ground that the said dispute could not be treated as an industrial dispute under the U. P. Industrial Disputes Act, 1947 which defined by section 2 an industrial dispute as having the same meaning assigned to it in section 2 (k) of the Central Act. This Court upheld the contention observing that the notification referring the said dispute proceeded on an assumption that a dispute existed between the employer and "his workmen," that Tajammul Hussain, the workman concerned, could not be described as "workmen," nor could the U. P. Working Journalists Union be called "his workmen" nor was there any evidence to show that a dispute had got transformed into an industrial dispute. The question whether the union sponsoring a dispute must be the union of workmen in the establishment in which the workman concerned is employed or not had not so far arisen. It seems such a question arose for the first time in the case of *Bombay Union of Journalists v. The Hindu, Bombay*². The decision in that case laid down (1) that the Industrial Disputes Act excluded its application to an individual Dispute as distinguished from a dispute involving a group of workmen unless such a dispute is made a common cause by a body or a considerable section of workmen and (2) the members of a union who are not workmen of the employer against whom the dispute is sought to be raised cannot by their support convert an individual dispute into an industrial dispute. Persons who seek to support the cause must themselves be directly and substantially interested in the dispute and persons who are not the employees of the same employer cannot be regarded as so interested. The Court held that the dispute there being *prima facie* an individual dispute it was necessary in order to convert it into an industrial dispute that it should be taken up by a union of the employees of an appreciable number of employees of Hindu, Bombay. The Bombay Union of Journalists not being a union of the employees of the Hindu, Bombay, but a union of all employees in the industry of journalism in Bombay, its support of the cause of the workman concerned would not convert the individual dispute into an industrial dispute. The members of such a union cannot be said to be persons substantially and directly interested in the dispute between the workman concerned and his employer, the Hindu Bombay, But in *Workmen v. M/s. Dharampal Premchand*³, this Court, after reviewing the previous decisions, distinguished the case of Hindu, Bombay and held that notwithstanding the width of the words used in section 2 (k) of the Act a dispute raised by an individual workman cannot become an industrial dispute unless it is supported either by his union or in the absence of a union by a number of workmen, that a union may validly raise a dispute though it may be a minority union of the workmen employed in an establishment, that if there was no union of workmen in an establishment a group of employees can raise the dispute which becomes an industrial dispute even though it is a dispute relating to an individual workman, and lastly, that where the workmen of an establishment have no union of their own and some or all of them have joined a union of another establishment belonging to the same industry, if such a union takes up the cause of the workman working in an establishment which has no union of its own, the dispute would become an industrial dispute if such a union can claim a representative character in a way that its support would make the dispute an industrial dispute.

1. — (1957) S.G.R. 754: (1957) S.C.J. 566: (1957) M.L.J. (Cri.) 540. 2. — (1962) 2 S.C.J. 107: (1962) 3 S.C.R. 197. 3. (1965) 2 S.C.J. 818: (1965) 3 S.C.R. 394.

The evidence of the union secretary was that in 1959-60, 31 working journalists of the respondent company were members of the Delhi Union of Journalists. It was nobody's case that these 31 members did not continue to be the members of that union in 1960-61 also. If the number of working journalists in the respondent company were to be taken as 69, membership of the union by as many as 31 working journalists would certainly confer on the union a representative character. Even if the number of working journalists were to be taken as 131, it would not be unreasonable to say that 31 i.e., about 25 per cent. of them would, by becoming members of the union, give a representative character to the union. It is clear from the evidence that at the material time there was no union of working journalists employed by the respondent company. Therefore, in accordance with the decision in *The Workmen v. M/s. Dharampal Premchand*¹, the union can be said to have a representative character *qua* the working journalists employed in the respondent company. There can be no doubt that the union had taken up the cause of the two workmen by its executive committee passing the said resolution and its office bearers having followed up that resolution by taking the matter before the conciliation officer. Though the grievance of the two workmen arose in July 1959 when the management declined to accept them as proof-readers the union has sponsored their cause before the date of reference as laid down in the case of *Hindu, Bombay*². That being the position it cannot be gainsaid that the dispute was transformed into an industrial dispute as it was sponsored by a union which possessed a representative character *vis-a-vis* the working journalists in the employ of the respondent company.

We must, therefore, hold that the Tribunals' view that the dispute was not an industrial dispute was incorrect. The award, therefore, will have to be set aside and the appeal of the workmen allowed. There will be no order as to costs.

Appeal allowed.

V.M.K.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—MR. M. Hidayatullah, Chief Justice AND G. K. MITTER, J.

.. Appellant *

Goka Ramalingam

v.

.. Respondents.

Boddu Abraham and another

Representation of the People Act (XLIII of 1951), section 116-A—Scope—Appeal under fresh evidence—Appellant, if could change his case and narrow the field of enquiry.

An application asking for amendment of the plea of conversion of the answering respondent into one of his parents. Cannot be allowed because it changes the nature of the case requiring fresh evidence to be taken and is also filed beyond the period of limitation prescribed for election petitions.

It is because of clumsy blundering that the petitioner undertook a much greater burden than the law required him to take. He should have pleaded only that the returned candidate was a Christian on the date he filed his nomination paper and therefore was not a Hindu and was not competent to stand for the Reserved Seat. Instead he proceeded to demonstrate through his plea and his evidence that the returned candidate was himself converted to Christianity and failed. Therefore he cannot be allowed to change his front and narrow the field of enquiry to one which he should have adopted in the first instance. Not having done so, it is too late for him to change his case now.

Appeal under section 116-A of the Representation of the People Act, 1951 from the Judgment and Order dated the 21st August, 1967 of the Andhra Pradesh High Court in Election Petition No. 3 of 1967.

1. (1965) 2 S.C.J. 818: (1965) 3 S.C.R. 394.
* C.A.No. 61 of 1968.

2. (1962) 2 S.C.J. 107: (1962) 3 S.C.R. 197.
27th November, 1968.

P. Ram-Reddy, Senior Advocate; (*A. V. V. Nair*, Advocate, with him), for Appellant.

R. K. Garg, *D. P. Singh* and *S. C. Agarwal*, Advocates of *M/s. Ramamurthi & Co.* and *Asif Ansari*, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Hidayatullah, C.J.—This appeal arises from the decision of the Andhra Pradesh High Court dated 21st August, 1967 by which an election petition filed by the present appellant Goka Ramalingam to question the election of the answering respondent Boddu Abraham was dismissed. The matter concerns the Cheriya (Scheduled Caste) constituency in the election to the Andhra Pradesh Legislative Assembly held in February, 1967. Three candidates had offered themselves for election. Two of them we have already named, the third is one Devadanam. The answering respondent obtained 15000 and odd, appellant-election petitioner 12000 and odd and Devadanam 7000 and odd votes. The election petition was based only on one issue, namely, that the respondents who had stood for a scheduled caste Reserved seat had “converted themselves into Christianity long time back and they continue to profess the said religion Christianity even today.” Under the Constitution (Scheduled Castes) Order, 1950, it is provided as follows:—

“(2) Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within, castes or tribes, specified in Parts I to XIII of the Scheduled to this Order shall, in relation to the States to which those parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them in those parts of that Schedule.

(3) Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste.”

It would therefore appear that if the answering respondent and Devadanam were not members of a named scheduled caste (in this case the Madiga caste) they were not eligible to stand for election for the Reserved Seat. The case as put forward in the High Court was that these two candidates had themselves got converted into Christianity a long time ago and that they did not therefore profess Hindu religion although in the plea it is stated affirmatively that they profess Christian religion. The case went to trial on this plea and the issues framed were as follows:

“1. Whether the respondents who admittedly once belonged to “Madiga” community embraced Christianity and professed the religion of Christianity at the time of election and hence respondent No. 1 was not qualified to be chosen to fill the seat in the Assembly of the State as per section 5 (a) read with rule (3) of the Constitution (Scheduled Castes) Order, 1950 (C.O. 19 dated 10th August, 1950)?

2. Whether the nomination papers of both the respondents were improperly received and as a result thereof the result of the election has been materially affected?

3. What is the effect of admission of respondent 2 in his written statement as to his status on this election petition?”

Evidence was led to prove that the answering respondent was converted to Christianity. This evidence was not accepted by the High Court. As regards the other respondent, he went out of the fight admitting that he was a Christian and nothing more need be said of him.

It appears that while this case was going on, the learned Judge was informed that a Register of all converted Christians was maintained by the Church. He accordingly sent for the Register and marked it as Exhibit C-1. In the judgment the learned Judge gives his order: pertaining to this action. It reads as follows:—

"I may mention here that since it came out in the evidence of R.W. 2 that the names of all converts to Christianity within the jurisdiction of Hanumakonda Baptist Mission would be entered in the General Record of the Field Association, Houmakonda, and that register was filed as an exhibit in a suit pending in the District Court at Warangal, I summoned it and marked it as Exhibit C-1. I gave opportunity for the lawyers appearing on both sides to inspect the register and make their submissions. The entries relating to Dharmasangaram village are to be found in pages 50 to 51 and 182. It is true that the name of the 1st respondent is not found in this Record; but since this register does not appear to be an exhaustive and complete record of all the Christians in that area, I do not propose to rely on the entries in this register for any purpose."

This Register was inspected by the parties. They went into it with a view to finding out whether the answering respondent and his wife Chinna Mariamma has been converted or not. There was no entry showing that they had been so converted. It appears, however, that the Register did contain two entries showing the conversion of Boddu Kumaraiah and China Buchamma who are now said to be the father and mother of answering respondent. An affidavit has also been filed from the Pastor of the Church in which it is stated that these entries refer to the parents of the answering respondent. Even though the Register was in Court and was open to inspection of the parties, care was not taken to discover these two names, with the result that the case was fought on the original plea and issue that the answering respondent was converted to Christianity. That apparently was not a fact, because if he was born of Christian parents he did not need conversion. That fact, however, is only alleged now before us and has not been subjected to proof.

The question therefore is whether in view of this fresh evidence, we should allow this appeal. On a proper consideration of the entire matter we are of opinion that we cannot. An application was made to us asking for amendment of the plea of conversion of the answering respondent into one of conversion of his parents to Christianity. We have been unable to allow that petition, because it changes the nature of the case requiring fresh evidence to be taken and is filed also beyond the period of limitation prescribed for filing of election petitions. That it does change the entire nature of the case is obvious, because instead of the plea that the answering respondent was converted to Christianity, it is now sought to be substituted a plea that the parents were converted to Christianity. We should have understood such an application being made in the Court of trial when the Register was produced, because that might have been a matter not within the knowledge of the election petitioner till the register was produced. But after the Register had been produced and it lay in the Court for nearly an year and had been inspected by the answering respondent, it does not lie in his mouth to say that he had no notice of the true facts. He had notice of them because he had the register with him and the names of the alleged parents of the answering respondent are clearly mentioned therein. In fact the register seems to be a well-kept document written extremely legibly and there was no danger of any name having been overlooked. Therefore we must consider this as a belated plea and reject it on the two grounds already mentioned by us.

Once the application for amendment is out of the way, the question is whether the appeal of the election petitioner can be otherwise sustained. Mr. Ram Reddy contended that under clause (3) of the Presidential Order, it is sufficient to prove that if a person possesses religion other than Hinduism or Sikhism it disentitles him to contest for a reserved seat. He says that for whatever reason the answering respondent be regarded as a Christian today or at any rate at the time he filed his nomination paper, he would be incompetent to stand for the election from the reserved seat if he professed a religion other than Hinduism or Sikhism. In other words, he wants to extract from the plea and the issue a very much narrower field for enquiry, namely, that the answering respondent was not a Hindu on that date. This would have been a proper plea to take in the first instance. It is because of clumsy blundering that the petitioner undertook a much greater burden than the

law required him to take. He should have pleaded only that the returned candidate was a Christian on the date he filed his nomination paper and therefore was not a Hindu and was not competent to stand for the Reserved Seat. Instead he proceeded to demonstrate through his plea and his evidence that the returned candidate was himself converted to Christianity and failed. In this view of the matter we do not think that we should allow him to change his front and narrow the field of enquiry to one which he should have adopted in the first instance. Not having done so, we think, that it is too late for him to change his case now. For these reasons, we are constrained to dismiss the appeal. We may say that it is an odd situation, because probably a Christian occupies a Reserved Seat, but this is the result of the vagaries of litigation which have to be carried on according to rules. The rules do not permit us to give relief where the party himself is at fault in making a wrong plea and in not making the right plea in time. But in the circumstances of the case, we think that the parties should be directed to bear their costs throughout.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.

Shashibhushan Prasad Misra (dead) and another

.. *Appellants**

v.

Babuaji Rai (dead) by his legal representatives and others .. *Respondents*

Res judicata—Deity, not a necessary party, joined as a defendant—No relief claimed against the deity—Appeal against the dismissal of the suit—Appeal dismissed against deity for non-payment of guardian's costs—No final decision by the appellate Court against the deity on the question of the title to suit lands—Decision of the Trial Court, if operates as res judicata.

The deity was not a necessary party to the suit. It was joined as a defendant, but no relief was claimed against it. The suit was dismissed. As soon as the appeal was filed by the plaintiffs in the High Court the decision of the Trial Court lost its character of finality and the question whether the suit lands appertained to village Siripur Majraha became once again *res sub judice*. Before the appeal was finally heard and decided, it was dismissed as against the deity for non-payment of its guardian's costs. The appellate Court did not give any decision on the merits of the case in the presence of the deity. There is no final decision against the deity on the question of the title to suit lands. The decision of the appellate Court against the contesting defendants will not lead to conflicting and inconsistent decree. The High Court was in error in holding that the appeal against the contesting defendants became incompetent.

Appeal from the Judgment and Decree dated the 6th July, 1959 of Patna High Court in First Appeal No. 235 of 1951.

Sarjoo Prasad, Senior Advocate, (*B. P. Jha*, Advocate, with him), for Appellants.

G. B. Agarwala, Senior Advocate, (*P. K. Chatterjee* and *R. B. Datar*, Advocates, with him), for Respondents (excepting Respondents Nos. 15 (b) to 15 (d)).

The Judgment of the Court was delivered by

Bachawat, J.—This appeal arises out of Title Suit No. 12/9 of the 1946 instituted in the Court of the First Additional Subordinate Judge, Darbhanga. The plaintiff claimed declaration of their title and possession in respect of 70 bighas of land in plot No. 1083 in village Siripur Majraha. They obtained settlements of the lands from the deity Shri Radhakrishnajee Baldeojee. The deity was the 16 annas proprietor of village Siripur Majraha Pergana Janakhalpur, Tauzi No. 2794. The river Karey flows between this village and the villages of Kazi Dumra and Shankarpur. The contesting defendants were the landlords and tenants of villages

Kazi Dumra and Shankarpur. The deity was defendant No. 18 and was represented by one Tantreshwar Singh. The plaintiffs claimed that in consequence of the changes in the Channel of the river Karey the lands in suit were lost to villages Kazi Dumra and Shankarpur by diluvion and were annexed to plot No. 1083 in village Sirpur Majraha by gradual increment and accretion. The Trial Court dismissed the suit. It held that (1) the suit lands did not accrete to plots Nos. 1083 and 1089 in village Sirpur Majraha due to slow, gradual and imperceptible changes in the channel of the river Karey, (2) there was no custom in the village by which the disputed lands became the property of the owner of plots, (3) the deity Radha Krishanji Baldeoji or the owner of village Sirpur Majraha did not obtain possession of the lands in the manner alleged in the plaint, (4) the lands originally belonged to the proprietors of villages Kazi Dumra and Shankarpur and continued to be their property and (5) the plaintiffs failed to prove their title and possession in respect of the suit lands within 12 years before the date of the institution of the suit. The plaintiffs filed F.A. No. 291 of 1951 in the High Court of Patna against the decree passed by the Trial Court. The deity Shri Radha Krishanji Baldeoji, the original defendant No. 18 was impleaded as respondent No. 23 in the appeal. By an order dated 24th January, 1952 the High Court appointed the Deputy Registrar as the guardian of the deity. On 18th February, 1952 the High Court passed the following order:—

“Two weeks further time is allowed to deposit D. R. guardian's cost for respondent No. 23 (deity) failing which this appeal shall stand dismissed against him without further reference to a Bench.”

This peremptory order was not complied with and on the expiry of the two weeks the appeal stood dismissed against the deity. At the hearing of the appeal the contesting defendants urged that the entire appeal became incompetent in view of the dismissal of the appeal against the deity. The High Court accepted this contention and dismissed the appeal in its entirety. The High Court held that there was a clear issue between defendant No. 18 and the contesting defendants as to whether the lands formed part of the village Sirpur Majraha, that the issue stood concluded against defendant No. 18 by the decree of the Trial Court, that the appeal had abated against defendant No. 18 and that as success in the appeal might lead to conflicting and inconsistent decrees, the appeal against all the defendants became incompetent. The present appeal has been filed by the plaintiffs after obtaining a certificate from the High Court.

Clearly, the High Court was in error in holding that the appeal had abated either wholly or in part. None of the parties to the appeal had died and there was no question of the abatement of the appeal. Mr. C. B. Agarwala relying on the case of *Munni Bibi v. Trilokinath*¹, submitted that the decision of the Trial Court on the question whether the suit lands appertained to village Sirpur Majraha operated as *res judicata* between the deity and the contesting co-defendants, that the appellate Court could not record an inconsistent finding that the suit lands appertained to village Sirpur Majraha, and that in the circumstances, the entire appeal before the High Court became incompetent. We are unable to accept these contentions.

The plaintiff's claiming as tenants of the deity sued the contesting defendants for declaration of their title and possession in respect of the suit lands on the allegation that the lands appertained to village Sirpur Majraha of which the deity was the proprietor. The deity was not a necessary party to the suit. It was joined as a defendant, but no relief was claimed against it. The suit was dismissed on the finding that the suit lands did not appertain to village Sirpur Majraha. The plaintiffs filed an appeal against the decree impleading the deity as one of the respondents. The appeal was dismissed against the deity for non-payment of costs of its guardian *ad litem*. The deity was not a necessary party to the appeal. The plaintiffs were entitled to prosecute their appeal against the contesting defendants in the absence of the deity.

As soon as the appeal was filed by the plaintiffs in the High Court the decision of the Trial Court lost its character of finality and the question whether the suit lands appertained to village Siripur Majrahia became once again *res sub judice*. The case of *Munni Bibi v. Trilokinath*¹, shows that a decision operates as *res judicata* between co-defendants if (1) there is a conflict of interest between them; (2) it is necessary to decide that conflict in order to give the plaintiffs the reliefs which they claim and (3) the question between the co-defendants is finally decided. In the present case, the third condition was not satisfied. The question whether the suit lands appertain to Siripur Majrahia was not finally decided between the deity and the co-defendants. On the filing of the appeal by plaintiffs, the question became once more the subject of judicial inquiry between the deity and the contesting defendants.

Before the appeal was finally heard and decided, it was dismissed as against the deity for non-payment of its guardian's costs. The appellate Court did not give any decision on the merits of the case in the presence of the deity. There is no final decision against the deity on the question of the title to the suit lands. The decision of the appellate Court against the contesting defendants will not lead to conflicting and inconsistent decree. The High Court was in error in holding that the appeal against the contesting defendants became incompetent.

In the circumstances the High Court ought to have decided the appeal before it on the merits. Counsel for the parties agreed that the decision of the present appeal on the merits would abide by the decision in C. A. No. 140 of 1966 arising out of T. S. No. 29/11 of 1946. That suit and T. S. No. 12/19 of 1946 out of which the present appeal arises were heard together by the Trial Court and disposed of by a common judgment. In C. A. No. 140 of 1966 we have held that the disputed lands appertained originally to village Kazi Dumra and Shankarpur, that due to the recession of the river Karey the lands re-formed *in situ* and that the property in the lands continued to remain with the proprietors of the lands in villages Kazi Dumra and Shankarpur. The plaintiffs failed to prove that the deity Shri Radha Krishanji Baldeoji came into possession of the disputed land as alleged in the plaint. There was no issue on the question whether the deity had acquired title to the suit lands by adverse possession. The plea for the acquisition of title by adverse possession cannot be raised for the first time at the appellate stage. The plaintiffs failed to establish acquisition of the title of the deity to any portion of the suit lands by adverse possession. It follows that there was no merit in F.A. No. 235 of 1951. Although the High Court did not decide this appeal on the merits, it is not necessary to remand the matter to the High Court. Having regard to our findings in C.A. No. 140 of 1966. T.S. No. 12/9 of 1946 also must be dismissed.

In the result, the appeal is dismissed. There will be no order as to costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.

Workmen of the Indian Leaf Tobacco Development Co. Ltd.,
Guntur .. Appellants*

v.

The Management of Indian Leaf Tobacco Development Co. Ltd.,
Guntur .. Respondent.*Labour Law—Closure of business of the company, genuine and real—Stoppage of part of a business (closure of 8 depots by the Company), if could be interfered with by an Industrial Tribunal—Closure entirely in the discretion of the company.**Labour Law—Closure of part of business of the company—Closure genuine and real to effect economy and secure quality—Discharge of workmen on payment of retrenchment compensation.—Tribunal, if could ask the company to reinstate the workmen.*

The closure of the 8 depots by the respondent—company, even if it is held not to amount to closure of business of the company, cannot be interfered with by an Industrial Tribunal if, in fact, that closure was genuine and real. The closure may be treated as stoppage of part of the activity or business of the company. Such stoppage of part of a business is an act of management which is entirely in the discretion of the company carrying on the business. No Industrial Tribunal, even in a reference under section 10 (1) (d) of the Industrial Disputes Act, can interfere with the discretion exercised in such a matter and can have any power to direct a company to continue a part of the business which the company has decided to shut down. A Tribunal under the Industrial Disputes Act has no power to issue orders directing a company to re-open a closed depot or branch, if the company, in fact, closes it down.

After examining the evidence, the Tribunal came to the conclusion that the stoppage of the work at the depots was genuine and that the work which was being carried on at the depots had not been transferred to the buying points established by the Company. The closure of the business at the depots was necessitated by reasons of expediency inasmuch as the company had to reduce its purchases in its quest for quality and its desire to run the business economically. The principal work which used to be done at the depots, was not that of purchasing tobacco, but of handling it and that work was not transferred at all to any buying point. The Tribunal, thus came to the finding that the closure of these depots was real and genuine. The suggestion that only, a device was adopted of carrying on the same business in a different manner had no force at all. If the same business had been continued, though under a different guise, the claim of the workmen not to be retrenched could possibly be considered by the Tribunal, but, on the finding that there was a genuine closure of the business that used to be carried on at the depots, no question could arise of retrenchment being set aside by the Tribunal. The Tribunal could not ask the company to re-employ or reinstate the workmen, because there was no business for which the workmen could be required.

Appeal by Special Leave from the Order dated the 13th August, 1964 of the Industrial Tribunal, Andhra Pradesh in Industrial Dispute No. 41 of 1963.

M. K. Ramamurthi, Mrs. Shyamala Pappu and Mr. Vinod Kumar, Advocates, for Appellants.

K. Srinivasamurthy and Naimit Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—This appeal, by Special Leave, has arisen out of an award made by the Industrial Tribunal, Andhra Pradesh, at Hyderabad in an Industrial dispute between the respondent, the Indian Leaf Tobacco Development Company Limited, Guntur (hereinafter referred to as "the Company"), and its workmen. Admittedly, the Company is an associate of the Imperial Tobacco Company Ltd. and the main business carried on by the Company is that of purchasing tobacco of all varieties and qualities, stemming, grading and packing of tobacco and supplying it to the Imperial Tobacco Co., as well as exporting the tobacco to various foreign countries in the world. The Company has been carrying on this business for about 40 years and handles almost 35 per cent of the tobacco grown in the State of Andhra Pradesh. For the work of stemming, grading and packing tobacco, the Company has two factories, one at Anaparty in East Godavary District, and the other at Chirala in Guntur District. In connection with this business, the Company, in the year 1962, was maintaining 21 depots where, according to the workmen, the appellants, the Company was carrying on the work of collecting tobacco, though the Company's case was that the principal work done at these depots was that of handling the tobacco purchased at other places and only included the work of purchasing tobacco on a small scale.

On 16th August, 1963, the Company gave a notice to the Union of the appellant workmen that 8 out of 21 depots mentioned therein would be closed down with effect from 30th September, 1963. Thereafter, an industrial dispute was raised by the workmen which related to the closure of these 8 depots, as well as to a number of other demands, including revision of basic wages and dearness allowance, additional discomfort allowance, etc. The State Government, by its order dated 14th November, 1963, referred the dispute for adjudication under section 10 (1) (d) of the Industrial Disputes Act, 1947 to the Industrial Tribunal, Hyderabad. The first issue, which was referred for adjudication, was as follows :—

"How far the demands of the union, *viz.*, that no depot which worked during 1962 season should be closed, and (ii) that no workman who worked in 1962 season should be retrenched, are justified?"

There were ten other issues, but we need not reproduce them, as we are not concerned with them in this appeal.

In the proceedings for adjudication, the Company took a preliminary objection that the closure of the depots was a managerial function, that there could not be an industrial dispute over such closure, that the Government, therefore, had no power to refer this issue for adjudication, and that the Tribunal also had no power to adjudicate on it. Thereupon, the Tribunal framed a preliminary issue as to "whether the employer is justified in alleging that Issue No. 1 framed by the Government cannot be deemed related to an industrial dispute, and as such, whether the Government had the power to refer it for adjudication." The Tribunal decided this preliminary issue by giving an interim award on the 13th August, 1964. The preliminary objection was allowed and further direction was made that the effect of this decision on Issue No. 1 will be decided later after hearing the parties. Thereafter, the Tribunal proceeded to hear the reference on this question as well as on all other issues referred to it and, ultimately, gave its award on 11th December, 1964. In that award, both the parts of issue No. 1 were decided against the workmen. The workmen have now come up in this appeal against the interim award, dated 13th August, 1964 as well as against the final award insofar as it relates to issue No. 1.

The decision given by the Tribunal in the interim award, holding that the reference covered by issue No. 1 was not competent, has been challenged by learned Counsel for the appellants on the ground that the closure of a depot does not amount to closure of business in law and, since the same business was continued by the Company at least 13 other depots, the closure of the 8 depots in question was unjustified

For the proposition that the closure of the depots did not amount to closure of business, learned Counsel relied on the views expressed by this Court in *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union*¹, where the Court explained the reason for the decision given by the Labour Appellate Tribunal in the case of *Employees of Messrs. India Reconstruction Corporation Ltd., Calcutta v. Messrs. India Reconstruction Corporation Ltd., Calcutta*². It, however, appears to us that this question raised on behalf of the appellants is totally immaterial insofar as the question of the jurisdiction of the Tribunal to decide the first part of issue No. 1 is concerned. The closure of the 8 depots by the Company, even if it is held not to amount to closure of business of the Company, cannot be interfered with by an Industrial Tribunal if, in fact, that closure was genuine and real. The closure may be treated as stoppage of part of the activity or business of the Company. Such stoppage of part of a business is an act of management which is entirely in the discretion of the Company carrying on the business. No Industrial Tribunal, even in a reference under section 10 (1) (d) of the Industrial Disputes Act, can interfere with discretion exercised in such a matter and can have any power to direct a Company to continue a part of the business which the Company has decided to shut down. We cannot possibly accept the submission made on behalf of the appellants that a Tribunal under the Industrial Disputes Act has power to issue orders directing a Company to reopen a closed depot or branch, if the Company, in fact, closes it down.

An example may be taken of a case where a Bank with its headquarters in one place and a number of branches at different places decides to close down one of the branches at one of those places where it is functioning. We cannot see how, in such a case, if the employees of that particular branch raise an industrial dispute, the Bank can be directed by the Industrial Tribunal to continue to run that branch. It is for the Bank to decide whether the business of the branch should be continued or not, and no Bank can be compelled to continue a branch which it considers undesirable to do.

In these circumstances, it is clear that the demand contained in the first part of Issue No. 1 was beyond the powers and jurisdiction of the Industrial Tribunal and was incorrectly referred for adjudication to it by the State Government.

Of course, if a Company closes down a branch or a depot, the question can always arise as to the relief to which the workmen of that branch or depot are entitled and, if such a question arises and becomes the subject-matter of an industrial dispute, an Industrial Tribunal will be fully competent to adjudicate on it. It is unfortunate that, in this case, when dealing with the preliminary issue, the Tribunal expressed its decision in the interim award in general words, holding that Issue No. 1 as a whole was beyond its jurisdiction. If the reasoning in the interim award is taken into account, it is clear that the Tribunal on that reasoning only came to the conclusion that it was not competent to direct reopening of the 8 depots which had been closed, so that the Tribunal should have held that the first part of Issue No. 1 only was outside its jurisdiction.

So far as the second part of that issue is concerned, as we have said above, it was competent for the Tribunal to go into it and decide whether the claim of the workmen that they should not be retrenched was justified. On an examination of the interim award and the final award, we, however, find that the Tribunal in fact did do so. The case reported in *Pipraich Sugar Mills Ltd.*¹, was also concerned only with the question as to the relief that can be granted to workmen when there is closure of a business. No question arose either before the Court, or in the cases considered by the Court, of an Industrial Tribunal making a direction to the employers to continue to run or to reopen a closed branch of the business. The Labour

Appellate Tribunal in the case of *Employees of Messrs. India Reconstruction Corporation Ltd., Calcutta*¹, was dealing with the question of retrenchment compensation as a result of the closure of one of the units of the company concerned, and it held that the workmen were entitled to retrenchment compensation in accordance with law. This Court, in the case of *Pipraich Sugar Mills Ltd.*², only explained why the Labour Appellate Tribunal was justified in granting retrenchment compensation in that case. The opinion expressed by the Court was that, though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is to be awarded under the law, not for discharge as such but for discharge on retrenchment, and if, as is conceded, retrenchment means in ordinary parlance discharge of the surplus, it cannot include discharge on closure of business. It was in this context that the Court went on to add that in the case of *Employees of M/s. India Reconstruction Corporation Ltd., Calcutta*¹, what had happened was that one of the units of the Company had been closed which would be a case of retrenchment and not a case of closure of business. It may be noted that, at the time when this decision was given, section 25-FF and section 25-FFF had not been introduced in the Industrial Disputes Act, and the only right to retrenchment compensation granted to the workmen was conferred by section 25-F. It was in the light of the law then prevailing that the Court felt that the decision of the Labour Appellate Tribunal in the case of *Employees of M/s. India Reconstruction Corporation Ltd.*¹, granting retrenchment compensation could be justified on the ground that the services of the workmen had not been dispensed with as a result of closure of business, but as a result of retrenchment. That question does not arise in the case before us. Since then, as we have indicated above, section 25-FF and section 25-FFF have been added in the Industrial Disputes Act, and the latter section specifically lays down what rights a workman has when an undertaking is closed down. In a case where a dispute may arise as to whether workmen discharged are entitled to compensation under section 25-F or section 25-FFF it may become necessary to decide whether the closure, as a result of which the services have been dispensed with, amounts to a closure in law or not. In the case before us, it was admitted by learned Counsel for both parties that the workmen, who have been discharged as a result of the closure of the 8 depots of the Company, have all been paid retrenchment compensation at the higher rate laid down in section 25-F, so that, in this case, it is not necessary to decide the point raised on behalf of the workmen.

In connection with the second part of issue No. 1, it was also urged by learned Counsel for the appellants that the business, which was being carried on at the depots, had not in fact been closed down and had merely been transferred to buying points situated in and around the closed depots, including two new buying points established by the Company after the closure of these 8 depots. The argument was that the workmen were old employees who had served the Company for a long time and were entitled to certain benefits as a result of that long service. The Company closed these 8 depots *malafide* with the object of depriving the workmen of those benefits and merely altered the nature of the business by closing the depots and carrying on the same business at the buying points. This point urged by learned Counsel cannot, however, be accepted in view of the findings of fact recorded by the Tribunal.

The Tribunal examined in detail the allegations made on behalf of the workmen in this respect. In fact, the interim award mentions that, for the purpose of deciding the preliminary issue and the first issue, evidence was recorded by the Tribunal for more than a week and arguments of Advocates of the parties were heard for even a longer period. After examining the evidence, the Tribunal came to the conclusion that the stoppage of the work at the depots was genuine and that the work which was being carried on at the depots had not been transferred to the buying points established by the Company. The closure of the business at the depots was necessitated by reasons of expediency inasmuch as the Company had to reduce its purchases in its quest for quality and its desire to run the business economically. The principal

1. (1953) L.A.C. 563.

2. (1957) S.C.J. 38 : (1956) S.C.R. 872.

work, which used to be done at the depots, was not that of purchasing tobacco, but of handling it and that work was not transferred at all to any buying point. The Tribunal, thus, came to the finding that the closure of these depots was real and genuine and that the suggestion of the appellants that only a device was adopted of carrying on the same business in a different manner had no force at all. If the same business had been continued, though under a different guise, the claim of the workmen not to be retrenched could possibly be considered by the Tribunal; but, on the finding that there was a genuine closure of the business that used to be carried on at the depots, no question could arise of the retrenchment being set aside by the Tribunal. The Tribunal could not ask the Company to re-employ or reinstate the workmen, because there was no business for which the workmen could be required. In these circumstances all that the workmen could claim was compensation for loss of their service and in that respect, as we have indicated above, the workmen have received adequate compensation.

Consequently, the appeal has no force and is dismissed; but we make no order as to costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. S. HEGDE AND A. N. RAY, JJ.

Kabul Singh

.. Appellant*

v.

Kundan Singh and others

.. Respondents.

Representation of the People Act (XLIII of 1951), sections 16, 30 and 62 (2) and Part III—Scope—Election petition—Electoral roll, challenge of—Voter, if incurs disqualification, by becoming a Government servant by the time the polling took place.

The mandate of sub-section (3) of section 23 of the Representation of the People Act, 1950 is plain and unambiguous. It prohibits inclusion of any name in the electoral roll after the prescribed date whether the application for inclusion was made before or after that date.

Can it be said that the vote of T.S. was void as by the time the polling took place, as he had become a Government servant?

Held that, section 62 (2) of the 1950 Act says that no person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Act. There is no provision in section 16 to his qualify him (T.S.) from voting. There is no other provision of law in the Act or in any other law disqualifying him from exercising his vote. The right to vote being purely a statutory right, the validity of any vote has to be examined on the basis of the provisions of the Act. Part III of the 1950 Act deals with the preparation of rolls in a constituency. Sections 14 to 24 of the 1950 Act are integrated provisions. They form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. It is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either before a civil Court or before a tribunal which considers the validity of any election. The finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election.

Appeal under section 116-A of the Representation of the People Act, 1951 from the Judgment and Order dated the 20th March, 1969 of the Punjab and Haryana High Court in Election Petition No. 1 of 1968.

Hardev Singh, Advocate, for Appellant.

R.K. Garg, S.C. Agarwala and D.P. Singh, Advocates of *M/s. Ramamurthi & Co.*, and *Miss Sumitra Chakravarti*, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Hegde, J.—This appeal under section 116-A of the Representation of the People Act, 1951 (to be shortly referred to hereinafter as the Act) is directed against the decision of the High Court of Punjab and Haryana in Election Petition No. 1 of 1968 on its file. In that election petition, Kundan Singh, the 1st respondent to this appeal challenged the validity of the returning Officer's declaration that the appellant has been duly elected from the Hoshiarpur Local Authorities Constituency to the Punjab Legislative Council in the election held in April, 1968. The High Court came to the conclusion that some of the votes polled in that election were invalid votes and if the valid votes alone are taken into consideration, as it should have been, then the 1st respondent is entitled to be declared elected. It accordingly set aside the declaration made in favour of the appellant and declared the 1st respondent as having been duly elected.

We may now briefly state the material facts. In March, 1968, the Hoshiarpur Local Authorities Constituency was called upon to elect one member to the Punjab Legislative Council. The election calendar was as follows :

- (1) The last date for filing nomination papers—12-3-1968.
- (2) Date of scrutiny of the nomination papers—13-3-1968.
- (3) The last date for withdrawal of candidatures—16-3-1968.
- (4) Date of polling—7-4-1968.
- (5) Date of counting and declaration of result—8-4-1968.

In that election, as many as five candidates contested. They are the appellant and the respondents herein. On 8th April, 1968, the returning officer after counting the votes cast declared the appellant to be the successful candidate as he had secured one vote more than the 1st respondent. The 1st respondent challenged that declaration in the aforementioned election petition on various grounds of which, at present, we are only concerned with one, *viz.*, that the vote of Hari Singh should have been held to be a void vote as his name was included in the electoral roll on 5th April, 1968, *i.e.*, just two days before the date of polling. In his turn the appellant filed a recriminatory petition contending *inter alia* that the vote of Tarsem Singh was void as by the time the polling took place, he had become a Government servant and the votes of two other persons namely Harjinder Singh and Balwant Singh were void as their names were included in the electoral roll after the last date for filing nominations for the election. Other grounds taken in the recriminatory petition are not relevant for our present purpose. They have not been pressed before us.

The election petition came up for trial before Mahajan, J. The learned Judge submitted the following question to a Full Bench for decision :

“Whether allegation in para. 4 (a) pertaining to the vote of Hari Singh is correct and the vote was void and was polled in favour of respondent No. 1 in violation of the Rules and has materially affected the result of the election of respondent No. 1”.

The Full Bench by majority came to the conclusion that the vote of Hari Singh was void as his name was included in the electoral roll of the constituency after the last date for making nominations for the election in that constituency. Thereafter the case was sent back to Mahajan, J., for deciding the issues left undecided. On the basis of the opinion expressed by the Full Bench, the learned Judge came to the conclusion that the votes of Hari Singh, Harjinder Singh and Balwant Singh were void votes. Consequently he recounted the votes validly cast and came to the conclusion that the 1st respondent had been duly elected. He gave a declaration to that effect.

As seen earlier, the main contention in this appeal relates to the true effect of sub-section (3) of section 23 of the Representation of People Act, 1950 (to be hereinafter referred to as "the 1950 Act") which prohibits the deletion of any entry or inclusion of any name in the electoral roll of a constituency after the last date for making nominations for an election in that constituency and before the completion of that election. We have considered the scope of that provision in *Baidyarath Panjari v. Siteram Mehta and others*¹, in which we have delivered judgment just now. In view of that decision, the view taken by the majority of the Full Bench must be held to be correct.

Evidently under an erroneous impression that Harjinder Singh and Balwant Singh had voted against him, the appellant had contended in his recriminatory petition that their votes were invalid. But on scrutiny it was found that one of them had given his first preference to him. Now it is contended on his behalf that as the 1st respondent had not challenged the validity of those votes, the trial Court could not have excluded from consideration the vote cast in his favour by one of those persons. This is an untenable contention. The votes of Harjinder Singh and Balwant Singh have been rejected on the ground that their names were included in the electoral roll in defiance of the mandate given under section 23 (3) of the 1950 Act. What applies to Hari Singh equally applies to Harjinder Singh and Balwant Singh. The fact that the 1st respondent did not challenge the validity of those votes is immaterial in the circumstances of this case. The election petition and recriminatory petition were parts of one enquiry. As the validity of these three votes had come up for consideration and as it has been held that those votes are void votes, it necessarily follows that those votes must be excluded from consideration in determining the result of the election.

Another contention urged by Shri Hardev Singh is that only the votes of those electors who had applied for the inclusion of their names in the electoral roll after the period mentioned in section 23 (3) of the 1950 Act can be held to be void; as the person who cast his vote in favour of the appellant had applied for inclusion of his name some days before the last date for making nominations, the inclusion of his name in the roll after that date will not make his vote void. In support of his contention, he placed reliance on the decision of the Patna High Court in *Ramswaroop Prasad Tadas v. Jaga Kishore Prasad Narain Singh*². The ratio of that decision has no application to the facts of the present case. That decision was rendered before sub-section (3) of section 23 of the 1950 Act was incorporated into the 1950 Act. The mandate of that provision is plain and unambiguous. It prohibits inclusion of any name in the electoral roll after the prescribed date whether the application for inclusion was made before or after that date.

The only other contention that remains to be considered is that the High Court should have held that the vote of Tarsem Singh is invalid. It is not disputed that Tarsem Singh's name finds place in the electoral roll of the constituency but the argument was that as he had taken up Government service subsequent to the inclusion of his name in the electoral roll, he became disqualified to be a member of any local board and therefore he was not entitled to vote in the election. This contention cannot be upheld. Section 62 of the Act provides thus :

"62. (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950.

1. A.I.R. 1970 S.C. 314.

2. (1958-59) 17 F.L.R. 110.

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police :

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

In view of those provisions read with section 23 (3) of the 1950 Act every person who is for the time being entered in the electoral roll of a constituency as it stood on the last date for making nominations for an election in that constituency is entitled to vote unless it is shown that he is prohibited by any of the provisions of the Act from exercising his vote. The prohibitions contained in sub-sections 3, 4 and 5 of section 62 of the Act do not apply to the case of Tarsem Singh. Therefore we have to see whether the prohibition contained in sub-section (2) applies to his case. That sub-section says that no person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the 1950 Act.

This takes us to section 16 of the 1950 Act. It reads thus :

" 16 (1) A person shall be disqualified for registration in an electoral roll if he—

(a) is not a citizen of India ; or

(b) is of unsound mind and stands so declared by a competent Court ; or

(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included :

Provided that the name of any person struck off the electoral roll of a constituency by reason of a disqualification under clause (c) of sub-section (1) shall forthwith be re-instated in that roll if such disqualification is, during the period such roll is in force, removed under any law authorizing such removal".

It is not the case of the appellant that Tarsem Singh had incurred any of the disqualifications mentioned therein. No other provision of law in the Act or in any other law was brought to our notice disqualifying him from exercising his vote. The right to vote being purely a statutory right, the validity of any vote has to be examined on the basis of the provisions of the Act. We cannot travel outside those provisions to find out whether a particular vote was a valid vote or not. In view of section 30 of the 1950 Act, civil Courts have no jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a constituency or to question the illegality of the action taken by or under the authority of the electoral registration officer or any decision given by any authority appointed under that Act for the revision of any such roll. Part III of the 1950 Act deals with the preparation of rolls in a constituency. The provisions contained therein prescribe the qualifications for being registered as a voter (section 19), disqualifications which disentitle a person from being registered as a voter (section 16), revision of the rolls (section 21), correction of entries in the electoral rolls (section 22) inclusion of the names in the electoral rolls (section 23), appeals

against orders passed by the concerned authorities under sections 22 and 23 (section 24). Sections 14 to 24 of the 1950 Act are integrated provisions. They form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. It is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either before a civil Court or before a tribunal which considers the validity of any election. In *B. M. Ramaswamy v. B. M. Krishnamurthy and others*¹, this Court came to the conclusion that the finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election.

For the reasons mentioned above this appeal fails and the same is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

.. Appellants*

Malkiat Singh and another

v.

.. Respondent.

State of Punjab

Essential Commodities Act (X of 1955), section 8—“Attempt to contravene...any order made under section 3”—What is—Distinction between attempt and preparation.

As a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand an attempt to commit an offence is a direct movement towards the commission after preparations are made. The test for determining whether an act constitutes an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless.

On the facts found in the present case, there was no attempt on the part of the appellants to commit the offence of export of paddy contrary to the provisions of Punjab Paddy (Export Control) Order, 1959. It was merely a preparation. It is true that the appellants had no permit to carry the paddy, which they had on the lorry, outside the State limits, but it is quite possible that they might have changed their mind before crossing the State border.

Appeal by Special Leave from the Judgment and Order dated the 4th November, 1965 of the Punjab High Court in Criminal Revision No. 263 of 1965 and Criminal Misc. No. 224 of 1965.

Pritam Singh Safer, for Appellants.

Harbans Singh and R. N. Sachthy, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, from the judgment of the Punjab High Court, dated 4th November, 1965 by which Criminal Revision Petition No. 263 of 1965 and Criminal Miscellaneous case No. 224 of 1965 were dismissed.

The case of the prosecution is that on 19th October, 1961 Sub-Inspector, Banarsi Lal of Food and Supplies Department was present at Samalkha Barrier along with Head Constable Badan Singh and others. The appellant Malkiat Singh then came driving truck No. PNU 967. Babu Singh was the cleaner of that truck. The truck carried 75 bags of paddy weighing about 140 maunds. As the export of paddy was contrary to law, the Sub-Inspector took into possession the truck as also the bags

1. (1964) 2 S.C.J. 268; (1963) 3 S.C.R. 479.

* Crl. A. No. 186 of 1966.

8th November, 1968.

of paddy. It is alleged that the consignment of paddy was booked from Malerkotla on 18th October, 1961 by Qimat Rai on behalf of Messrs. Sawan Ram Chiranji Lal. The consignee of the paddy was Messrs. Devi Dayal Brij Lal of Delhi. It is alleged that Qimat Rai also gave a letter, Exhibit P-3 addressed to the consignee, Sawan Ram and Chiranji Lal were partners of Messrs. Sawan Ram Chiranji Lal and they were also prosecuted. In the trial Court Malkiat Singh, admitted that he was driving the truck which was loaded with 75 bags of paddy and the truck was intercepted at Samalkha Barrier. According to Malkiat Singh, he was given the paddy by the Transport Company at Malerkotla for being transported to Delhi. The Transport Company also gave him a letter assuring him that it was an authority for transporting the paddy. But it later transpired that it was a personal letter from Qimat Rai to the Commission agents at Delhi and that it was not a letter of authority. Babu Singh admitted that he was sitting in the truck as a cleaner. The trial Court convicted all the accused persons, but on appeal the Additional Sessions Judge set aside the conviction of Sawan Ram and Chiranji Lal and affirmed the conviction of Qimat Rai and of the two appellants. The appellants took the matter in revision to the High Court but the revision petition was dismissed on 4th November, 1964.

It is necessary at this stage to reproduce the relevant provisions of the Essential Commodities Act, 1955 (X of 1955). Section 3 (1) is to the following effect:

“3. (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.”

Section 7 States :

“7. (1) If any person contravenes any order made under section 3—

(a) he shall be punishable—

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of the section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which may extend to three years and shall also be liable to fine :

Provided that if the Court is of opinion that a sentence of fine only will meet the ends of justice, it may, for reasons to be recorded, refrain from imposing a sentence of imprisonment ; and

(b) any property in respect of which the order has been contravened or such part thereof as the Court may deem fit including, in the case of an order relating to foodgrains, any packages, coverings or receptacles in which they are found and any animal, vehicle, vessel or other conveyance used in carrying foodgrains shall be forfeited to the Government :

Provided that if the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property or any packages, coverings or receptacles or any animal, vehicle, vessel or other conveyance, it may, for reason to be recorded, refrain from doing so.

(2) If any person to whom a direction is given under clause (b) of sub-section (4) of section 3 fails to comply with the direction he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.”

By section 2 of Punjab Act XXXIV of 1950 the Punjab Legislature added a new section, section 7-A in the Central Act No. X of 1955 which reads as follows :

“Forfeiture of certain property used in the commission of the offence.—Whenever any offence relating to foodstuffs which is punishable under section 7 has been committed, the Court shall direct that all the packages, coverings or receptacles in which any property liable to be forfeited under the said section is found and

all the animals, vehicles, vessels or other conveyances used in carrying the said property shall be forfeited to the Government."

On 3rd January, 1959 the Central Government promulgated the Punjab Paddy (Export Control) Order, 1959 in exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955. Para 2 of this Order states :

"2. *Definitions*.—In this Order, unless the context otherwise requires,—

(a) 'export' means to take or cause to be taken out of any place within the State of Punjab to any place outside the State.

(b) 'paddy' means rice in husk ;

(c) 'State Government' means the Government of the State of Punjab."

Para. 3 of the Order provides as follows :

"*Restrictions on export of paddy*.—No person shall export or attempt to export or abet the export of paddy except under and in accordance with a permit issued by the State Government or any officer authorised by the State Government in this behalf :

Provided that nothing contained herein shall apply to the export of paddy,—

(i) not exceeding five seers in weight by a *bona fide* traveller as part of his luggage ; or

(ii) on Government account ; or

(iii) under and in accordance with Military Credit Notes."

The question to be considered in this appeal is whether upon the facts found by the lower Courts any offence has been committed by the appellants. It is not disputed that the truck carrying the paddy was stopped at Samalkha Barrier which is 32 miles from Delhi. It is also not disputed that the Delhi-Punjab boundary was, at the relevant point of time, at about the 18th mile from Delhi. It is therefore evident that there has been no export of paddy outside the State of Punjab in this case. The truck with the loaded paddy was seized at Samalkha well inside the Punjab boundary. It follows therefore that there was no export of paddy within the meaning of Para 2 (a) of the Punjab Paddy (Export Control) Order, 1959. It was however argued on behalf of the respondent that there was an attempt on the part of the appellants to transport paddy to Delhi, and so there was an attempt to commit the offence of export. In our opinion, there is no substance in this argument. On the facts found, there was no attempt on the part of the appellants to commit the offence of export. It was merely a preparation on the part of the appellant and as a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the *actus reus* of a criminal attempt. The sufficiency of the *actus reus* is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it. Sir James Stephen, in his Digest of Criminal Law, Article 50, defines an attempt as follows :

"an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The

point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case."

The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey. Section 8 of the Essential Commodities Act States that "any person who attempts to contravene or abets a contravention of, any order made under section 3 shall be deemed to have contravened that order." But there is no provision in the Act which makes a preparation to commit an offence punishable. It follows therefore that the appellants should not have been convicted under section 7 of the Essential Commodities Act.

For these reasons we allow this appeal and set aside the conviction of the appellants under section 7 of the Essential Commodities Act and the sentence of fine imposed upon each of them. We also set aside the conviction and sentence of Qimat Rai and the order of forfeiture passed by the trial Magistrate with regard to 75 bags of paddy and truck No. PNU 967. The fines, if paid by any of the convicted persons must be refunded.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A.N. GROVER, JJ.

Smt. Sitabai and another

.. *Appellants**

v.

Ramchandra

.. *Respondent.*

Hindu Law—Hindu undivided family—Temporary reduction of the coparcenary unit to a single individual—Its effect on joint property.

Hindu Adoptions and Maintenance Act, (LXXVIII of 1956), sections 11, 12 and 14—Interpretation—Widow adopting a child—Adopted child, if becomes the son of the deceased husband—Ties of the child in the family of his birth, if become completely severed.

The property which was the joint family property of the Hindu undivided family did not cease to be so because of the "temporary reduction of the coparcenary unit to a single individual". The character of the property, viz., that it was the joint property of a Hindu undivided family, remained the same.

It is clear on a reading of the main part of section 12 and sub-section (vi) of section 11 of the Act (LXXVIII of 1956) that the effect of adoption under the Act is that it brings about severance of all ties of the child given in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in section 14 (1) namely where a wife is living, the adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the child. When a widow or an unmarried woman

adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The scheme of sections 11 and 12, therefore, is that in the case of adoption by an widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with the child through that deceased husband of the widow. It is true that section 14 does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of sections 12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that we find in sub-section (4) of section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the "step-father" of the adopted child. It is not correct to say that the rights of the Inamdar's tenants were not heritable under the Madhya Bharat Land Revenue and Tenancy Act, 1950. Because, section 86 which contains provisions with regard to mutation of names, applies to all tenants and contemplates heritability and transferability of the rights of a tenant or sub-tenant.

Appeal by Special Leave from the Judgment and Decree dated the 7th September, 1965 of the Madhya Pradesh High Court, Indore Bench in Second Appeal No. 275 of 1962.

M. C. Chagla, Senior Advocate (*A. K. Nag*, Advocate, with him), for Appellants.

K. A. Chitale and *R. Gopalkrishnan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by Special Leave from the judgment of the Madhya Pradesh High Court dated 7th September, 1965 in Second Appeal No. 275 of 1962.

Dulichand and Bhagirath were brothers and the properties concerned are, according to the written statement of the defendant himself, ancestral. Plaintiff Sitabai is the widow of Bhagirath, who predeceased Dulichand, his elder brother sometime in 1930. It is the admitted case of both the parties that after Bhagirath died, the plaintiff Sitabai was living with Dulichand as a result of which connection an illegitimate child defendant Ramchandra was born in 1935. Dulichand died on 13th March, 1958. Sometime before his death Sitabai adopted plaintiff No. 2 Suresh Chandra and an adoption deed was executed on 4th March, 1958. After the death of Dulichand, Ramchandra took possession of the joint family properties. The plaintiff therefore brought the present suit for ejectment of the defendant Ramchandra, the illegitimate son of Dulichand from the disputed properties. The suit was contested by the defendant on the ground that Dulichand had in his lifetime surrendered the lands to the Jagirdar who made re-settlement of the same with the defendant. As regards the house the contention of the defendant was that Dulichand had executed a will before his death making a bequest of his house entirely to him. The trial Court decided all the issues in favour of the plaintiff and granted the plaintiffs a decree for possession with regard to the land and the house. The defendant took the matter in appeal to the District Judge who modified the decree. The District Judge took the view that the will executed by Dulichand was valid so far as half of his share in the house was concerned and, therefore, defendant was entitled to claim half the share of the house in dispute. The defendant preferred a second appeal before the Madhya Pradesh High Court which reversed the decree of the lower Courts and held that the plaintiff was not entitled to any relief and the suit should be dismissed in its entirety. The High Court held that plaintiff No. 2 became the son of plaintiff No. 1 in 1958 from the date of adoption and did not obtain any coparcenary interest in the joint family properties. The High Court thought that on the date of adoption Dulichand was the sole coparcener and there was nobody else to take a share of his property and plaintiff No. 2 had no concern with the coparcenary property in the hands of Dulichand.

The first question to be considered in this appeal is whether the High Court was right in holding that plaintiff No. 2 Suresh Chandra at the time of his adoption by plaintiff No. 1 did not become a coparcener of Dulichand in the joint family properties. It is the admitted case of both the parties that the properties consisted of agricultural land and a house jointly held by Bhagirath and Dulichand. After the death of Bhagirath, Dulichand became the sole surviving coparcener of the joint family. At the time when plaintiff No. 2 Suresh Chandra was adopted the joint family still continued to exist and the disputed properties retained their character of coparcenary properties. It has been pointed out in *Gowli Buddanna v. Commissioner of Income-tax, Mysore*¹, that under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and that the property of a joint family did not cease to belong to a joint family merely because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess. In that case, one Buddappa, his wife, his two unmarried daughters and his unmarried son, Buddanna, were members of a Hindu undivided family. Buddappa died and after his death the question arose whether the income of the properties held by Buddanna as the sole surviving coparcener was assessable as the individual income of Buddanna or as the income of the Hindu undivided family. It was held by this Court that since the property which came into the hands of Buddanna as the sole surviving coparcener was originally joint family property, it did not cease to belong to the joint family and income from it was assessable in the hands of Buddanna as income of the Hindu undivided family. As pointed out by the Judicial Committee in *Attorney-General of Ceylon v. A.R. Arunachalam Chettiar*², it is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family. In that case one Arunachalam Chettiar and his son constituted a joint family governed by the Mitakshara school of Hindu law. The father and son were domiciled in India and had trading and other interests in India, Ceylon and Far Eastern countries. The undivided son died in 1934 and Arunachalam became the sole surviving coparcener in the Hindu undivided family to which a number of female members belonged. Arunachalam died in 1938, shortly after the Estate Ordinance No. 1 of 1938 came into operation in Ceylon. By section 73 of the Ordinance it was provided that property passing on the death of a member of the Hindu undivided family was exempt from payment of estate duty. On a claim to estate duty in respect of Arunachalam's estate in Ceylon, the Judicial Committee held that Arunachalam was at his death a member of the Hindu undivided family, the same undivided family of which his son, when alive, was a member and of which the continuity was preserved after Arunachalam's death by adoption made by the widows of the family and since the undivided family continued to persist, the property in the hands of Arunachalam as a single coparcener was the property of the Hindu undivided family. The Judicial Committee observe at page 543 of the report :

".....though it may be correct to speak of him as the 'owner', yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality ; it is such, too, that female members of the family (whose members may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property. Once again their Lordships quote from the judgment of Gratiaen, J : "To my mind it would make a mockery of the undivided family system if this temporary reduction of the coparcenary unit to a single individual were to convert what was previously joint property belonging to an undivided family into the separate property of the surviving coparcener." To this it may be added that

1. (1966) 1 S.C.J. 686 : (1966) 1 I.T.J. 576 : 2. L.R. (1957) A.C. 540.
(1966) 60 I.T.R. 293.

it would not appear reasonable to impart to the Legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners."

The basis of the decision was that the property which was the joint family property of the Hindu undivided family did not cease to be so because of the "temporary reduction of the coparcenary unit to a single individual". The character of the property, viz., that it was the joint property of a Hindu undivided family, remained the same. Applying the principle to the present case, after the death of Bhagirath the joint family property continued to retain its character in the hands of Dulichand as the widow of Bhagirath was still alive and continued to enjoy the right of maintenance out of the joint family properties.

The question next arises whether Suresh Chandra, plaintiff No. 2, when he was adopted by Bhagirath's widow he became a coparcener of Dulichand in the Hindu joint family properties. The High Court has taken the view that Suresh Chandra became the son of plaintiff No. 1 with effect from 1958 and plaintiff No. 2 would not become the adopted son of Bhagirath in view of the provisions of the Hindu Adoptions and Maintenance Act, 1956 (LXXVIII of 1956). It was argued on behalf of the appellant that the High Court was in error in holding that the necessary consequence of a widow adopting a son under the provisions of Act LXXVIII of 1956 was that the adoptee would be the adopted son of the widow and not of her deceased husband. In our view the argument put forward on behalf of the appellant is well-founded and must be accepted as correct. Section 5 (1) of Act LXXVIII of 1956 states :

"(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this chapter."

Section 6 deals with the requisites of a valid adoption and provides:

"No adoption shall be valid unless—

(i) the person adopting has the capacity, and also the right, to take in adoption ;

(ii) the person giving in adoption has the capacity to do so ;

(iii) the person adopted is capable of being taken in adoption ; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter."

Sections 7 and 8 relate to the capacity of a male Hindu and a female Hindu to take in adoption. Under section 7 any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. If he is married, he requires the consent of his wife in connection with the adoption. A person having more than one wife is required to have the consent of all his wives. Under section 8, any female Hindu, who is of sound mind and not a minor is stated to have capacity to take a son or a daughter in adoption. The language of this section shows that all females except a wife have capacity to adopt a son or a daughter. Thus, an unmarried female or a divorcee or a widow has the legal capacity to take a son or a daughter in adoption. Section 11 relates to "other conditions for a valid adoption" Clause (vi) of section 11 states :

"(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption :"

Section 12 enacts :

"An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family ;

Provided that—

- | | | | | | |
|-----|---|---|---|---|---|
| (a) | * | * | * | * | * |
| (b) | * | * | * | * | * |

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

Section 14 provides :

"(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts any child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child."

It is clear on a reading of the main part of section 12 and sub-section (1) of section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in section 14 (1) namely where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The scheme of sections 11 and 12, therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with the child through that deceased husband of the widow. For instance, the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and in this way, the adopted son would become a member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. It is true that section 14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of sections 21 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that we find in sub-section (4) of section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the "step-father" of the adopted child. The true affect and interpretation of sections 11 and 12 of Act No. LXXVIII of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses. This view is borne out by the decision of the Bombay High Court in

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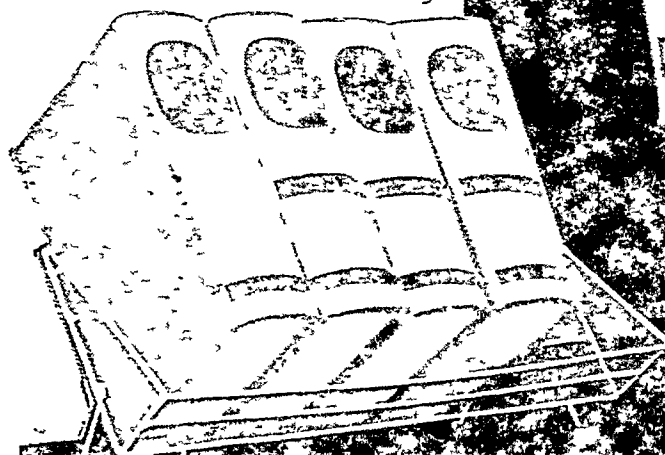
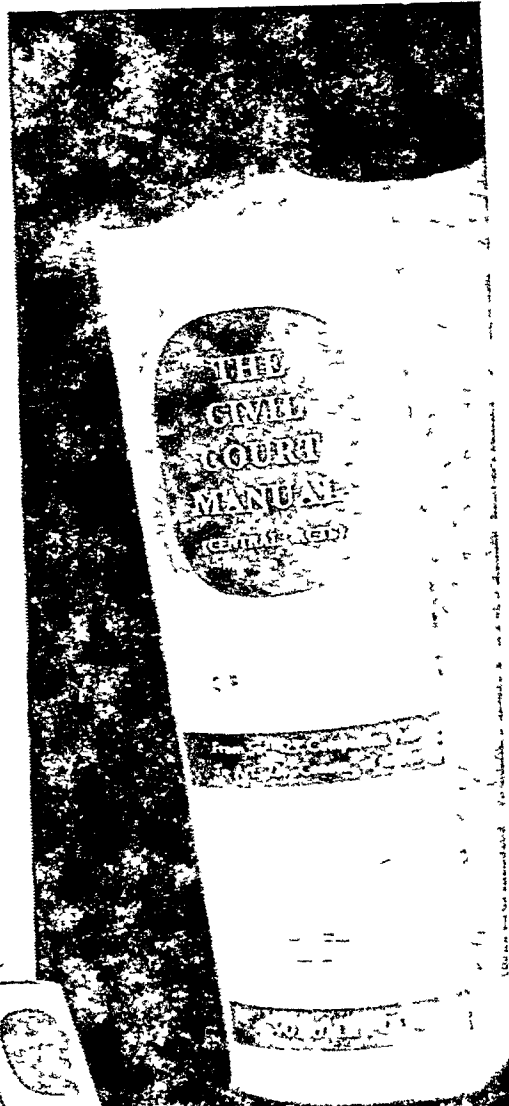
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In support of his contention that the present suit is not maintainable, the appellant relies on the following observations of Hegde, J.—

“When the Commissioner sets aside the order passed by the District Magistrate granting permission to file a suit for ejecting a tenant, the order of the Commissioner prevails. If he cancels the permission granted by the District Magistrate there is no effective permission left and the suit instituted by the plaintiff without awaiting his decision must be treated as one filed without any valid permission by the District Magistrate.”

Having regard to these observations the present suit though validly instituted after obtaining the permission under section 3 (1) became incompetent when the permission was revoked by the Commissioner under section 3 (3). But the order under section 3 (3) itself was set aside by the State Government under section 7-F during the pendency of the suit. The question is what is the effect of this order under section 7-F. Now, section 3 (4) provides that the order of the Commissioner under section 3 (3) is subject to an order passed by the State Government under section 7-F. If the State Government acting under section 7-F sets aside the order of the Commissioner revoking the permission, the order under section 3 (1) granting permission is revived. The result is that there is an effective permission to institute the suit under section 3 (1) and the suit is validly instituted.

In *Bhagwan Das's case*¹, the suit was validly instituted after obtaining permission from the Commissioner under section 3 (3). The State Government could not render such a suit incompetent by any order under section 7-F. In the present case the suit was validly instituted after obtaining permission from the Rent Control and Eviction Officer under section 3 (1). The effect of the order of the Commissioner revoking the permission was that the suit became incompetent. The State Government acting under section 7-F had power to revise and set aside the Commissioner's order and restore the permission granted under section 3 (1) so as to make the suit competent.

The order of the State Government after stating that in the interest of justice the house should be available to the landlord for his use, set aside the Commissioner's order under section 3 (3). The result was that the order of the Rent Control and Eviction Officer passed under section 3 (1) stood restored. The further direction in the order that the landlord “is advised to file a suit for eviction from the house in dispute against the opposite party in a civil Court under section 3 of the Act, which will be applicable four months after the date of the order” really means that the permission under section 3 (1) would become effective on the expiry of 4 months. The landlord had thus an effective permission to institute the suit under section 3 (1) on the expiry of four months from 30th March, 1963, that is to say, as from 30th July, 1963. The decree in the suit was passed on 2nd March, 1964. On that date the landlord had a valid permission to institute the suit. The suit was therefore maintainable.

In the result, the appeal is dismissed. There will no order as to costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—G.K. MITTER AND K.S. HEGDE, JJ.

Virji Ram Sutaria

.. Appellant*

v.

Nathalal Premji Bhanvadia and others

.. Respondents.

Constitution of India (1950) Article 173—Scope—Requirement as to subscription to an oath or affirmation in the prescribed form—Substantial compliance with—Sufficiency.

The essential requirement of Article 173 (a) of the Constitution as far as material for the present case, is that in order to be qualified to be chosen to fill a seat in the Legislature of a State a person (i) must be a citizen of India and (ii) must make and subscribe before a person duly authorised an oath or affirmation according to the form set out for the purpose in the Third Schedule.

The real purpose of the oath is that the person concerned must give an undertaking to bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India.

Non-compliance with the provisions of a statute or Constitution will not necessarily render a proceeding invalid if by considering its nature, its design and the consequences which follow from its non-observance one is not led to the conclusion that the Legislature or the Constitution-makers intended that there should be no departure from the strict words used.

In the present case, the essential requirement of Article 173 read with Form VII-A was that the person taking the oath or making the affirmation would bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India. The words which precede this portion are merely descriptive of the person and of his nomination as a candidate. It is reasonable to think that a mere mis-print in the form of the oath or a mere inaccuracy in rendering the expression "Legislative Assembly" in Gujarati would not be fatal to the election of candidate to Legislative Assembly, if otherwise valid.

Appeal under section 116-A of the Representation of the People Act, 1951 from the Judgment and Order dated the 17th and 18th January, 1968 of the Gujarat High Court in Election Petition No. 2 of 1967.

Mrs. Shyamla Pappu, M.K. Ramamurthi and Vineet Kumar, Advocates for Appellant.

Bishan Narain, Senior Advocate (D.N. Misra, Advocate for Messrs. J.B. Dadachanji and Co., with him) for Respondent No. 1.

The Judgment of the Court was delivered by

Mitter, J.—The only question raised in this appeal from a judgment and order of the High Court of Gujarat dismissing an election petition is, whether the returned candidate was not qualified to be chosen to fill a seat of the State Legislative Assembly inasmuch as he did not subscribe to an oath or affirmation according to the form set out for the purpose in the Third Schedule to the Constitution as prescribed under Article 173 thereof.

The relevant facts may be stated as follows : The notification of the Governor of Gujarat under section 15 (2) of the Representation of the People Act of 1951 for the purpose of election to the Gujarat State Legislative Assembly was issued on 13th January, 1967. Nomination papers were filed by several persons including the returned candidate and the scrutiny thereof was made on 21st January, 1967. The poll took place on 18th February, 1967 and the result declared on 27th February, 1967 showing the returned candidate winning comfortably by a margin exceeding 3,800 votes over his nearest rival. One of the grounds taken in the election petition was that immediately after the scrutiny of the nomination papers, the third respondent to

the election petition has filed a written objection before the Returning Officer contending that the returned candidate had not taken oath properly and on the same ground he along with respondents 2 and 4 were not qualified to be chosen and their nomination papers should be rejected. This contention was turned down by the Returning Officer and was also negatived by learned Judge who heard the election petition and in this appeal the unsuccessful petitioner has only pressed this ground.

The relevant portion of Article 173 of the Constitution reads as follows :—

“ A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he.....

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule ;

(b) and (c) * * * *

The Third Schedule contains various forms of oath or affirmation. Form VII-A, the relevant form for the present purpose is, as follows :

“ Form of oath or affirmation to be made by a candidate for election to the Legislature of State :—

“ I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God that I will solemnly affirm bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India.”

The returned candidate had filed three nomination papers with three different proposers on 20th January, 1967. Each of the three nomination papers clearly mentioned that he was a candidate for election to fill a seat in the Vidhan Sabha for the Gujarat State, i.e., Legislative Assembly of the State. The nomination paper of the returned candidate contained a form of oath or affirmation which was both in Gujarati as well as in English. The English form followed word for word Form No. VII as set out in the Third Schedule, to the Constitution and the Gujarati form purported to set out the Gujarati translation of the form of oath or affirmation. The relevant difference for the purpose of this appeal between the two forms lay in this that the words “ Legislative Assembly ” in the form in English were translated in Gujarati form as “ Rajya Sabha ” and the appellant’s contention before the High Court and before us rested solely on the use of this word which according to learned Counsel went to show that the oath that was taken was for the purposes of filling a seat not in the Legislative Assembly of the State but in the Legislative Council of the State. At the hearing of the petition before the High Court the returned candidate gave evidence to the effect that he had taken the oath not according to the words in the Gujarati form but according to the translation of the words in the English form rendered by the Returning Officer. The Returning Officer was merely called to produce some documents but he was not put on oath nor was he asked any question to corroborate the testimony of the returned candidate. The High Court did not accept this testimony and we see no reason to come to any different conclusion.

We must therefore proceed on the basis that the returned candidate took the oath according to the words of the Gujarati form. It was argued before us that ‘ Rajya Sabha ’ means the Legislative Council of the State and not the Legislative Assembly of the State and consequently the oath taken did not fulfil the requirements of Article 173 (c) of the Constitution. We were not referred to any official translation of the expression “ Legislative Assembly ” in Gujarati. The word “ sabha ” means a gathering or a meeting or an assembly of persons for a definite purpose. Giving the word “ sabha ” the said meaning in the expression ‘ Rajya Sabha ’ it would not be possible to hold that the oath was not in compliance with the form prescribed in Article 173 (c) of the Constitution. No doubt by common parlance in many of

the States in Northern India the expression 'Rajya Sabha' has come to mean the Legislative Council of a State while the State Legislative Assembly is generally known as Rajya Vidhan Sabha. But in the absence of any authoritative translation of the expression "State Legislative Assembly" in Gujarati we cannot guide ourselves by the popular rendering of the expression. In this connection it is necessary to mention that in the State of Gujarat there is no Legislative Council of the State. The Legislature consists of one house only, namely, the State Legislative Assembly. There could therefore be no misapprehension either in the person taking the oath or in the Returning Officer when he was accepting the nomination paper with the oath in Gujarati form that the candidate who afterwards won the election was being nominated as a candidate to fill a seat in the Legislative Council of the State and not in the Legislative Assembly.

The High Court held that there was substantial compliance with the requirements of Article 173 (a) of the Constitution in the circumstances surrounding the making and the subscribing of the oath even if the compliance was not literal. We are in full agreement with that view. The essential requirement of Article 173 (a) of the Constitution for our present purpose is that in order to be qualified to be chosen to fill a seat in the Legislature of a State, a person (i) must be a citizen of India and (ii) must make and subscribe before a person duly authorised an oath or affirmation according to the form set out for the purpose in the Third Schedule. Form VII-A contains the following essential requirements :

(1) The person taking the oath or making the affirmation must have been nominated as a candidate to fill a seat in the Legislative Assembly or Legislative Council ;

(2) that he will bear true faith and allegiance to the Constitution of India as by law established ; and

(3) that he will uphold the sovereignty and integrity of India.

The vital requirements, therefore, are (a) the securing of a nomination, and (b) declaration of bearing true faith and allegiance to the Constitution and promise to uphold the sovereignty and integrity of India. The securing of a nomination precedes the making of a declaration. The real purpose of the oath is that the person concerned must give an undertaking to bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India. This is brought out by the Statement of objects and reasons to the Bill No. 1 of 1963 seeking to amend Articles 19, 84 and 173 of the Constitution. The statement of objects and reasons notes the recommendation of the Committee on National Integration and Regionalism and its view "that every candidate for the membership of a State Legislature or Parliament and every aspirant to, and incumbent of, public office should pledge himself to uphold the Constitution and to preserve the integrity and sovereignty of the Union and that forms of oath in the Third Schedule to the Constitution should be suitably amended for the purpose". The Bill proposed to give effect to the recommendation by amending clauses (2), (3) and (4) of Article 19 as also Articles 84 and 173 and the forms of oath in the Third Schedule. The words in the form of oath in Form VII-A,

"I will uphold the sovereignty and integrity of India"

were inserted by the Constitution (Fifteenth Amendment) Act, 1963 giving effect to the view of the said Committee.

As the essential requirements of the oath given in the form in the Third Schedule were not deviated from in the Gujarati form used in this case, we cannot hold that the oath subscribed in this case was not in compliance with Article 173 merely because of the popular meaning of the expression 'Rajya Sabha'.

The real question is, whether the deviation, if any, from the form of oath in English as contained in the Third Schedule is so vital as to lead to the conclusion that no proper oath was taken by the returned candidate. There have been many instances where this Court has held that a substantial compliance with the statute

or with the rules framed thereunder is enough even if there be no literal compliance and in our view, there is no reason to adopt a different line of reasoning in the construction and interpretation of the Constitution. In all such cases, one must consider the real purpose of the provision whether statutory or constitutional, to find out whether notwithstanding the apparently mandatory form of the words used any deviation therefrom was to be struck down.

One of the questions which came up for consideration in *Kamaraja Nadar v. Kurju Tharar*¹, was whether the election petition ought to have been rejected merely because the deposit provided for under section 117 of the Representation of the People Act was made in favour of the Election Commission and not in favour of the Secretary to the Election Commission as provided for in the said section. Turning down the argument advanced for rejecting the election petition it was observed :

“What is of the essence of the provision contained in section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law.....”

In *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore*², one of the points urged against the petitioner was that there was non-compliance with the provisions of section 81 (3) of the Representation of the People Act because the copy of the election petition served on the appellant was not a true copy of the original filed before the Election Commission. Rejecting the said contention it was said :

“.....the word “copy” in sub-section (3) of section 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it.”

To the similar effect is the judgment in *Ch. Subbarao v. Member, Election Tribunal Hyderabad*³.

In *State of U.P. v. Manbodhan Lal Srivastava*⁴, one of the contentions urged on behalf of the respondent who was reduced in rank after departmental enquiry, was that the order of the Government was invalid for non-compliance with the provisions of Article 320 (3) (c) of the Constitution which read literally made it obligatory for the Government of India or a Government of a State to consult the Union Public Service Commission or the State Public Service Commission on all disciplinary matters affecting a person in service of the State. In turning down the above it was observed by this Court :

“.....the use of the word “shall” in statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid.”

In *State of Punjab v. Satya Pal Dang and State of Punjab v. Dr. Baldev Parkash and others*⁵, one of the points canvassed before this Court was, whether the certificate by the Deputy Speaker on a Money Bill was sufficient compliance with Article 199 (4) of the Constitution which provides that :

“There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under Article 108, and when it is presented to the Governor for assent under Article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.”

It was contended that the provisions of the above clause were mandatory and only the Speaker of the Legislative Assembly could sign the Money Bill. It was pointed

1. (1959) S.C.R. 583 : (1958) S.C.J. 680 : (1958) 2 A.W.R. (S.C.) 52 : (1958) 2 M.L.J. (S.C.) 52.

2. (1964) 3 S.C.R. 573 : (1965) 1 S.C.J. 153.

3. (1964) 6 S.C.R. 213.

4. (1958) S.C.R. 533 : (1958) S.C.J. 150 : (1958) M.L.J. (Ch.) 85.

5. (1969) 2 S.C.J. 409 : A.I.R. 1969 S.C. 903.

out by this Court that the Speaker was not present when the Bills were passed and under Article 180 (2) the Deputy Speaker could act as the Speaker when the latter was absent. This Court proceeded to examine the several tests to determine when the provisions of a statute might be treated as mandatory and when not, and emphasis was laid on one of the distinctions, namely, in cases where strict compliance was necessary to be a condition precedent to the validity of the act itself, the neglect to perform it as indicated was fatal.

The above cases are sufficient to show that non-compliance with the provisions of a statute or Constitution will not necessarily render a proceeding invalid if by considering its nature, its design and the consequences which follow from its non-observance one is not led to the conclusion that the Legislature or the Constitution-makers intended that there should be no departure from the strict words used.

In this case, as we have already noted, the essential requirement of Article 173 read with Form VII-A was that the person taking the oath or making the affirmation would bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India. The words which precede this portion are merely descriptive of the person and of his nomination as a candidate. It is reasonable to think that a mere mis-print in the form of the oath or a mere inaccuracy in rendering the expression "Legislative Assembly" in Gujarati would not be fatal to the election of candidate, if otherwise valid.

In the result, the appeal fails and is dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K.S. HEGDE AND A.N. RAY, JJ.

Baidyanath Panjira

.. *Appellant**

v.

Sita Ram Mah'ao and others

.. *Respondents.*

Representation of the People Act (XLIII of 1950), section 23 (3)—Amendment of the electoral roll after the last date for making the nomination was over—Validity.

Representation of the People Act (XLIII of 1951), section 62 (1)—Scope.

Section 23 (3) of the Representation of the People Act, 1950 gives a mandate to the electoral registration officers not to amend, transpose or delete any entry in the electoral roll of a constituency after the last date for making nominations for election in that constituency and before the completion of that election. The legislative mandate like the one embodied in section 23 (3) must be considered as mandatory not merely because of the language employed in that sub-section but also in view of the purpose behind the provision in question.

There is no conflict between sub-section (2) of section 23 and sub-section (2) of section 27. A fair reading of the various clauses in section 27 (2) will make it clear that the entries in an electoral roll of a constituency, as they stood on the last date for making the nominations for an election in that constituency should be considered as final for the purpose of that election.

Section 62 (1) of the Representation of the People Act, 1951 no doubt stipulates that every person who is for the time being registered in the electoral roll of any constituency except as expressly provided by the Act shall be entitled to vote in that constituency. But in view of section 23 (3) of the 1950 Act the electoral roll referred to in section 62 (1) of the 1951 Act must be understood to be the electoral roll that was in force on the last day for making the nominations for the election.

Appeal under section 116-A of the Representation of the People Act, 1951 from the Judgment and Order dated the 11th December, 1968 of the Patna High Court in Election Petition No. 4 of 1968.

D. Gobardhan, Advocate for Appellant.

Birendra Prasad Sinha, S.K. Bagga, Hardev Singh and S. Bagga, Advocates for Respondent No. 1.

Hardev Singh, Advocate for Respondents Nos. 2 and 3.

The Judgment of the Court was delivered by

Hegde, J.—The principal question raised in this appeal under section 116-A of the Representation of People Act, 1951 (to be hereinafter referred to as the Act) is as to the scope of section 23 (3) of the Representation of People Act, 1950 (to be hereinafter referred to as the 1950 Act). A few subsidiary contentions have also been canvassed. They will be considered at the appropriate stage.

The election petition from which this appeal arises relates to the Darbhanga Local Authorities Constituency of the Bihar Legislative Council. The calendar for the election for that constituency was as follows :

1. Last date for filing nomination papers—2-4-1968.
2. Date of scrutiny of nomination papers—4-4-1968.
3. Last date for withdrawal of candidatures—6-4-1968.
4. Date of poll—28-4-1968.
5. Date of declaration of result—29-4-1968.

Originally five candidates submitted their nominations for the election in question. On scrutiny all of them were held to have been validly nominated. Two of them later withdrew their candidatures within the period prescribed leaving in the field Shri Baidyanath Panjira, the appellant herein, Shri Raj Kumar Mahaseth, respondent No. 2 and Shri Gangadhar, respondent No. 3. There were six polling stations in the constituency. 134 votes were polled out of which 33 votes were polled at Dalsingsarai polling station. Counting of the votes showed that the appellant had secured 45, the second respondent 49 and the third respondent 40, first preference votes. As none of them obtained an absolute majority of the votes cast, the third respondent was eliminated and his second preference votes were taken into consideration. 12 of his second preference votes went to the appellant and 5 to the second respondent. Therefore the appellant was declared elected. His election was later challenged by the 1st respondent herein. The High Court has set aside the election and declared the 2nd respondent elected on the ground that on counting the validly cast votes, the second respondent has secured more votes than the appellant. It held that some of the votes cast were not valid votes.

The controversy relating to the validity of some of the votes polled arose under the following circumstances. In the electoral roll as it stood on the last date of filing nomination papers, the registered voters were only 123; 16 of the registered voters were of the members of Dalsingsarai Notified Area Committee. On 13th April, 1968 as per a notification under section 389 (c) of the Bihar and Orissa Municipal Act, 1922, 40 members were nominated as members to the said Notified Area Committee in place of the old members. Most of them were newly appointed members. To be exact 35 of the 40 members nominated were new members. Thereafter the electoral roll was amended on the 27th April, 1968, just a day prior to the polling. As per the amended electoral roll, there were 39 electors in the Dalsingsarai polling station. Only four of them stood registered in the electoral roll as it stood on 2nd April, 1968. 12 of those who were electors under the original roll were removed from the roll. 33 out of the 39 electors included in the electoral roll relating to Dalsingsarai polling station exercised their franchise during the poll on 28th April, 1968.

The question for consideration is whether it was within the competence of the electoral registration officer to amend the electoral rolls after the last date for making the nomination was over.

Provisions relating to the preparation of electoral rolls for the Legislative Councils' Constituencies are found in Part IV of the 1950 Act. Section 27 (2) of

the Act prescribes the mode of preparation of the electoral rolls regarding the local authorities' constituencies of a Legislative Council. Clause (e) of that sub-section stipulates that provisions of sections 15, 16, 18, 22 and 23 shall apply in relation to local authorities constituencies as they apply in relation to assembly constituencies. Section 22 deals with correction of entries in the electoral rolls. Section 23 deals with the inclusion of names in the electoral rolls. Sub-section (3) of that section provides that :

"No amendment, transposition or deletion of any entry shall be made under section 22 and no direction for the inclusion of a name in the electoral roll of a constituency shall be given under this section, after the last date for making nomination for an election in that constituency or in the parliamentary constituency within which that constituency is comprised and before the completion of that election."

The object behind sub-section (3) of section 23 of the 1950 Act would be clear if we examine the scheme of the Act and the principles underlying that scheme. Part III of the 1950 Act provides for the preparation of the electoral rolls for assembly constituencies. Section 15 provides that for every constituency, there shall be an electoral roll which shall be prepared in accordance with the provisions of that Act under the superintendence, direction and control of the Election Commission. Section 16 enumerates what disqualifications will disentitle a person from being enrolled as a voter. Section 18 provides that no person shall be entitled to be registered in the electoral roll for any constituency more than once. Section 18 enunciates the principle "one person-one vote". Section 22 provides for correction of entries in the electoral rolls. Section 23 (1) permits a person whose name is omitted from the rolls to apply for inclusion. Sub-section (2) of section 23 authorises the electoral registration officer to include the name of the applicant in the rolls if he is satisfied that he is entitled to be registered. The object of the aforementioned provision is to see that to the extent possible, all persons qualified to be registered as voters in any particular constituency should be duly registered and to remove from the rolls all those who are not qualified to be registered. Sub-section (3) of section 23 is an important exception to the rules noted earlier. It gives a mandate to the electoral registration officers not to amend, transpose or delete any entry in the electoral roll of a constituency after the last date for making nominations for election in that constituency and before the completion of that election. If there was no such provision, there would have been room for considerable manipulations, particularly when there are only limited number of electors in a constituency. But for that provision, it would have been possible for the concerned authorities so manipulate the electoral rolls as to advance the prospects of a particular candidate. This would be more so if either all or a section of the electors are persons nominated to local authorities. The legislative mandate like the one embodied in section 23 (3) must be considered as mandatory not merely because of the language employed in that sub-section but also in view of the purpose behind the provision in question. In our opinion, section 23 (3) takes away the power of the electoral registration officer or the chief electoral officer to correct the entries in the electoral rolls or to include new names in the electoral rolls of a constituency after the last date for making the nominations for election in that constituency and before the completion of that election. Section 23 (3) does not deal with any mode or procedure in the matter of registering the voters. It interdicts the concerned officers from interfering with the electoral rolls under the prescribed circumstances. It puts a stop to the power conferred on them. Therefore it is not a question of irregular exercise of power but a lack of power.

It was next urged by Mr. Goburdhun, learned Counsel for the appellant that section 23 (3) of the 1950 Act is subject to section 27 (2) of the same Act and therefore in view of the direction issued by the electoral registration officer to include the names of the electors in question, it was not open to the election petitioner to take any objection to the same. We see no substance in this contention. There is no conflict between sub-section (2) of section 23 and sub-section (2) of section 27. In

fact, as noticed earlier, the provisions of section 23 have been incorporated into section 27 (2) in view of section 27 (2) (e). A fair reading of the various clauses in section 27 (2) will make it clear that the entries in an electoral roll of a constituency, as they stood on the last date for making the nominations for an election in that constituency should be considered as final for the purpose of that election.

It was next urged that in view of section 62 (1) of the Act, no valid objection can be taken to the franchise exercised by the electors whose names were included in the electoral roll on 27th April, 1968. Section 62 (1) says that "no person who is not, except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency." That provision no doubt stipulates that every person who is for the time being registered in the electoral roll of any constituency except as expressly provided by the Act shall be entitled to vote in that constituency. The question is which is the electoral roll referred to in that section? Is it the electoral roll that was in force on the last date for making nominations for an election or is it the electoral roll as it stood on the date of the polling? For answering that question we have to go back to section 23 (3) of the 1950 Act. In view of that provision the electoral roll referred to in section 62 (1) of the Act must be understood to be the electoral roll that was in force on the last day for making the nominations for the election.

It was next urged that even if we hold that in including fresh electors in the electoral roll on 27th April, 1968, the electoral registration officer contravened section 23 (3) of the 1950 Act, the same cannot be made a ground for invalidating the election as the contravention in question does not come within the purview of sub-section (1) of section 100 of the Act. This contention again does not appear to be sound. Clause (d) (iii) of sub-section (1) of section 100 of the Act provides that if the High Court is of the opinion that the result of the election in so far as it concerns the returned candidate has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, it shall declare the election void. We have earlier come to the conclusion that the electoral registration officer had no power to include new names in the electoral roll on 27th April, 1968. Therefore votes of the electors whose names were included in the roll on that date must be held to be void votes. That conclusion satisfies one of the conditions prescribed in section 100 (1) (d). We have now to see whether the other conditions prescribed in that clause namely whether the High Court on the material before it could have been of the opinion that the result of the election in far as it concerned the returned candidate has been materially affected because of the reception of the votes which are void. The High Court elaborately considered that question. It has examined each one of the disputed votes and has come to the conclusion that if those votes had been excluded, the valid votes received by the contesting candidates in the first count would have been as follows :

Appellant	.. 32.
Respondent No. 2.	.. 46.
Respondent No. 3.	.. 23.

In the second count after the elimination of the third respondent and taking into consideration the second preferences given by the electors who gave their first preference to him, the following would have been the position :

Appellant	.. 43 votes and
Respondent No. 2.	.. 57 votes.

No material was placed before us to show that this conclusion was wrong. There was some controversy about two votes but we do not think it necessary to go into the same as any decision as regards their validity will not affect the final conclusion.

Before leaving this case, it is necessary to mention that at one stage of the arguments, the learned Counsel for the appellant contended that the decision of this Court in *B. M. Ramaswamy v. B. M. Krishnamurthy and others*¹, governs the facts of

1. (1963) 3 S.C.R. 479 : (1964) 2 S.C.J. 268.

this case. But after some discussion he gave up that contention. The ratio of that decision has no relevance for our present purpose. In that case, the High Court came to the conclusion that the corrections in the concerned electoral roll had been made before the last date prescribed for filing nominations to the election but it came to the conclusion that the electors newly added to the list were not qualified to be registered as electors. This Court overruled that finding holding that every person whose name finds place in the electoral roll must be held to be qualified to be a candidate whether he was qualified to be registered as an elector or not. In other words it upheld the finality of the electoral roll as it stood on the last date for filing nominations for the election.

For the reasons mentioned above this appeal fails and the same is dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE AND
A. N. GROVER, JJ.
Hansraj Girdhandas

.. Appellant*

v.

H. H. Dave, Assistant Collector of Central Excise Customs, Surat
and others

.. Respondents

.. Interveners.

Shree Agency and others

Central Excises and Salt Act (I of 1944), sections 2 and 3 and Central Excise Rules (1944), rules 8 and 9—Notifications dated 31st July, 1959 and 30th April, 1960—Exemption from excise duty—Grant of.

Taxing Statutes—Interpretation of.

The notification dated 31st July, 1959 grants exemption to "cotton fabrics produced by any co-operative society formed of owners of cotton powerlooms which is registered or which may be registered on or before 31st March, 1961" subject to four conditions set out in the notification. In the next notification dated 30th April, 1960 exemption was granted to "cotton fabrics produced on powerlooms owned by any co-operative society or owned by or allotted to the members of the society, which is registered or which may be registered on or before 31st March, 1961" subject to the conditions specified in the notification.

Held: Construing those notifications, all that is required for claiming exemption is that the cotton fabrics must be produced on power looms owned by the co-operative society. There is no further requirement under the two notifications that the cotton fabrics must be produced by the co-operative society on the powerlooms "for itself." It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different, but that is not the case here. A statutory notification may not be extended so as to meet a *casus omissus*.

The operation of the notifications has to be judged not by the object which the rule making authority had in mind but by the words which it has employed to effectuate the legislative intent.

Held, on facts, that the appellant was entitled to exemption from excise duty.

Appeal from the Judgment and Order dated the 13th July, 1964 of the Gujarat High Court in Special Civil Application No. 1054 of 1963.

Soli Sorabjee, D. M. Damodar and B. Datta, Advocates, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, for Appellant.

V. A. Seyid Muhamed, Senior Advocate, (*S. P. Nayar*, Advocate, with him), for Respondents.

P. R. Mridal and Janendra Lal, Advocates, and *B. R. Agarwala*, Advocate of *M/s. Gagrat & Co.*, for Intervener. No. 1.

J. B. Dadachanji, Advocate, of *M/s. J. B. Dadachanji & Co.* for Interveners Nos. 2 and 3.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate from the judgment of the High Court of Gujarat dated 31st July, 1964 in Special Civil Application No. 1054 of 1963.

The appellant is the sole proprietor of Messrs. Gordhanadas & Co. carrying on business as a dealer in textiles in Bombay. Under an agreement between the appellant on the one hand and the Gandevi Vanat Udhoog Sahkari Mandli Ltd. (hereinafter referred to as the "Society") the Society manufactured cotton fabrics during the period between June, 1959, and September, 1959 and from 1st October, 1959 to 31st January, 1961 for the appellant on certain terms and conditions which were later reduced to writing on 12th October, 1959. Under these terms, the Society agreed to carry out weaving work on behalf of the appellant on payment of weaving charges fixed at 19 nP. per yard which included expenses the Society would have to incur in transporting yarn from Bombay and cotton fabrics woven by the Society to Bombay. The appellant was to supply yarn to be delivered at Bombay to the Society and the Society was to make its own arrangement to bring the yarn to its factory at Gandevi. Clause II provided that the yarn supplied by the appellant, remaining either in stock or in process or in the form of ready made pieces would be in the absolute ownership of the appellant and the Society, as the bailee of the yarn, undertook to take such care of it as it would normally take if the yarn belonged to it. The Society also undertook to have the yarn insured against fire, theft and all other risks including transit risks and further undertook to reimburse the appellant in case it failed to do so. The terms of the agreement though recorded on 12th October, 1959 were to be deemed to be effective as from 21st April, 1959 and the agreement was terminable by either party by giving one month's notice.

The Society was a co-operative society carrying on its work at Gandevi and was registered on or before 31st May, 1961 and consisted of members who owned powerlooms. The Society started the weaving work for the appellant some time in May or June 1959 and supplied to the appellant between 1st June, 1959 and 3rd January, 1961, cotton fabrics measuring 3,19,460 yards. The Society had obtained L-4 licence as required by the Central Excises and Salt Act, 1944 (hereinafter referred to as the 'Act'). By letters dated 29th August 1959 and 27th October, 1961 the Excise Department had granted exemption from excise duty payable on cotton fabrics manufactured by the Society under the notification issued by the Central Government. On 10th November, 1961 the excise authorities issued a notice to the appellant demanding a sum of Rs. 1,69,263.44 payable as excise duty. It was alleged that the duty was payable by the appellant as it had got the goods manufactured through the Society and had got them removed from the Society's factory at Gandevi without payment of duty. On 10th January, 1962 the Superintendent of Central Excise, Bulsar sent another notice to show cause why penalty should not be imposed upon the appellant for contravention of rule 9 and why duty should not be charged for the cotton fabrics so removed by the appellant. The appellant showed cause and on 26th November, 1962 the Assistant Collector of Central Excise and Customs, Surat held that the appellant was liable to pay excise duty to the extent of Rs. 2,20,574.74, being the total amount of basic duty and a penalty of Rs. 350 was levied for contravention of rule 9. The appellant preferred an appeal to the Collector of Central Excise, Baroda but the appeal was dismissed.

Thereafter the appellant moved the High Court of Gujarat for grant of a writ under Article 226 of the Constitution. The High Court dismissed the writ petition by its judgment dated 31st July, 1964 but gave a direction that the respondent was to work out the excise duty on the footing that the appellant was entitled to exemption from duty altogether in respect of goods supplied for the period from 1st June, 1959 to 30th September, 1959. As regards the two other periods *i.e.*, 1st October, 1959 to 30th April, 1960 and from 1st May, 1960 to 31st January, 1961, the High Court dismissed the writ petition and directed the respondent to charge duty at the rate of 29.3 nP. per square meter.

Clause (d) of section 2 of the Act defines "excisable goods" as meaning goods specified in the First Schedule as being subject to a duty of excise. Item 19 in the First Schedule provides for excise duty at different rates depending upon the variety of cotton fabrics. Section 3 which is the charging section, provides for the levy and collection of duties specified in the First Schedule on all excisable goods which are produced or manufactured in India. Rule 8 authorises the Central Government to exempt any excisable goods from the whole or any part of duty payable on such goods. Clause (1) of rule 9 provides that no excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed. Clause (2) of that rule provides that if any excisable goods are, in contravention of sub-rule (1), deposited in, or removed from any place specified therein, producer or manufacturer thereof shall pay the duty leviable on such goods upon written demand made by the proper officer and shall also be liable to a penalty which may extend to two thousand rupees and such goods shall be liable to confiscation. In pursuance of the power under rule 8, the Central Government issued notifications from time to time granting exemptions on cotton fabrics, though such goods were excisable goods under tariff item 19. The first relevant notification is dated 5th January, 1957. By this notification certain classes of cotton fabrics were made exempt from payment of excise duty. Of the items exempted the seventh item is as follows :

"Cotton fabrics manufactured by or on behalf of the same person in one or more factories commonly known as powerlooms (without spinning plants) in which less than 5 powerlooms in all are installed;"

The next relevant notification is notification No. 74 of 1959 dated 31st July, 1959 which reads as follows :

"G.S.R. 899—In pursuance of sub-rule (1) of rule 8 of the Central Excise Rules, 1944, as in force in India and as applied to the State of Pondicherry, the Central Government hereby exempted cotton fabrics produced by any co-operative society formed of owners of cotton powerlooms, which is registered or which may be registered on or before the 31st March, 1961 under any law relating to co-operative societies from the whole of the duty leviable thereon, subject to the following conditions :—

(a) that every member of the co-operative society has been exempt from excise duty for three years immediately preceding the date of his joining such society:

(b) that the total number of cotton powerlooms owned by the co-operative society is not more than four times the number of members forming such society;

(c) that a certificate is produced by each member of the co-operative society from the State Government concerned or such officer as may be nominated by the State Government that he is a *bona fide* member of the society and that the number of cotton powerlooms in his ownership and actually operated by him does not exceed four and did not exceed four at any time during the three years immediately preceding the date of his joining the society, and that he would have been exempt from excise duty even if he had not joined the co-operative society ;

....."

The Central Government issued another notification dated 30th April, 1960 by which the earlier notification dated 31st July, 1959 was superseded. By this notification the Central Government exempted cotton fabrics produced on powerlooms owned by any co-operative society or owned by or allotted to the members of the society from the whole of the duty leviable thereon subject to the four conditions therein set out. The notification dated 30th April, 1960 is to the following effect.

“In pursuance of sub-rule (1) of rule 8 of the Central Excise Rules, 1944, as in force in India and as applied to the State of Pondicherry, and in supersession of the Notification of the Government of India Ministry of Finance (Department of Revenue) No. 74 of 1959 Central Excises, dated the 31st July, 1959, the Central Government hereby exempts cotton fabrics produced on powerlooms owned by any co-operative society or owned by or allotted to the members of the society, which is registered or which may be registered on or before the 31st March, 1961 under any law relating to co-operative societies, from the whole of the duty leviable thereon subject to the following conditions:—

(a) that every member of the co-operative society who has been a manufacturer of cotton fabrics on powerlooms, has been exempt from excise duty for three years immediately preceding the date of his joining such society.

(b) that the total number of cotton powerlooms owned by the co-operative society or owned by or allotted to its members is not more than four times the number of members forming such society.

(c) that each member of the co-operative society produces a certificate from the State Government concerned or such officer as may be nominated by the State Government that he is a *bona fide* member of the society and that the number of cotton powerlooms owned by or allotted to him and actually operated by him does not exceed four and did not exceed four at any time during that three years immediately preceding the date of this joining the society and that he would have been exempt from excise duty even if he had not joined the co-operative society and.....”

The main contention on behalf of the appellant is that the case fell within the language of two notifications dated 31st July, 1959 and 30th April, 1960 and the appellant was entitled to exemption from payment of excise duty on the cotton fabrics. The argument was stressed that the exemption applied to all cotton fabrics which were produced on powerlooms owned by the co-operative society or on powerlooms allotted to its members and it was not a relevant consideration as to who produced or manufactured such fabrics, whether it was the society itself or its members or even outsiders. It was conceded by the appellant that it was the owner of the cotton fabrics. But even upon that assumption the claim of the appellant is that it was entitled to exemption from excise duty as it was covered by the language of the two notifications already referred to. In our opinion, the argument of the appellant is well-founded and must be accepted as correct. The notification dated 31st July, 1959 grants exemption to “cotton fabrics produced by any co-operative society formed of owners of cotton powerlooms which is registered or which may be registered on or before 31st March, 1961” subject to four conditions set out in the notification. In the next notification dated 30th April, 1960 exemption was granted to “cotton fabrics produced on powerlooms owned by any co-operative society or owned by or allotted to the members of the society, which is registered or which may be registered on or before 31st March, 1961” subject to the conditions specified in the notification. It was contended on behalf of the appellant that under the contract between the appellant and the Society there was no relationship of master and servant but the appellant supplied raw material and the contractor *i.e.*, the Society produced the goods. But even on the assumption that the appellant had manufactured the goods by employing hired labour and was therefore a manufacturer, still the appellant was entitled to exemption from excise duty since the case fell within the language of the two notifications dated

31st July, 1959 and 30th April, 1960, and the cotton fabrics were produced on power-looms owned by the co-operative society and there is nothing in the notifications to suggest that the cotton fabrics should be produced by the co-operative society "for itself" and not for a third party before it was entitled to claim exemption from excise duty. It was contended on behalf of the respondent that the object of granting exemption was to encourage the formation of co-operative societies which not only produced cotton fabrics but which also consisted of members, not only owning but having actually operated not more than four power-looms during the three years immediately preceding their having joined the society. The policy was that instead of each such member operating his looms on his own, he should combine with others by forming a society which, through the co-operative effort should produce cloth. The intention was that the goods produced for which exemption could be claimed must be goods produced on its own behalf by the society. We are unable to accept the contention put forward on behalf of the respondents as correct. On a true construction of the language of the notifications dated 31st July, 1959 and 30th April, 1960 it is clear that all that is required for claiming exemption is that the cotton fabrics must be produced on power looms owned by the co-operative society. There is no further requirement under the two notifications that the cotton fabrics must be produced by the co-operative society on the powerlooms "for itself". It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different, but that is not the case here. In this connection we may refer to the observations of Lord Watson in *Salomon v. Salomon & Co.*¹:

"Intention of the legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

It is an application of this principle that a statutory notification may not be extended so as to meet a *casus omissus*. As appears in the judgment of the Privy Council in *Crawford v. Spooner*²:

".....we cannot aid the legislature's defective phrasing of the Act, we cannot add, and mend, and, by construction, make up deficiencies which are left there."

Learned Counsel for the respondents is possibly right in his submission that the object behind the two notifications is to encourage the actual manufacturers of handloom cloth to switch over to powerlooms by constituting themselves into co-operative societies. But the operation of the notifications has to be judged not by the object which the rule-making authority had in mind but by the words which it has employed to effectuate the legislative intent. Applying this principle we are of opinion that the case of the appellant is covered by the language of the two notifications dated 31st July, 1959 and 30th April, 1960 and the appellant is entitled to exemption from excise duty for the cotton fabrics produced for the period between 1st October, 1959 to 30th April, 1960 and from 1st May, 1960 to 3rd January, 1961. It follows therefore that the appellant is entitled to the grant of a writ in the nature of *certiorari* to quash the order of the Assistant Collector of Central Excise of Boaroda dated 26th November, 1962 and the appellant order of the Collector of Central Excise dated 12th November, 1963.

1. L.R. (1897) A.C. 22, 38.

2. 6 Moo. P.C.C. 8.

For the reasons expressed we hold that the judgment of the High Court of Gujarat dated 31st July, 1964 should be set aside and that Special Civil Application No. 1054 of 1963 should be allowed and that a writ in the nature of *certiorari* should be granted to quash the order of the Assistant Collector of Excise and Customs dated 26th November, 1962 and the order of the Collector of Excise dated 12th November, 1963. This appeal is accordingly allowed with costs.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND K.S. HEGDE, JJ.

Motibhai Fulabhai Patel & Co.

.. *Appellant**

v.

R. Prasad, Collector of Central Excise, Baroda and others .. *Respondents.*

Central Excise Rules, (1944), rule 40—Mixture of duty paid tobacco with non-duty paid tobacco—Impossibility of separation of the same—Power of Collector to confiscate the entire mixture—Procedure to be adopted.

It would not be proper, in dealing with a penal provision (relating to forfeiture), for the Court to extend the scope of that provision by reading into it words which are not there and thereby widen the scope of the provision relating to confiscation.

Rule 40 permits the Central Excise authorities to confiscate only those goods on which duty has not been paid. It does not permit them either specifically or by necessary implication to confiscate other goods. Therefore, it was not permissible for the Collector to confiscate the entire tobacco mixture. At the same time no person can be permitted to benefit by his wrongful Act. No rule of law should be so interpreted as to permit or encourage its circumvention. If by a wrongful act of a party he renders it impossible for the authorities to confiscate under rule 40 the non-duty-paid goods it is open to those authorities to confiscate from out of the goods seized, goods of the value reasonably representing the value of the non-paid goods mixed in the goods seized.

The Collector, Central Excise could have confiscated out of the tobacco seized, so much of it as can be held to reasonably represent the value of the tobacco on which the duty had not been paid.

Appeal from the Judgment and Order dated the 13th January, 1964 of the Punjab High Court, Circuit Bench at Delhi in Civil Writ No. 557-D of 1961.

M. P. Vashi, Dilip K. Kapur, S. V. Tambekar and A. G. Ratnaparkhi, Advocates, for Appellant.

D. Narsaraja, Senior Advocate, (R. M. Mehta and S. P. Nayar, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Hegde, J.—In this appeal by certificate though several contentions were raised in the memo of appeal only two of them were pressed at the time of hearing. They are : (1) under the circumstances of the case the confiscation ordered by the Collector Central Excise is illegal and (2) under any circumstances he could not have confiscated the entire quantity of tobacco used in the mixture.

The appellants are tobacco merchants in Dashrath village near Baroda in Gujarat State. At the relevant time they were holding Central Excise licence in form L-2 and L-5 for the purpose of storing, selling and processing duty paid and nonduty paid tobacco. They had their own duty paid and non-duty paid godowns. In about December, 1958 according to their books they possessed the following lots of different varieties of tobacco.

<i>Variety of tobacco.</i>		<i>Quantity</i>	<i>Rate of duty.</i>
Biri Patti	Bmds.	251.8	1.20 nP. per lb.
Stems Kandi	"	287.20	0.50 -do-
Rava	"	1,326.14	0.50 -do-
Stalk Kandi	"	57.20	0.06 -do-

On 13th December, 1958 the appellants obtained permission from the local Central Excise authorities to mix the above lots of tobacco. The percentage of different varieties of tobacco when mixed would have been as under :

Rava	.. 68.97 per cent.
Stems Kandi	.. 14.86 "
Biri Patti	.. 13.07 "
Stalk Kandi	.. 3.00 "

On 23rd December, 1958 when the process of mixing was still going on the Superintendent of Central Excise, Preventive Headquarters, Baroda and his party raided the duty paid premises of the appellants. There he seized the entire mixture tobacco weighing Mds. 2004.3 srs. i.e., 1,64,834.50 lbs. of tobacco. According to that Superintendent when experiments were conducted he found in the above mixture percentage of different varieties as under :

Rava	.. 44 per cent.
Biri Patti	.. 51.50 per cent.
Stems Kandi	.. 3.74 per cent.

From this he concluded that considerable quantity of non-duty paid Biri Patti tobacco had been utilised in the manufacture of the mixture. Hence notice was issued to the appellants on 6th January, 1959 to show cause why action should not be taken against them under rule 40 of the Central Excise Rules 1944 inasmuch as they brought into duty paid premises 60,770 lbs. of Biri Patti tobacco without payment of duty. It was also alleged in that notice the appellants had removed certain quantity of Rava tobacco from L-2 premises. The appellants submitted their reply on 13th March, 1959. At the hearing before the Collector as the appellants challenged the correctness of the experiments conducted by the Superintendent, Central Excise, the Collector himself in the presence of the appellants conducted a fresh experiment. On the basis of that experiment he came to the conclusion that the results obtained by the experiment conducted by the Superintendent, Central Excise are by and large correct.

By his order dated 13th April, 1959, the Collector, Central Excise held the appellants guilty of contravening rule 40 and consequently levied on them a penalty of Rs. 2,000 as well as the duty payable under law. He also ordered the confiscation of the seized tobacco weighing 1,64,834.50 lbs. But he gave an option to the appellants of redeeming the same on payment of a fine of Rs. 1 lakh. The appellants paid the amount of fine under protest and got the goods released.

Thereafter they moved the High Court of Bombay under Article 226 of the Constitution for quashing the order of the Collector but that application was withdrawn as the appellants first wanted to exhaust their remedy under the Central Excise Act. The appellants unsuccessfully went up in appeal and thereafter in revision under the Central Excise and Salt Act 1944 against the order of the Collector. After the 3rd respondent dismissed their revision petition they filed in the High Court of Punjab at Delhi Civil Writ No. 557-D of 1961 challenging the legality of the order made by the Collector of Central Excise on 13th April, 1959. That petition was dismissed by a Division Bench of that Court on 13th January, 1964. This appeal is brought against that decision.

In this Court the finding of the Collector of Central Excise that the appellants were guilty of mixing the duty-paid tobacco with non-duty-paid tobacco and thereby

they contravened rule 40 was not challenged. Nor was there any dispute about the quantity of non-duty paid tobacco used in the mixture. The main contention of Mr. M. P. Vashi, learned Counsel for the appellants was that under rule 40, the Collector could not have confiscated the tobacco mixture as it consisted of both duty paid tobacco as well as tobacco on which duty had not been paid. His alternative contention was that under any circumstances the Collector could not have confiscated anything more than 60,770 lbs. of the mixture which can be said to represent Biri Patti tobacco on which duty had not been paid. In support of his first contention he heavily relied on the decision of K.T. Desai, J., in *Messrs. Valimahomad Gulamhusain Sonavala & Co. v. G.T.A. Pillai*¹.

The seized tobacco mixture weighed 1,64,834.50 lbs. That included 60,770 lbs. of Biri Patti tobacco on which duty had not been paid. But on the remaining quantity duty had been paid. The tobacco seized was found in the godown licenced to store duty paid tobacco. Hence the appellants were clearly guilty of contravening rule 40 of the Central Excise Rules which reads :

“Except as provided in the proviso to sub-rule (1) of rule 32 and in rule 171 no wholesale purchaser of unmanufactured tobacco for the purpose of trade or manufacture and no wholesale purchaser of other unmanufactured products from a curer shall receive into any part of his premises or into his custody or possession, any unmanufactured tobacco or other unmanufactured products other than tobacco or other unmanufactured products imported from a foreign country otherwise than under a valid permit granted by an officer showing that the proper duty has been paid ; and every such wholesale purchaser who receives or has in his custody or possession any such goods, in contravention of this rule shall, in respect of every such offence, be liable to pay the duty leviable on such goods, and to a penalty which may extend to two thousand rupees, and the goods shall also be liable to confiscation.”

In view of this rule the legality of the order made by the Collector in so far as he levied duty as well as penalty cannot be challenged and was not challenged before us. But so far as the confiscation is concerned it was urged that under the rule in question only tobacco on which duty had not been paid could alone have been confiscated. In the instant case even according to the finding of the Collector only on 66,770 lbs. of Biri Patti tobacco the duty had not been paid ; but on the remaining tobacco seized duty had been paid ; it was not possible to separate the duty paid tobacco from the non-duty paid tobacco ; hence it was impermissible for the Collector to confiscate the said tobacco under rule 40, as that rule permitted the confiscation of only non-duty paid tobacco. In *Sonavala's case*¹, referred to earlier Desai, J. had held that the right to confiscate smuggled goods under section 167 (8) of the Sea Customs Act, 1878 does not carry with it the right to confiscate unsmuggled goods. The words ‘such goods’ appearing in section 167 (8) of the Act cannot be interpreted to mean similar goods. It is not open to the Customs authorities to confiscate similar goods even though they may be of the same quality, bulk and value. The words ‘such goods’ mean the very goods which have been smuggled. If the smuggled goods lose their identity, it would not be open to the Customs Officer to confiscate any part of those goods. Where, therefore, gold that has been smuggled has in the melting process got so mixed up with gold that is unsmuggled that it is impossible to separate the smuggled gold from the unsmuggled one, the right to confiscate smuggled gold ceases when the two get inextricably mixed up. The broad proposition laid down by Desai, J., undoubtedly supports the contention advanced on behalf of the appellants. We shall presently show that this statement of the law is not correct but it is necessary to mention at this juncture that in the *Sonavala's case*¹ an innocent third party had purchased the smuggled gold for proper value and mixed the same with unsmuggled gold, which circumstance had an important bearing on the decision of the case.

In Institutes of Justinian at page 104 dealing with the topic *commixtio* it is observed :

"If the things mixed, still remaining the property of their former owners, were easy to separate against, as for instance, cattle united in one herd, when one owner brought his claim by *vindictio* his property was restored to him without difficulty but if there was difficulty in separating the materials from each other, as in dividing the grains of wheat in a heap, the obvious mode would be to distribute the whole heap in shares proportionate to the quantity of wheat belonging to the respective owners. But it might happen that the wheat mixed together was not all of the same quality, and therefore the owner of the better kind of wheat would lose by having a share determined in amount only by the quantity of his wheat; and the judge therefore was permitted to exercise his judgment how great an addition ought to be made to his share to compensate for the superior quality of the wheat originally belonging to him."

In *Williams on Personal Property* (18th Edn.) at page 50, it is observed :

"The acquisition of ownership by accession or confusion of substances also pre-supposes a previous title. Thus the young of a domestic animal belong to the owner of the mother. If any substances, for instances tallow belonging to various owners be mixed by consent or accidentally, the mass appears to belong to the owners of parts in common. And if the confusion be made wilfully by one without the other's leave, the mass belongs to the latter, whose ownership is thus unlawfully invaded."

Dealing with the same topic it is observed in *Halsbury's Laws of England* 3rd Edn. (Vol. 29) at page 378.

"Ownership of goods may be acquired by confusion or intermixture, if the goods, when mixed, are indistinguishable. If the goods are mixed by agreement or consent the proprietors have an interest in common in proportion to their respective shares; if mixed by accident or the act of a third party, for which neither owner is responsible, the proprietors become owners in common of the mixed property in proportion to the amounts contributed. Where, however, one man wilfully mixes his goods with those of another without the approbation or knowledge of the other, the whole belongs to the latter."

The law on this topic was stated by Bovill, C.J., as early as 1868 in *Spence and another v. The Union Marine Insurance Co., Ltd.*¹, thus :

"In our own law there are not many authorities to be found upon this subject but, as far as they go, they are in favour of the view, that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of Blackburn, J., in the case of the tallow which was melted and flowed into the sewers, is to that effect : *Buckley v. Gross*². And a similar view was adopted by Lord Abinger in the case of the mixture of oil by leakage on board ship in *Jones v. Moore*³.

"It has been long settled in our law, that, where goods are mixed so as to become undistinguishable, by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner, but no authority has been cited to shew that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of the two owners; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*."

The same principle was again reiterated by the House of Lords in *Smarthwaite and others v. Hannay and others*⁴.

1. (1968) L.R. 3 Common Pleas 427 : 37 L.J. C.P. 169
2. (1863) 3 B & S. 566 : 32 L.J. Q.B. 129.

3. (1841) 4 Y. & C. 351.
4. L.R. (1894) A.C. 494.

The rules enunciated above are of assistance in finding out a solution to the problem before us though they do not govern the same. In the instant case there is no doubt that the appellants were guilty of an unlawful act in mixing duty paid tobacco with the non-duty paid tobacco but the fact remains that they were the owners of both those lots at the time they mixed them and hence the legal principles set out earlier do not cover such a case. It must also be remembered that in dealing with a provision, relating to forfeiture we are dealing with a penal provision. It would not be proper for us to extend the scope of that provision by reading into it words which are not there and thereby widen the scope of the provision relating to confiscation. Rule 40 permits the Central Excise Authorities to confiscate only those goods on which duty has not been paid. It does not permit them either specifically or by necessary implication to confiscate other goods. Therefore it was not permissible for the Collector to confiscate the entire tobacco mixture. At the same time no person can be permitted to benefit by his wrongful act. No rule of law should be so interpreted as to permit or encourage its circumvention. If by the wrongful act of a party he renders it impossible for the authorities to confiscate under rule 40 the non-duty paid goods it is in our opinion open to those authorities to confiscate from out of the goods seized, goods of the value reasonably representing the value of the non-duty paid goods mixed in the goods seized. Applying that rule to the facts of this it follows that the Collector, Central Excise could have confiscated out of the tobacco seized, so much of it as can be held to reasonably represent the value of the tobacco on which the duty had not been paid.

As noticed earlier the tobacco confiscated had been returned to the appellants after realising from them a sum of Rs. 1. lac as fine. The Counsel for the parties agreed at the hearing that the value of the Biri Patti tobacco used in the mixture for which no duty had been paid could be fixed at Rs. 35,000. In view of this agreement it is not necessary for us to remit the case back to the Collector of Central Excise for assessing the value of the tobacco on which duty had not been paid. In view of our earlier findings the fine to be levied on the appellants in lieu of the confiscation that could have been ordered has to be fixed at Rs. 35,000. From this it follows that the Collector has to refund to the appellants a sum of Rs. 65,000 which he has collected from them in excess of the aforementioned Rs. 35,000. The appeal is allowed to that extent. In the circumstances of the case we direct the parties to bear their own costs both in this Court as well as before the High Court.

S.V.J.

Appeal partly allowed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—J. C. SHAH, S. M. SIKRI, J. M. SHELAT, V. BHARGAVA, G. K. MITTER, C. A. VAIDIALINGAM, K. S. HEGDE, A. N. GROVER, A. N. RAY, P. JAGANMOHAN REDDY AND I.D. DUA, JJ.

Rustom Gajrajee Cooper and T. M. Gurubaxani .. Petitioners*
v.

Union of India .. Respondent

State of Jammu and Kashmir and other States .. Interveners.

Constitution of India (1950), Article 226—State action impairing rights both of shareholder and company—Locus standi of shareholder to file writ petition challenging the State action.

Constitution of India (1950), Article 123—Scope—Satisfaction of President under—If justiciable.

Banking Companies (Acquisition and Transfer of Undertakings) Ordinance (XIII of 1969)—Validity.

Banking Companies (Acquisition and Transfer of Undertakings) Act (XXII of 1969)—Legislative competence of Parliament to enact the Act.

Constitution of India (1950), Schedule 7, List I, Entries 43, 44 and 45, List II, Entry 26 and List III, Entry 42—Scope of Entries 43, 44 and of the word "Banking" in Entry 45 of List I—Meaning of the word "Property" in Entry 42 of List III.

Constitution of India (1950), Articles 19 (1) (f), 19 (1) (g), 19 (6) (ii) and 31 (2)—Scope—Inter-relation between Article 19 (1) (f) and Article 31 (2)—Whether mutually exclusive—Validity of law which authorises compulsory acquisition—If liable to be tested under Article 19 (5)—Scope of Article 19 (6) (ii) as amended in 1951.

Banking Companies (Acquisition and Transfer of Undertakings) Act (XXII of 1969)—If invalid as infringing Articles 19 (1) (f), 19 (1) (g), 14, 31 (2) or 301 of the Constitution of India.

By Majority, (Minority, *Ray, J.*) expressing no opinion): By a petition praying for a writ against infringement of fundamental rights, except in a case where the petition is for a writ of *habeas corpus* and probably for infringement of the guarantee under Articles 17, 23 and 24, the petitioner may seek relief in respect of his own rights and not of others. The shareholder of a company, it is true, is not the owner of its assets; he has merely a right to participate in the profits of the company subject to the contract contained in the Articles of Association. But on that account the petition will not fail. A measure, executive or legislative, may impair the rights of the company alone and not of its shareholders; it may impair the rights of the shareholders and not of the company; it may impair the right of the shareholders as well as of the company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, even if that action impairs the rights of the company as well. The test in determining whether the shareholder's right is impaired is not formal. It is essentially qualitative: if the State action impairs the right of the shareholders as well as of the company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief.

A shareholder, a depositor or a director of a banking company may not, therefore, be entitled to move a petition for infringement of the rights of the company, unless by the action impugned by him, his rights are also infringed.

The present writ petition by the petitioner (who claimed to be a shareholder, director and holder of deposit and current accounts in some of the banks taken over) challenging the validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, on the ground that it infringed his rights under Articles 14, 19 and 31 of the Constitution, was maintainable.

Query: Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction under Article 123 of the Constitution of India depends, how far justiciable?

Per *Raj, J.*:—The interpretation of Article 123 of the Constitution is to be made first on the language of the Article and secondly the context in which that power is reposed in the President. When power is conferred on the President to promulgate Ordinances the satisfaction of the President is subjective for these reasons: The power in Article 123 is vested in the President who is the executive head and the circumstances contemplated in Article 123 are a guide to the President for exercise of such power. Parliament is not in session throughout the year and during the gaps between sessions the legislative power of promulgating ordinances is reposed in the President in cases of urgency and emergency. The President is the sole judge whether he will make the Ordinance. The power under Article 123 relates to policy and to an emergency when immediate action is considered necessary and if an objective test is applied the satisfaction of the President contemplated in Article 123 will be shorn of the power of the President himself and as the President will be acting on the advice of Ministers it may lead to disclosure of facts which under Article 75 (4) are not to be disclosed. For these reasons it must be held that the satisfaction of the President is subjective.

The only way in which the exercise of power by the President can be challenged is by establishing bad faith or *mala fide* and corrupt motive. Bad faith will destroy any action. Such bad faith will be a matter to be established by a party propounding bad faith. He is not only to allege the same but also to prove it. In the present case there is no allegation of *mala fides*.

The fact that the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969 was passed shortly before the Parliament session began does not show any *mala fides*.

Legislative competence: By Majority: The argument that the Banking Companies (Acquisition and Transfer of Undertakings) Act (XXII of 1969) is not within the legislative power of the Parliament or that in any event to the extent to which it vests in the corresponding new banks the assets of business other than banking, it trenches upon the authority of the State Legislature and on that account void, is untenable.

It cannot, however be held that Parliament was competent to enact Act XXII of 1969, because the subject matter of the Act is "with respect to" regulation of trading corporations and matters subsidiary and incidental thereto and on that account is covered by Entries 43 and 44 of List I of the Seventh Schedule to the Constitution of India. (For reasons *see* judgment).

Nor is it covered in its entirety by "Banking" in Entry 45 of List I. The legislative entry in List I is "Banking" and not "Banker" or "Banks". To include within the connotation of the expression "Banking" in Entry 45 List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in re-writing the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the union and the constituent units. The field of "Banking" cannot be extended to include trading activities which not being incidental to banking encroach upon the substance of the entry "trade and commerce" in Entry 26, List II.

But this does not lend any practical support to the argument that Act XXII of 1969 to the extent it makes provisions in respect of the undertaking of the named banks relating to non-banking business distinct and independent of the banking business, is *ultra vires*. There is no evidence that the named banks were before

19th July, 1969, carrying on non-banking business distinct and independent of of the banking business, or that the banks held distinct assets for any non-banking business, apart from the assets of the banking business.

Power to legislate for acquisition of property is exercisable only under Entry 42 of List III, and not as an incident of the power to legislate in respect of a specific head of legislation in any of the three lists. Under that entry "property" can be compulsorily acquired. In its normal connotation "property" means the "highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy : it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copy-rights, patents and even rights *in personam* capable of transfer or transmission, such as debts ; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured." The expression "undertaking" in section 4 of Act XXII of 1969 clearly means a going concern with all its rights, liabilities and assets as distinct from various rights and assets which compose it.

Power to legislate for acquisition of "property" in Entry 42, List III therefore includes the power to legislate for acquisition of an undertaking. The expression "property" in Entry 42, List III has a wide connotation and it includes not only assets, but the organisation, liabilities and obligations of a going concern as a unit. A law may therefore, be enacted for compulsory acquisition of an undertaking as defined in section 5 of Act XXII of 1969.

Per Ray, J.: The contention that the word "Banking" in Entry 45 of List I would have the same meaning as the definition of "banking" in section 5 (b) of the Banking Regulation Act of 1949 and that therefore Act XXII of 1969 is not, in its entirety, within the legislative competence of "Banking" under Entry 45, List I, is untenable. "Banking" in Entry 45, List I will have the wide meaning—to include all legitimate businesses of a banking company referred to in section 5 (b) as well as in section 6 (1) of the Banking Regulation Act, 1949.

The business of a bank will consist not only of the hard core of banking business but also of the diverse kinds of lawful businesses which have grown to be inextricably bound up in the form of chain or string transactions. The word has never had any static meaning and the only meaning will be the common understanding of men and the established practice in relation to banking.

Act XXII of 1969 is a valid piece of legislation under Entries 42 in List III and Entry 45 of List I. It does not trench upon Entry 26 in List II.

The undertaking of a banking company is property which can be acquired under Article 31 (2) of the Constitution.

*Infringement of Articles 19 (1) (f) and (g) :—*By Majority : The contention that Articles 31 (2) and 19 (1) (f) are mutually exclusive and that therefore a law directly providing for acquisition of property for a public purpose cannot be tested for its validity on the plea that it imposes limitations on the right to property which are not reasonable, is untenable.

Under the Constitution protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action. Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection. To concentrate merely on power of the State and the object of the State action in exercising that power is therefore to ignore the true intent of the Article. In this Court, there is, however, a body of authority that the nature and extent of the protection of the fundamental rights is measured not by the operation of the State action upon the rights of the individual, but by its object. Thereby the constitutional scheme which makes the guaranteed rights subject to the permissible restrictions within their allotted fields

got blurred and gave impetus to a theory that certain Articles of the Constitution enact a code dealing exclusively with matters dealt with therein and the protection which an aggrieved person may claim is circumscribed by the object of the State action. Protection of the right to property or personal freedom is most needed when there is an actual threat. To argue that State action which deprives a person permanently or temporarily of his right to property, or personal freedom operates to extinguish the right or the remedy is to reduce the guarantee to an empty platitude. Again to hold that the extent of, and circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness. Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion is inevitable that the validity of the State action must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions.

(Divergent lines of authority discussed.)

Limitations prescribed for ensuring due exercise of the authority of the State to deprive a person of his property and of the power to compulsorily acquire his property are, therefore, specific classes of limitations on the right to property falling within Article 19 (1) (f). Hence it cannot be said that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31 (2). Formal compliance with the conditions under Article 31 (2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. Thus, Articles 19 (1) (f) and 31 (2) are not mutually exclusive.

The assumption in *A.K. Gopalan's case*, (1950) S.C.R. 88: (1950) S.C.J. 174, that certain Articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct.

The area of protection afforded against State action by the freedom under Article 19 (1) (f) and by the exercise of the power of the State to acquire property of the individual without his consent must still be reconciled. If property is compulsorily acquired for a public purpose and the law satisfied the requirements of Articles 31 (2) and 31 (2A), the Court may readily presume that by the acquisition a reasonable restriction on the exercise of the right to hold property is imposed in the interests of the general public. But that is not because the claim to plead infringement of the fundamental right under Article 19 (1) (f) does not avail the owner; it is because the acquisition imposes a permissible restriction on the right of the owner of the property compulsorily acquired.

By virtue of Article 19 (6) (ii) as amended by the Constitution (First Amendment) Act, 1951, the basic and essential provisions of law which are integrally and essentially connected with the carrying on of a trade by the State will not be exposed to the challenge that they impair the guarantee under Article 19 (1) (g) whether the citizens are excluded completely or partially from carrying on that trade, or the trade is competitive. Imposition of restrictions which are incidental or subsidiary to the carrying on of trade by the State whether to the exclusion of the citizens or not must, however satisfy the test of the main limb.

Hence the law which prohibits after 19th July, 1969, the named banks from carrying on banking business, being a necessary incident of the right assumed by the Union, is not liable to be challenged because of Article 19 (6) (ii) in so far it affects the right to carry on business.

But by the provisions of Act XXII of 1969 the named banks are rendered practically incapable of engaging in any business. A named bank cannot even use its name and the compensation which is to be given will, in the absence of agreement, be determined by the tribunal and paid in securities which will mature not before ten years. The named banks are, however, declared entitled to engage in business other than banking; but they have no assets with which that business may be carried. A business organization deprived of its entire assets and undertaking, its managerial and other staff, its premises, and even its name, even if it has a theoretical right to carry on non-banking business, would not be able to do so, especially when even the fraction of the value of its undertaking made payable to it as compensation, is not made immediately payable to it.

Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot in practice be carried on, the Court will regard the imposition of the restrictions as unreasonable.

If compensation paid is in such a form that it is not immediately available for restarting any business, declaration of the right to carry on business other than banking becomes an empty formality, when the entire undertaking of the named banks is transferred to and vests in the banks together with the premises and the names of the banks, and the named banks are deprived of the services of its administrative and other staff. Under the circumstances, the restriction imposed upon the right of the named banks to carry on 'non-banking' business is plainly unreasonable.

Per *Raj, J.*: Article 19 (1) (f) does not have any application to acquisition or requisition of property for a public purpose under authority of a law which provides for compensation as mentioned in Article 31 (2) for the following reasons. First, the provisions of the Constitution are to be interpreted in a harmonious manner. No provision of the Constitution is superfluous or redundant. It cannot be suggested that acquisition of property for public purpose is not of the same content as acquisition for public interest or in the interest of the public. It will be pedantry to say that acquisition for public purpose is not in the interest of the public. Secondly, the contention that Article 31 (2) will have to be read along with Article 19 (1) (f) for the purpose of deciding the piece of legislation on the anvil of reasonableness of restrictions in the interest of the general public will mean that acquisition or requisition for a public purpose under Article 31 (2) is embraced within Article 19 (5). That would be not only depriving the provisions of the Constitution of harmony but also making Article 31 (2) otiose and a dead letter. By harmonising is meant that each provision is rendered free to operate, with full vigour in its own legitimate field. If acquisition or requisition of property for a public purpose has to satisfy again the test of reasonable restriction in the interest of the general public then harmony is repelled and Article 31 (2) becomes a mere repetition and meaningless. It could not be said that when Article 31 (2) was specifically enacted to deal with a case of acquisition or requisition of property for a public purpose the framers of the Constitution were not aware that it was a form of public deprivation of property. That is why it is important to note the distinction between deprivation of property under Article 31 (1) which will relate to all kinds of deprivation of property other than acquisition or requisition by the State and Article 31 (2) which deals only with such acquisition or requisition of property.

Thirdly, Article 31 (2) and 31 (2-A) is a self contained code. Finally the Constitution Fourth Amendment Act, 1955 indicates in bold relief the separate and distinctive field of law for acquisition and requisition by the State of property for public purpose.

Article 19 (6) in the two limbs and in the two sub-Articles of the second limb deals with separate matters and State monopoly in respect of trade or business is not open to be reviewed in Courts on the ground of reasonableness.

Section 15 (2) of Act XXII of 1969 allows the existing banks to carry on business other than banking. If as a result of acquisition, there is lack of immediate resources to carry on these businesses the Act provides compensation and the existing bank will devise ways and means for carrying on the businesses. Constitutionality of the Act cannot be impeached on the ground of lack of immediate resources to carry on business. It cannot be suggested that after compensation has been provided for, the State will have to provide moneys to enable the existing bank to carry on these businesses. That would be asking for something beyond the limits of the Constitution. If the entire undertaking of a banking company is taken by way of acquisition the assets cannot be separated to distinguish those belonging to banking business from others belonging to "non-banking business" because assets are not divided on any such basis. It would be strange to hold in the teeth of express provisions in Act XXII of 1969 permitting the banks to carry on business other than banking that the same will amount to a prohibition on the bank to carry on those businesses.

Articles 19 (1) (f) and (g) do not at all enter the domain of Article 31 (2) because a legislation for acquisition and requisition of property for public purpose is not required to be tested again on the touchstone of reasonableness of restriction. Such reasonable restriction is inherent and implicit in public purpose. That is why public purpose is dealt with separately in Article 31 (2).

Infringement of Article 14 : By majority.—The fourteen named banks are prohibited from carrying on banking business, a disability for which there is no rational explanation. Banks other than the named banks may carry on banking business in India and abroad; new banks may be floated for carrying on banking business. In this a flagrantly hostile discrimination is practised. Section 15 (2) of the Act which by the clearest implication prohibits the named banks from carrying on banking business is, therefore, liable to be struck down.

Again the named banks are also, though in theory competent, in substance prohibited from carrying on non-banking business. For reasons set out for holding that the restriction is unreasonable it must also be held that the guarantee of equality is impaired by taking over the assets relating the non-banking business.

Per Ray, J.—The object of Act XXII of 1969 is to control the deposit resources for developing national economy and as such the selection of 14 banks having regard to their larger resources, their greater coverage, their managerial and personnel resources and the administrative and organisational factors involved in expansion is both intelligible and related to the object of the Act. Section 15 (2) (d) states that these 14 banks after acquisition are not to carry on any banking business for the obvious reason that these 14 banks are not in the same class as the other Indian banks. Besides, it is also reasonable that the 14 banks should not be permitted to carry on banking business as the corresponding new banks. Therefore the classification of the 14 banks is also a rational and intelligible classification for the purposes of the Act.

There has to be a line of demarcation somewhere and it is reasonable that these 14 banks which are in a class by themselves because of their special features in regard to deposit, credit, administration, organisation should be prohibited from carrying on banking business. These special circumstances are the reasons for classification. This distinction between the 14 banks and others reasonably justified different treatment. An absolute symmetry or an accurate classification is not possible to be achieved in the task of acquisition of undertakings of banking companies.

Infringement of Article 31 (2) : By Majority.—A law providing for acquisition must either fix the amount of compensation or specify the principles on which, and the manner in which the compensation is to be determined and given. It is plain on the terms of Articles 31 (2) that the owner whose property is compulsorily acquired is guaranteed the right to receive compensation and the amount of compensation is either fixed by the law or is determined according to the princi-

ples and in the manner specified by the law. The law which does not ensure the guarantee will, except where the grievance only is that the compensation provided by the law is inadequate, be declared void.

Both the lines of thought in *Vajravelu Mudaliar's case*, (1964) 2 S.C.J. 703 : (1965) 1 S.C.R. 614 and *Shantilal Mangaldas's case*, (1969) 2 S.C.J. 322 : A.I.R. 1969 S.C. 634, which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of compensation and is a recognised principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired.

On the application of the view expressed in the above two decisions, Act XXII of 1969 is liable to be struck down as it fails to provide to the expropriated banks compensation determined according to relevant principles.

It cannot be held that a principle specified by the Parliament for determining compensation of the property to be acquired is conclusive. If that view be accepted, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process, the constitutional guarantee of the right to compensation may be severely impaired. The principle specified must be appropriate to the determination of compensation for the particular class of property sought to be acquired.

Compensation to be determined under Act XXII of 1969 is for acquisition of the undertaking, but the Act instead of providing for valuing the entire undertaking as a unit provides for determining the value of some only of the components, which constitute the undertaking and reduced by the liabilities. It also provides different methods of determining compensation in respect of each such component. This method for determination of compensation is *prima facie* not a method relevant to the determination of compensation for acquisition of the undertaking. Aggregate of the value of components is not necessarily the value of the entirety of a unit of property acquired, especially when the property is a going concern, with an organised business. On that ground alone acquisition of the undertaking is liable to be declared invalid, for it impairs the Constitutional guarantee for payment of compensation for acquisition of property by law.

Even if it be assumed that the aggregate value of the different components will be equal to the value of the undertaking of the named bank as a going concern the principles specified do not give a true recompense to the banks for the loss of the undertaking.

The undertaking of a banking company taken over as a going concern would ordinarily include the goodwill and the value of the unexpired period of long-term leases in the prevailing conditions in urban areas. But goodwill of the banks is not one of the items in the assets in the impugned Act and in clause (f) of Part I of Schedule II though provision is made for including a part of the premium paid in respect of leasehold properties proportionate to the unexpired period, no value of the leasehold interest for the unexpired period is given. The value determined by excluding important components of the undertaking, such as the goodwill and value of the unexpired period of leases, will not be compensation for the undertaking.

The method specified for valuation of lands and buildings is not relevant to determination of compensation and the value determined thereby in certain circumstances is illusory as compensation. By providing a method of valuation of land and buildings which is not relevant the amount determined cannot be regarded as compensation. (For details See Majority judgment).

Determination of compensation to be paid for the acquisition of an undertaking as a unit after awarding compensation for some items which go to make up the undertaking and omitting important items amounts to adopting an irrelevant

principle in the determination of the value of the undertaking and does not furnish compensation to the expropriated owner.

Further, under the Act the principle for determination of the aggregate value of liabilities is also irrelevant.

Sections 4, 5 and 6 read with Schedule II of Act XXII of 1969 therefore violate Article 31 (2) of the Constitution. Since section 4, 5 and 6 and Schedule II are not severable for the rest of the Act, the Act must, in its entirety, be declared void.

Per Ray, J.—If the quantum of compensation fixed by the Legislature is not liable to be challenged before the Court on the ground that it is not a just equivalent the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of these principles is not a just equivalent. The right declared by the Constitution guarantees compensation before a person is compulsorily expropriated of the property for public purpose. Principles may be challenged on the ground that they are not relevant to the property acquired or the time of acquisition of the property but not on the plea that the principles are not relevant to the determination of a fair or just equivalent of the property acquired. A challenge to the statute that a principle specified by it does not provide or award a just equivalent will be a clear violation of the Constitutional declaration that inadequacy of compensation provided for is not justicable.

When principles are laid down in a statute for determination of compensation all that the Court will see is whether those principles are relevant for determination of compensation. The relevancy is to compensation and not to adequacy. It cannot be held that when the relevant principle set out is 'ascertained value' the petitioner could yet contend that market value should be the principle. It would really be going into adequacy of compensation by preferring the merits of the principle to those of the other for the oblique purpose of arriving at what is suggested to be just equivalent. It is unthinkable that the Legislature after the Constitution Fourth Amendment Act intended that the word "compensation" would mean just equivalent. Therefore, just equivalent cannot be the criterion in finding out whether the principles are relevant to compensation or whether compensation is illusory.

Under Act XXII of 1969 the entire undertaking is the subject-matter of acquisition and compensation is to be paid for the undertaking and not for each of the assets of the undertaking. There is no uniform established principle for valuing an undertaking as a going concern but the usual principle is assets minus liabilities. If it be suggested that no compensation has been provided for any particular asset that will be questioning adequacy of compensation because compensation has been provided for the entire undertaking.

The principles which have been set out in the 1969 Act are relevant to the determination of compensation. It may be that adoption of one principle may confer lesser sum of money than another but that will not be a ground for saying that the principle is not relevant. The criticism that compensation provided by the 1969 Act is illusory is utterly unmeritorious. (For details see dissenting judgment of Ray, J.).

Per Ray, J. (Majority expression no opinion):—There can be retrospective legislation affecting acquisition of property and such retrospective operation and validation of actions with regard to acquisition does not offend Article 31 (2) of the Constitution. Act XXII of 1969 which is retrospective in operation does not violate Article 31 (2) because it speaks of authority of a law without any words of limitation or restriction as to law being in force at the time.

Section 11 of Act XXII of 1969 does not suffer from the vice of excessive delegation. It is explicable that where the Government acquires undertakings of industries, the matters of policy involving public interest or national interest

should be left to be decided by the Government. There is nothing unconstitutional in such provisions.

Acquisition of the 14 banks and the prohibition of banking business by the existing banks does not violate Article 301 of the Constitution. Article 305 directly applies to a law relating to banking and all businesses necessarily incidental to it carried on by the State to the complete or partial exclusion of 14 banks. Article 302 can have no application in such a case. An individual cannot complain of violation of Article 301. Article 305 applies in the present case and therefore neither Article 301 nor Article 302 will apply.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

N.A. Palkhivala and M. G. Ghagla, Senior Advocates (*A.J. Rana, Mrs. N. N. Palkhivala, R. N. Bannerjee, S. Swarup and B. Datta*, Advocates and *J. B. Dadachanji, O. G. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.* with them), for Petitioner (In W.Ps. Nos. 222 and 300 of 1969).

R. V. S. Mani, Advocate, for Petitioner (In W.P. No. 298 of 1969).

Mr. Niren De, Attorney-General for India, *Jagdish Swarup*, Solicitor-General of India, *M. G. Setalvad* and *G. K. Daphtary*, Senior Advocates (*R. H. Dhebar, R. N. Sachthey* and *S.P. Nayar*, Advocates, with them), for Respondent (In W.P. No. 222 of 1969).

Mr. Niren De, Attorney-General, for India, *Jagdish Swarup*, Solicitor-General of India, *M. G. Setalvad, G. K. Daphtary* and *N. S. Bindra*, Senior Advocates, (*R. H. Dhebar, R. N. Sachthey, S. P. Nayar* and *N. H. Hingorani*, Advocates, with them), for Respondent (In W.P. No. 300 of 1969).

Mr. Niren De, Attorney-General for India, *Jagdish Swarup*, Solicitor-General of India, *M.G. Setalvad, G. K. Daphtary* and *Dr. V. A. Seyid Muhammad*, Senior Advocates (*R. H. Dhebar, R. N. Sachthey* and *S. P. Nayar*, Advocates, with them), for Respondent (In W.P. No. 298 of 1969).

M. G. Setalvad and *S. Mohan Kumaramangalam*, Senior Advocates (*R. K. Garg* and *S. G. Agarwal*, Advocates of *M/s. Ramamurthi & Co.*, and *V. J. Francis*, Advocate, with them), for Intervener No. 1.

M. G. Setalvad, Senior Advocate (*R. H. Dhebar* and *S. P. Nayar*, Advocates, with him), for Intervener No. 2 (Maharashtra).

S. Mohan Kumaramangalam, Senior Advocate, (*A. V. Rangam*, Advocate, with him), for Intervener No. 3 (Tamil Nadu).

Mr. Lal Narain Sinha, Advocate-General for the State of Bihar (*R. K. Garg* and *D. P. Singh*, Advocates, with him), for Intervener No. 4 (Bihar).

V. K. Krishna Menon, Senior Advocate (*M. R. Krishna Pillai* and *D. P. Singh*, Advocates, with him), for Intervener No. 5 (Kerala).

P. Ram Reddy, Senior Advocate (*P. Parameswara Rao*, Advocate, with him), for Intervener No. 6 (Andhra Pradesh).

M. G. Ghagla, Senior Advocate (*Santosh Chatterjee* and *G. S. Chatterjee*, Advocates, with him), for Intervener No. 7 (Orissa).

The following Judgments of the Court were delivered

Shah, J.—(On behalf of himself and other Judges except Ray, J.)—Rustom Cavasjee Cooper—hereinafter called 'the petitioner'—holds shares in the Central Bank of India Ltd., the Bank of Baroda Ltd., the Union Bank of India Ltd., and the Bank of India Ltd., and has accounts—current and fixed deposit—with those Banks; he is also a director of the Central Bank of India Ltd. By these petitions he claims a declaration that the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance VIII of 1969 promulgated on 19th July, 1969, and the Banking Companies (Acquisition and Transfer of Undertakings) Act XXII of 1969 which re-

placed the Ordinance with certain modifications impair his rights guaranteed under Articles 14, 19 and 31 of the Constitution, and are on that account invalid.

In India there was till 1949, no comprehensive legislation governing banking business and banking institutions. The Central Legislature enacted the Banking Companies Act X of 1949 (later called "The Banking Regulation Act") to consolidate and amend the law relating to certain matters concerning banking. By section 5 (b) of that Act, "banking" was defined as meaning "the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise," and by section 5 (c) a "banking company" meant "any company which transacts the business of banking in India." By section 6 it was enacted that in addition to the business of banking as defined in section 5 (b) a banking company may engage in one or more of the forms of business specified in clauses (a) to (o) of sub-section (1). By sub-section (2) of section 6 banking companies were prohibited from engaging "in any form of business other than those referred to in sub-section (1)." The Act applied to commercial banks, and enacted provisions, amongst others, relating to prohibition of employment of managing agents and restrictions on certain forms of employment; minimum paid-up capital and reserves; regulation of voting rights of shareholders and election of Board of Directors; prohibition of charge on unpaid capital; restriction on payment of dividend; maintenance of a percentage of assets; return of unclaimed deposits; and accounts and balance-sheets. It also enacted provisions authorising the Reserve Bank to issue directions to and for trial of proceedings against the Banks and for speedy disposal of winding up proceedings of Banks.

The Banking Regulation Act was amended by Act LVIII of 1968, to give effect to the policy of "social control" over commercial banks. Act LVIII of 1968 provided for reconstitution of the Boards of Directors of commercial banks with a Chairman who had practical experience of the working of a Bank or financial, economic and business administration, and with a membership not less than 51 per cent. consisting of persons having special knowledge or practical experience in accountancy, agriculture and rural economy, banking co-operation, economics, finance, law and small-scale industry. The Act also provided that no loans shall be granted to any director of the Bank or to any concern in which he is interested as Managing Director, Manager, employee or guarantor or partner or in which he holds substantial interest. The Reserve Bank was invested with power to give directions to commercial banks and to appoint directors or observers in the interest of depositors or proper management of the Banking Companies, or in the interest of Banking policy (which expression was defined by section 5 (ca) as

"any policy which is specified from time to time by the Reserve Bank in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources."

The Reserve Bank was also invested with power to remove managerial and other personnel from office and to appoint additional directors and to issue directions prohibiting certain activities in relation to Banking Companies. The Central Government was given power to acquire the business of any Bank if it failed repeatedly to comply with any direction issued by the Reserve Bank under certain specific provision in regard to any matter concerning the affairs of the Bank and if acquisition of the Bank was considered necessary in the interest of the depositors or in the interest of the banking policy or for the better provision of credit generally or of credit to any particular section of the community or in a particular area.

During the last two decades the Reserve Bank reorganised the banking structure. A number of units which accounted for a small section of the banking business were amalgamated under directions of the Reserve Bank. The total number of commercial banking institutions was reduced from 566 in 1951 to 89 in 1969—73 scheduled and 16 non-scheduled.

In exercise of the authority conferred by the State Bank of India Act XXI of 1955 the undertaking of the former Imperial Bank of India was taken over by a public corporation controlled by the Central Government. The State Bank took over seven subsidiaries under authority conferred by Act XXXVIII of 1959. There were in June, 1969 14 commercial banks operating in India each having deposits exceeding Rs. 50 crores. The following is an analysis of the commercial banking structure in India in June, 1969:

	No. of Banks.	No. of Offices.	Deposits (in Crores)	Credit (in Crores).
State Bank of India ..	1	1,566	948	967
Subsidiaries of State Bank of India ..	7	888	291	219
Indian Schedule Commercial banks (each with deposit exceeding Rs. 50 Crores) ..	14	4,130	2,632	1,829
Banks incorporated in Foreign Countries ..	15*	130	478	385*
Other Indian Scheduled Banks ..	36	1,324	296	197
Non-scheduled Commercial Banks.	16	216	28	16

*Only 13 were operating.

Late in the afternoon of 19th July, 1969 (which was a Saturday) the Vice-President (acting as President) promulgated, in exercise of the power conferred by clause (1) of Article 123 of the Constitution, Ordinance VIII of 1969 transferring to and vesting the undertaking of 14 named commercial banks in corresponding new banks set up under the Ordinance. The long title of the Ordinance read as follows:

"An Ordinance to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with national policy and objectives and for matters connected therewith or incidental thereto."

By section 2, "banking company" was defined as not including a foreign company within the meaning of section 591 of the Companies Act, 1956. An "existing bank" was defined by section 2 (b) as meaning

"a banking company specified in column 1 of the First Schedule, being a company the deposits of which, as shown in the return as on the last Friday of June, 1969, furnished to the Reserve Bank under section 27 of the Banking Regulation Act, 1949, were not less than rupees fifty crores."

In the Schedule to the Act were included the names of fourteen commercial banks.

- (1) The Central Bank of India Ltd.
- (2) The Bank of India Ltd.
- (3) The Punjab National Bank Ltd.
- (4) The Bank of Baroda Ltd.
- (5) The United Commercial Bank Ltd.
- (6) Canara Bank Ltd.
- (7) United Bank of India Ltd.
- (8) Dena Bank Ltd.
- (9) Syndicate Bank Ltd.
- (10) The Union Bank of India Ltd.

- (11) Allahabad Bank Ltd.
- (12) The Indian Bank Ltd.
- (13) The Bank of Maharashtra Ltd.
- (14) The Indian Overseas Bank Ltd.

These banks are hereinafter referred to as the named banks.

A "corresponding new bank" was defined in relation to an existing bank as meaning "the body corporate specified against such bank in column 2 of the First Schedule." By section 2 (g) it was provided that the words and expressions used in the Ordinance and not defined, but defined in the Banking Regulation Act, 1949, had the meaning respectively assigned to them in that Act. Thereby the definitions of "banking" and "banking company" in section 5 (b) and section 5 (c) of the Banking Regulation Act were incorporated in the Ordinance.

The principal provisions of the Ordinance were—(1) Corporations styled in the ordinance "corresponding new banks" shall be established, each such corporation having paid-up capital equal to the paid-up capital of the named bank in relation to which it is a corresponding new bank. The entire capital of the new bank shall stand vested in the Central Government. The corresponding new banks shall be authorised to carry on and transact the business of banking as defined in clause (b) of section 5 of the Banking Regulation Act, 1949, and also to engage in one or more forms of business specified in sub-section (1) of section 6 of that Act. The Chairman of the named bank holding office immediately before the commencement of the Ordinance shall be the Custodian of the corresponding new bank. The general superintendence and direction of the affairs and business of a corresponding bank shall be vested in the Custodian, who shall be the chief executive officer of that bank.

(2) The undertaking within or without India of every named bank on the commencement of the Ordinance shall stand transferred to and vested in the corresponding new bank. The expression "undertaking" shall include all assets, rights, powers, authorities and privileges, and all property, movable and immovable cash balances, reserve fund investments and all other rights and interests arising out of such property as are immediately before the commencement of the Ordinance in the ownership, possession, power or control of the named bank in relation to the undertaking, including all books of accounts, registers, records and all other documents of whatever nature relating thereto. It shall also include all borrowings, liabilities and obligations of whatever kind then subsisting of the named bank in relation to the undertaking. If according to the law of any foreign country, the provisions of the Ordinance by themselves do not effectively transfer or vest any asset or liability situated in that country in the corresponding new bank, the affairs of the named bank in relation to such asset or liability shall stand entrusted to the chief executive officer of the corresponding new bank with authority to take steps to wind up the affairs of that bank. All contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting or having effect immediately before the commencement of the Ordinance, and to which the named bank is a party or which are in favour of the named bank shall be of as full force and effect against or in favour of the corresponding new bank, and be enforced or acted upon as fully and effectively as if in the place of the named bank the corresponding new bank is a party thereto or as if they are issued in favour of the corresponding new bank. In pending suits or other proceedings by or against the named bank, the corresponding new bank shall be substituted in those suits or proceedings. Any reference to any named bank in any law, other than the Ordinance, or in any contract or other instrument shall be construed as a reference to the corresponding new bank in relation to it.

(3) The Central Government shall have power to frame a scheme for carrying out the provisions of the Act, and for that purpose to make provisions for the corresponding new banks relating to capital structure, constitution of the Board of Directors, manner of payment of compensation to the shareholders, and matters incidental, consequential and supplemental. Corresponding new banks shall also be guided

in the discharge of their functions by such directions in regard to matters of policy involving public interest as the Central Government may give.

(4) On the commencement of the Ordinance, every person holding office as Chairman, Managing Director, or other Director of a named bank, shall be deemed to have vacated office, and all officers and other employees of a named bank shall become officers or other employees of the corresponding new banks. Every named bank shall stand dissolved on such date as the Central Government may by notification in that behalf appoint.

(5) The Central Government shall give compensation to the named banks determined according to the principles set out in Second Schedule, that is to say,—

(a) where the amount of compensation can be fixed by agreement, it shall be determined in accordance with such agreement.

(b) where no such agreement can be reached, the Central Government shall refer the matter to the Tribunal within a period of three months from the date on which the Central Government and the existing bank fail to reach an agreement regarding the amount of compensation.

Compensation so determined shall be paid to each named bank in marketable Central Government securities. For the purpose of determining compensation, Tribunals shall be set up by the Central Government with certain powers of a Civil Court.

(5) The Central Government shall have power to make such orders not inconsistent with the provisions of the Ordinance which may be necessary for the purpose of removing defects.

Under the Ordinance the entire undertaking of every named commercial bank was taken over by the corresponding new bank, and all assets and contractual rights and all obligations to which the named bank was subject stood transferred to the corresponding new bank. The Chairman and the Directors of the Banks vacated their respective offices. To the named banks survived only the right to receive compensation to be determined in the manner prescribed. Compensation, unless settled by agreement, was to be determined by the Tribunal, and was to be given in marketable Government securities. The entire business of each named bank was accordingly taken over, its chief executive officer ceased to hold office and assumed the office of Custodian of the corresponding new bank, its directors vacated office; and the services of the administrative and other staff stood transferred to the corresponding new bank. The named bank had thereafter no assets, no business, and no managerial administrative or other staff; it was incompetent to use the word "Bank" in its name, because of the provisions contained in section 7 (1) of the Banking Regulation Act, 1949, and was liable to be dissolved by a notification of the Central Government.

Petitions challenging the competence of the President to promulgate the Ordinance were lodged in this Court on 21st July, 1969. But before the petitions could be heard by this Court, a Bill to enact provisions relating to acquisition and transfer of undertakings of the existing banks was introduced in the Parliament, and was enacted on 9th August, 1969, as "The Banking Companies (Acquisition and Transfer of Undertakings) Act XXII of 1969." The long title of the Act was in terms identical with the long title of the Ordinance. By sub-section (1) of section 27 of the Act, Ordinance VIII of 1969 was repealed. In the First Schedule were included the names of the 14 banks named in the Ordinance in juxtaposition with the names of the corresponding new banks. By sub-section (2) of section 1, the Act came into force on 19th July, 1969, and the undertaking of every named bank was deemed, with effect from that date, to have vested in the corresponding new bank. By section 27 (2), (3) and (4) actions taken or things done under the Ordinance inconsistent with the provisions of the Act were not to be of any force or effect, and no right, privilege, obligation or liability was to be deemed to have been acquired, accrued or incurred under the Ordinance.

The general scheme of the Ordinance relating to the transfer to and vesting in the corresponding new bank of the undertaking of each named bank, payment of compensation, and management of the corresponding new bank, remained unaltered. The Act departed from the Ordinance in certain matters :

(1) Under the Act the named banks remain in existence for certain purposes and they are not liable to be dissolved by order of the Government. If under the laws in force in any foreign country it is not permissible for a banking company, owned or controlled by Government, to carry on the business of banking in that country, the assets, rights, powers, authorities and privileges and property, movable and immovable, cash balances and investments of any named bank operating in that country shall not vest in the corresponding new bank. The directors of the named banks shall remain in office and may register transfers or transmission of shares ; arrive at an agreement about the amount of compensation payable under the Act or appear before the Tribunal for obtaining a determination as to the amount of compensation ; distribute to shareholders the amount of compensation received by the Bank under the Act for the acquisition of its undertaking ; carry on the business of banking in any country outside India if under the law in force in that country any bank, owned or controlled by Government, is prohibited from carrying on the business of banking there; and carry on any business other than the business of banking. The Central Government has power to authorise the corresponding new bank to advance the amount required by the named bank in connection with the functions which the directors may perform. Reference to any named bank in any law, or in any contract or other instrument shall be construed as a reference to the corresponding new bank in relation to it, but not in cases where the named bank may carry on any business and in relation to that business.

(2) Principles for determination of compensation and the manner of payment are modified. Interim compensation may be paid to a named bank if it agrees to distribute to its shareholders in accordance with their rights and interests. A major change is made in the principles for determining compensation set out in Schedule II. By Explanation I to clause (e) of Part I of Schedule II, the value of any land or buildings to be taken into account in valuing the assets is to be the market value of the land or buildings, but where such market value exceeds the "ascertained value", that "ascertained value" is to be taken into account, and by Explanation II the "ascertained value" of any building wholly occupied on the date of the commencement of the Act is to be twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let out from year to year, and reduced by one-sixth of the amount of the rent on account of maintenance and repairs, annual premium paid to insure the building against risk of damage or destruction, annual charge, if any, on the building, ground rent, interest on any mortgage or other capital charge on the building, interest on borrowed capital if the building has been acquired, constructed, repaired, renewed or re-constructed with borrowed capital, and the sums paid on account of land revenue or other taxes in respect of such building.

(3) The Central Government may reconstitute any corresponding new bank into two or more corporations ; amalgamate any corresponding new bank or with another banking institution ; transfer the whole or any part of the undertaking of a corresponding new bank to any other banking institution ; or transfer the whole or any part of the undertaking of any other banking institution to a corresponding new bank. The Board of Directors of the corresponding new banks are to consist of representatives of the depositors of the corresponding new bank, employees of such banks, farmers, workers and artisans to be elected in the prescribed manner and of other persons as the Central Government may appoint.

(4) The profits remaining after making provision for bad and doubtful debts, depreciation in assets, contributions to staff and superannuation funds and all other matters for which provision is necessary under any law, the corresponding new bank shall transfer the balance of profits to the Central Government.

(5) Provision of law relating to winding up of corporations do not apply to the corresponding new banks, and a corresponding new bank may be ordered to be liquidated only by the order of the Central Government.

The petitioner challenges the validity of the Ordinance and the Act on the following principal grounds :

I. The Ordinance promulgated in exercise of the power under Article 123 of the Constitution was invalid, because the condition precedent to the exercise of the power did not exist ;

II. That in enacting the Act the Parliament encroached upon the State List in the Seventh Schedule of the Constitution, and to that extent the Act is outside the legislative competence of the Parliament ;

III. That by enactment of the Act, fundamental rights of the petitioner guaranteed by the Constitution under Articles 14, 19 (1) (f) and (g) and 31 (2) are impaired ;

IV. That by the Act the guarantee of freedom of trade under Article 301 is violated ; and

V. That in any event retrospective operation given to Act (XXII of 1969) is ineffective, since there was no valid Ordinance in existence. The provision in the Act retrospectively validating infringement of the fundamental rights of citizens was *not within the competence of the Parliament. That sub-sections (1) and (2) of section 11 and section 26 are invalid.*

The Attorney-General contended that the petitions are not maintainable, because no fundamental right of the petitioner is directly impaired by the enactment of the Ordinance and the Act, or by any action taken thereunder. He submitted that the petitioner who claims to be a shareholder, director and holder of deposit and current accounts with the Banks is not the owner of the property of the undertaking taken over by the corresponding new banks and is on that account incompetent to maintain the petitions complaining that the rights guaranteed under Articles 14, 19 and 31 of the Constitution were impaired.

A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the profit. Again a director of a company is merely its agent for the purpose of management. The holder of a deposit account in a company is its creditor : he is not the owner of any specific fund lying with the company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the company, unless by the action impugned by him, his rights are also infringed.

By a petition praying for a writ against infringement of fundamental rights, except in a case where the petition is for a writ of *habeas corpus* and probably for infringement of the guarantees under Articles 17, 23 and 24, the petitioner may seek relief in respect of his own rights and not of others. The shareholder of a company, it is true, is not the owner of its assets ; he has merely a right to participate in the profits of the company subject to the contract contained in the Articles of Association. But on that account the petitions will not fail. A measure executive or legislative may impair the rights of the company alone, and not of its shareholders ; it may impair the rights of the shareholders and not of the company : it may impair the rights of the shareholders as well as of the company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the company as well. The test in determining whether the shareholder's right is impaired is not formal : it is essentially qualitative : if the State action impairs the right of the shareholders as well as of the company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief.

The petitioner claims that by the Act and by the Ordinance the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution are impaired. He says

that the Act and the Ordinance are without legislative competence in that they interfere with the guarantee of freedom of trade and are not made in the public interest ; that the Parliament had no legislative competence to enact the Act and the President had no power to promulgate the Ordinance, because the subject-matter of the Act and the Ordinance is (partially at least) within the State List ; and that the Act and Ordinance are invalid because they vest the undertaking of the named banks in the new corporations without a public purpose and without setting out principles and the basis for determination and payment of a just equivalent for the property expropriated. He says that in consequence of the hostile discrimination practised by the State the value of his investment in the shares is substantially reduced, his right to receive dividend from his investment has ceased, and he has suffered great financial loss, he is deprived of the right as a shareholder to carry on business through the agency of the company, and that in respect of the deposits the obligations of the corresponding new banks not of his choice are substituted without his consent.

In *Dwarkadas Shrinivas v. The Sholapur Spinning and Weaving Company Limited and others*¹, this Court held that a preference shareholder of a company is competent to maintain a suit challenging the validity of the "Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance" 2 of 1950 (which was later replaced by Act XXVII of 1950), which deprived the company of its property without payment of compensation within the meaning of Article 31. Mahajan, J., observed :

"The plaintiff and the other preference shareholders are in imminent danger of sustaining direct injury as a result of the enforcement of this Ordinance, the direct injury being the amount of the call that they are called upon to pay and the consequent forfeiture of their shares."

Das, J., in the same case examined the matter in some detail and observed at page 722 :

"The impugned Ordinance, * * * directly affects the preference shareholders by imposing on them this liability, or the risk of it, and gives them a sufficient interest to challenge the validity of the Ordinance, * * * Certainly he can show that the Ordinance under which these persons have been appointed was beyond the legislative competence of the authority which made it or that the Ordinance had not been duly promulgated. If he can, with a view to destroy the *locus standi* of the persons who have made the call raise the question of the invalidity of the Ordinance * * *, I can see no valid reason why, for the self same purpose, he should not be permitted to challenge the validity of the Ordinance on the ground of its unconstitutionality for the breach of the fundamental rights of the company or of other persons."

A similar view was also taken in *Chiranjit Lal Chowdhuri v. The Union of India*,² by Mukherjee, J., at page 899, by Fazl Ali, J., at page 876, by Patanjali Sastri J., at page 889 and by Das, J., at page 922.

The judgment of this Court in *The State Trading Corporation of India Limited and others v. The Commercial Tax Officer, Visakhapatnam and others*³, has no bearing on this question. In that case in a petition under Article 32 of the Constitution the State Trading Corporation challenged the infringement of its right to hold property and to carry on business under Article 19 (1) (f) and (g) of the Constitution, and this Court opined that the Corporation not being a citizen was incompetent to enforce the rights guaranteed by Article 19. Nor has the judgment in *Tata Engineering and Locomotive Company Limited v. State of Bihar and others*⁴, any bearing on the question arising in these petitions. In a petition under Article 32 of the Constitution filed by a Company challenging the levy of sales-tax by the State of Bihar, two shareholders were also impleaded as petitioners. It was urged on behalf of the shareholders that in substance the interests of the Company and of the shareholders were identical

1. (1954) S.C.J. 175; (1954) 1 M.L.J. 355; (1954) S.C.R. 674; A.I.R. 1954 S.C. 119.
2. (1951) S.C.J. 29; (1950) S.C.R. 869.
3. (1964) 4 S.C.R. 99; (1963) 2 S.C.J. 605.
4. (1964) 6 S.C.R. 885; (1964) 1 Comp.L.J. 280; (1964) 1 S.C.J. 666.

and the shareholders were entitled to maintain the petition. The Court rejected that contention, observing that what the Company could not achieve directly, it could not relying upon the doctrine of "lifting the veil" achieve indirectly. The petitioner seeks in this case to challenge the infringement of his own rights and not of the Banks of which he is a shareholder and a director and with which he has accounts—current and fixed deposit.

It was urged that in any event the guarantee of freedom of trade does not occur in Part III of the Constitution, and the petitioner is not entitled to maintain a petition for breach of that guarantee in this Court. But the petitioner does not seek by these petitions to enforce the guarantee of freedom of trade and commerce in Article 301 : he claims that in enacting the Act the Parliament has violated a constitutional restriction imposed by Part XIII on its legislative power and in determining the extent to which his fundamental freedoms are impaired, the statute which the Parliament is incompetent to enact must be ignored.

It is not necessary to consider whether Article 31-A (1) (d) of the Constitution bars the petitioner's claim to enforce his rights as a director. The Act *prima facie* does not (though the Ordinance purported to) seek to extinguish or modify the right of the petitioner as a director : it seeks to take away expressly the right of the named Banks to carry on banking business, while reserving their right to carry on business other than banking. Assuming that he is not entitled to set up his right to enforce his guaranteed rights as a director, the petition will not still fail. The Preliminary objection raised by the Attorney-General against the maintainability of the petitions must fail.

I. Validity of Ordinance 8 of 1969—

Power to issue Ordinance is by Article 123 of the Constitution vested in the President. Article 123 provides :

"(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions ; and

(b) may be withdrawn at any time by the President.

Explanation.—Where the Houses of Parliament are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. Whether in a given case the President may decline to be guided by the advice of his Council of Ministers is a matter which need not detain us. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction : it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction. The President is under the Constitution not the repository of the legislative power of the Union, but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing the President with power to legislate by promulgating Ordinances.

Power to promulgate such Ordinance as the circumstances appear to the President to require is exercised—(a) when both Houses of Parliament are not in session ; (b) the provision intended to be made is within the competence of the Parliament to enact ; and (c) the President is satisfied that circumstances exist which render it necessary for him to take immediate action. Exercise of the power is strictly conditioned. The clause relating to the satisfaction is composite : the satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final.

The Attorney-General contended that the condition of satisfaction of the President in both the branches is purely subjective and the Union of India is under no obligation to disclose the existence of, or to justify the circumstances of the necessity to take immediate action. He relied upon the decisions of the Judicial Committee in *Bhagat Singh v. The King Emperor*¹; *King Emperor v. Benoari Lal Sharma*²; and upon a decision of the Federal Court in *Lakhi Narayan Das v. The Province of Bihar*³, which interpreted the analogous provisions of the Government of India Act, 1935, conferring upon the Governor-General in the first two cases, and upon the Governor of a Province in the last case, power to issue Ordinances. He also relied upon the judgment of the Judicial Committee in *Hubli Electricity Company Limited v. Province of Bombay*⁴.

The Attorney-General said that investment of legislative power upon the President being an incident of the division of sovereign functions of the Union and a "matter of high policy", the expression "the President is satisfied that circumstances exist which render it necessary for him to take immediate action" is incorporated as a guidance and not as a condition of the exercise of power. He invited our attention to the restraints inherent in the Constitution on the exercise of the power to promulgate Ordinance in clauses (1) and (2) of Article 74 ; clauses (3) and (4) of Articles 75 and Article 361, and submitted that the rule applicable to the interpretation of Parliamentary Statutes conferring authority upon officers of the State to act in a prescribed manner on being satisfied about the existence of certain circumstances is inept in determining the true perspective of the power of the head of the State in situations of emergency.

On the other hand, Mr. Palkhivala contended that the President is not made by Article 123 the final arbiter of the existence of the conditions on which the power to promulgate an Ordinance may be exercised. Power to promulgate an Ordinance being conditional, counsel urged, this Court in the absence of a provision—express or necessarily implicit in the Constitution—to the contrary, is competent to determine whether the power was exercised not for a collateral purpose, but on relevant circumstances which, *prima facie*, establish the necessity to take immediate action. Counsel submitted that the rules applicable to the interpretation of statutes conferring power exercisable on satisfaction of the specified circumstances upon the President and upon officers of the State, are not different. The nature of the power to perform an official act where the authority is of a certain opinion, or that in his view certain circumstances exist or that he has reasonable grounds to believe, or that he has reasons to believe, or that he is satisfied, springing from a constitutional provision is in no manner different from a similar power under a Parliamentary Statute, and no greater sanctity may attach to the exercise of the power merely because the source of the power is in the Constitution and not in a Parliamentary Statute. There is, it was urged, nothing in the constitutional scheme which supports the contention that the clause relating to satisfaction is not a condition of the exercise of power.

1. (1931) L.R. 58 I.A. 169 : 61 M.L.J. 279.

2. (1945) L.R. 72 I.A. 57 : (1945) F.C.R. 161 : (1945) F.L.J. 1 : (1945) 1 M.L.J. 76.

3. (1949) F.C.R. 693 : (1950) S.C.J. 32 : (1950) 1 M.L.J. 760.

4. (1949) L.R. 76 I.A. 57 : (1949) 2 M.L.J. 30.

Counsel relied upon the judgments of this Court in *Barium Chemicals Ltd. and another v. The Company Law Board and others*¹ and *Rohitas Industries Ltd. v. S. D. Agarwal and another*²; upon the decisions of the House of Lords in *Padfield and others v. Minister of Agriculture, Fisheries and Food and others*³; and of the Judicial Committee in *Durayappah v. Fernando and others*⁴; *Nakkuda Ali v. M. F. De. S. Jayaratne*⁵; *Ross-Glunis v. Papadopoulos*⁶, and contended that the decisions of the Judicial Committee in *Bhagat Singh's case*⁷, and *Benoari Lal Sarma's case*⁸, interpreted a provision which was in substance different from the provision of Article 123, that the decision in *Lakhi Narayan Das's case*⁹, merely followed the two judgments of the Judicial Committee and since the status of the President under the Constitution *qua* the Parliament is not the same as the constitutional status of the Governor-General under the Government of India Act, 1935, the decisions cited have no bearing on the interpretation of Article 123.

The Ordinance has been repealed by Act (XXII of 1969), and the question of its validity is now academic. It may assume significance only if we hold that Act (XXII of 1969) is valid. Since the Act is, in our view, invalid for reasons hereinafter stated, we accede to the submission of the Attorney-General that we need express no opinion in this case on the extent of the jurisdiction of the Court to examine whether the condition relating to satisfaction of the President was fulfilled.

II. Authority of Parliament to enact Act (XXII of 1969) —

On behalf of the petitioner it is urged that the Act is not within the legislative power of the Parliament and that, in any event, to the extent to which it vests in the corresponding new banks the assets of business other than banking, it trenches upon the authority of the State Legislature, and is on that account void. The relevant legislative entries in the Seventh Schedule and the constitutional provisions which have a bearing on the question of acquisition and taking over of undertaking of a bank may first be read.

The Parliament has exclusive legislative power with respect to "Banking" Entry 45 List I; "Incorporation, regulation and winding up of trading Corporations including banking, insurance and financial corporations but not including co-operative societies"; Entry 43 List I; and "Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including Universities": Entry 44, List I.

The States have exclusive legislative authority with respect to the following subjects in List II:

Entry 26—"Trade and commerce within the State, subject to the provisions of entry 33 of List III;"

Entry 30—"Money-lending and money-lenders; relief of agricultural indebtedness."

The Parliament and the States have concurrent legislative authority with respect to the following subjects in List III;

Entry 33—"Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

1. (1966) S.C.R. (Supp.) 311 : (1966) 2 Comp. L.J. 151 : (1966) 2 S.C.J. 623.

2. A.I.R. 1969 S.C. 707 : (1969) 1 Comp. L.J. 350 : (1969) 2 S.C.J. 1.

3. (1968) 1 All E.R. 694.

4. L.R. (1967) A.C. 337.

5. L.R. (1951) A.C. 66.

6. (1958) 2 All E.R. 23 : (1958) 1 W.L.R. 546.

7. (1931) L.R. 58 I.A. 619 : 61 M.L.J. 279.

8. (1945) L.R. 72 I.A. 57 : (1945) 1 M.L.J. 76.

9. (1949) F.C.R. 603 : (1950) S.C.J. 32 : (1950) 1 M.L.J. 760.

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute."

Entry 42—"Acquisition and requisition of property."

The argument raised by Mr. Setalvad, intervening on behalf of the State of Maharashtra and the State of Jammu and Kashmir, that the Parliament is competent to enact Act (XXII of 1969,) because the subject-matter of the Act is "with respect to" regulation of trading corporations and matters subsidiary and incidental thereto and on that account is covered in its entirety by Entries 43 and 44 of List I of the, Seventh Schedule, cannot be upheld. Entry 43 deals with incorporation, regulation and winding up of trading corporations including banking companies. Law regulating the business of a corporation is not a law with respect to regulation of a corporation. In List I entries expressly relating to trade and commerce are Entries 41 and 42. Again several entries in List I relate to activities commercial in character. Entry 45 "Banking"; Entry 46 "Bills of exchange, cheques promissory notes and other like instruments," Entry 47 "Insurance"; Entry 48 "Stock exchanges and future markets"; Entry 49 "Patents, inventions and designs." There are several entries relating to activities commercial as well as non-commercial in List II—Entry 21 "Fisheries;" Entry 24 "Industries x x x"; Entry 25 "Gas and Gas works;" Entry 26 "Trade and commerce"; Entry 30 "Money-lending and money-lenders;" Entry 31 "Inns and Inn-keeping;" Entry 33 "Theatres and dramatic performances cinemas, etc." We are unable to accede to the argument that the State Legislatures are competent to legislate in respect of the subject-matter of those entries only when the commercial activities are carried on by individuals and not when they are carried on by Corporations.

The object of Act (XXII of 1969) is to transfer the undertaking of each named bank and to vest it in the corresponding new bank set up with authority to carry on banking and other business. Each such corresponding new bank is controlled by the Central Government of which the entire capital is to stand vested in and allotted to the Central Government. The principal provisions of the Act which effectuate that object relate to—setting up of "corresponding new banks" as statutory corporations to carry on and transact the business of banking as defined in section 5 (b) of the Banking Regulation Act, 1949, and one or more other forms of business specified in section 6 (1) of that Act, with power to acquire and hold property for the purpose of the business, and to dispose of the same; administration of the corresponding new banks as institutions carrying on banking and other business; the undertaking of each named bank in its entirety stands transferred to and vested in a new corporation set up for that purpose; principles for determination of compensation and method of payment thereof to each named bank for transfer of its undertaking; and that the named bank may not carry on banking business, but may carry out business other than banking.

Mr. Palkhivala submitted that the Parliament may legislate in respect of the business of banking as defined in section 5 (b) of the Banking Regulation Act, 1949, and matters incidental thereto, and also for acquisition of that part of the undertaking of each named bank which relates to the business of banking, but not in respect of any other business not incidental to banking in which the named bank was engaged prior to 19th July, 1969, for the power to legislate in respect of such other business falls within Entry 26 of List II. As a corollary thereto, counsel submitted that power to legislate in respect of acquisition under Entry 42 of List III may be exercised by the Parliament only for effectuating legislation under a head falling in List I or List III of the Seventh Schedule.

It is necessary to determine the true scope of "banking" in Entry 35, List I, the meaning of the expression "property," and the limitations on the power of the Parliament to legislate in respect of acquisition of property in Entry 42, List III. Matters not in contest may be eliminated. Power to legislate for setting up corporations to carry on banking and other business and to acquire, hold and dispose of

property and to provide for administration of the corporations is conferred upon the Parliament by Entries 43, 44 and 45 of the first list. Power to enact that the named banks shall not carry on banking business [as defined in section 5 (b) of the Banking Regulation Act] is incidental to the power to legislate in respect of banking. Power to legislate for determination of compensation and method of payment of compensation for compulsory acquisition of the assets of the named banks, in so far as it relates to banking business is also within the power of the Parliament.

The expression "banking" is not defined in any Indian statute except the Banking Regulation Act, 1949. It may be recalled that by section 5 (b) of that Act "banking" means "the accepting for the purpose of lending or investment of deposits of money from the public repayable on demand or otherwise, and withdrawable by cheque, draft or otherwise." The definition did not include other commercial activities which a banking institution may engage in.

In support of his contention Mr. Palkhivala relied upon the observation of Lord Porter in *Commonwealth of Australia v. Bank of New South Wales*¹, that banking consists of the creation and transfer of credit, the making of loans, purchase and disposal of investments and other kindred transactions; and upon the statement in Halsbury's Laws of England, 3rd Edn. Vol 2, Article 270 at pages 150 and 151 that:

"A 'banker' is an individual partnership or corporation, whose sole or predominating business is banking, that is the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid by a customer,"

and in the foot-note (g) at page 151 that:

"Numerous other functions are undertaken at the present day by banks such as the payment of domiciled bills, custody of valuables, discounting bills, executor and trustee business, or acting in relation to stock exchange transactions, and banks have functions under certain financial legislation, * * * . These functions are not strictly banking business."

The Attorney-General said that the expression "banking" in Entry 45 List I means all form of business which since the introduction of western methods of banking in India, banking institutions have been carrying on in addition to banking as defined in section 5 (b) of the Banking Regulation Act, and on that account all forms of business described in section 6 (1) of the Banking Regulation Act in clauses (a) to (n) are, if carried on in addition to the "hard-core of banking," banking and the Parliament is competent to legislate in respect of that business under Entry 45 List I. In support of his contention that apart from the business of accepting money from the public for lending or investment, and withdrawable by cheque draft or otherwise, banking includes many allied business activities which banking institutions engaged in, the Attorney-General invited our attention to clause 21 of the Charter of the Bank of Bengal Act (VI of 1839); section 27 of Act IV of 1862; to sections 36 and 37 of the Presidency Banks Act (XI of 1876); to section 91 (15) of the British North America Act; to Paget's Law of Banking, 7th Edition at page 5; to the standard form of memorandum of association of a Banking Company in Palmer's Company Presidents Form 138; and to the statement of objects and reasons in support of the Bill which was enacted as the Indian Companies (Amendment) Act, 1936.

The Charter of the Bank of Bengal, the Presidency Banks Act IV of 1862, Chapter X-A of the Indian Companies Act, 1913, as incorporated by the Indian Companies (Amendment) Act, 1936, merely described the business which a banking institution could carry on. It was not intended thereby to include those activities

1. L.R. (1950) A.C. 235 : (1949) 2 All E.R. 755.

within the expression "banking." The Acts enacted after the Banking Regulation Act, 1949, also support that inference. Under section 33 of the State Bank of India Act, 1955, the State Bank is entitled to carry on diverse business activities beside banking. Similarly the banks subsidiary to the State Bank were by section 36 of Act (XXXVIII of 1959) to act as agents of the State Bank, and also to carry on and transact business of banking as defined in section 5 (b) of the Banking Regulation Act, 1949, and were also competent to engage in such one or more other forms of business specified in section 6 (1) of that Act. These provisions do not aid in construing the Entry "Banking" in Entry 45 List I.

In modern times in India as elsewhere, to attract business, banking establishments render, and complete in rendering, a variety of miscellaneous services for their constituents. If the test for determining what "banking" means in the constitutional entry is any commercial activity which bankers at a given time engage in, great obscurity will be introduced in the content of that expression. The coverage of constitutional entry in a Federal Constitution which carves out a field of legislation must depend upon a more satisfactory basis.

The legislative entry in List I of the Seventh Schedule is "Banking" and not "Banker" or "Banks." To include within the connotation of the expression "Banking" in Entry 45 List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in rewriting the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. But the field of "banking" cannot be extended to include trading activities which not being incidental to banking encroach upon the substance of the entry "trade and commerce" in List II.

Rejection of the argument of the Attorney-General does not lend any practical support to the argument of Mr. Palkhivala that Act (XXII of 1969), to the extent it makes provisions in respect of the undertaking of the named banks relating to non-banking business, is *ultra vires* the Parliament. In the first instance there is no evidence that the named banks were before 19th July, 1969, carrying on non-banking business distinct and independent of the banking business, or that the banks held distinct assets for any non-banking business, apart from the assets of the banking business. Again by Act (XXII of 1969) the corresponding banks are entitled to engage in business of banking and non-banking which the named banks were engaged in or competent to engage in prior to 19th July, 1969, and the named banks are entitled to engage in business other than banking as defined in section 5 (b) of the Banking Regulation Act, but not the business of banking. By enacting that the corresponding new banks may carry on business specified in section 6 (1) of the Banking Regulation Act and that the named banks shall not carry on banking business as defined in section 5 (b) of that Act, the impugned Act did not encroach upon any entry in the State List. By section 15 (2) (c) of the impugned Act the named banks are expressly reserved the right to carry on business other than banking, and it is not claimed that thereby there is any encroachment upon the State List. Exercise of the power to legislate for acquisition of the undertaking of the named banks also does not trespass upon the State List.

Before the Constitutions (Seventh Amendment) Act, Entry 33, List I invested the Parliament with power to enact laws with respect to acquisition or requisitioning for the purpose of the Union, and Entry 36, List II conferred upon the State Legislature the power to legislate with respect to acquisition or requisitioning for the remaining purposes. Those entries are now deleted, and a single Entry 42, List III invests the Parliament and the State Legislature with power to legislate with respect to "acquisition and requisitioning" of property. By Entry 42 in the Concurrent List power conferred upon the Parliament and the State Legislatures to legislate with respect to "Principles on which compensation for property

acquired or requisitioned for the purpose of the Union or for any other public purpose is to be determined, and the form in which such compensation is to be given." Power to legislate for acquisition of property is exercisable only under Entry 42 of List III, and not as an incident of the power to legislate in respect of a specific head of legislation in any of the three lists; *Rajahmundry Electric Supply Corporation Ltd. v. The State of Andhra*¹. Under that entry "property" can be compulsorily acquired. In its normal connotation "property" means the "highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy; it includes ownership, estates and interests in corporeal things, and also rights such as trademark, copyrights, patents and even rights in *personam* capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured." The expression "undertaking" in section 4 of Act XXII of 1969 clearly means a going concern with all its rights, liabilities and assets—as distinct from the various rights and assets which compose it. In Halsbury's Laws of England, 3rd Edn. Vol. 6, Article 75 at page 43, it is stated that "Although various ingredients go to make up an undertaking, the term describes not the ingredients but the completed work from which the earning arise."

Transfer of and vesting in the State Corporations of the entire undertaking of a going concern is contemplated in many Indian Statutes: e.g., Indian Electricity Act, 1910 sections 6, 7 and 7-A; Air Corporation Act, 1953, sections 16 and 17; Imperial Bank of India Act, 1920, sections 3 and 4; State Bank of India Act, 1955, sections 6 (2), (3) and (4); State Bank of India (Subsidiary Banks) Act, 1959; Banking Regulation Act, 1949, section 36 AE.; and Cotton Textile Companies Act, 1967, sections 5 (1) and (5) 1. Power to legislate for acquisition of "property" in Entry 42 List III therefore includes the power to legislate for acquisition of an undertaking. But, says Mr. Palkhivala, liabilities of the banks which are included in the connotation of the expression "undertaking" cannot be treated as "property". It is however the assets, rights and obligations of a going concern which constitute the undertaking: the obligations and liabilities of the business form an integral part of the undertaking, and for compulsory acquisition cannot be divorced from the assets, rights and privileges. The expression "property" in Entry 42, List III has a wide connotation, and it includes not only assets, but the organisation, liabilities and obligations of a going concern as a unit. A law may, therefore, be enacted for compulsory acquisition of an undertaking as defined in section 5 of (Act XXII of 1969).

The contention raised by Mr. Palkhivala that the Parliament is incompetent to legislate for acquisition of the named banks in so far as it relates to assets of the non-banking business fails for two reasons—(i) that there is no evidence that the named banks held any assets for any distinct non-banking business; and (ii) that the acquisition is not shown to fall within an entry in List II of the Seventh Schedule.

III. Infringement of the fundamental rights of the petitioner—

Clauses (1) and (2) of Article 31 subordinate the exercise of the power of the State to the basic concept of the rule of law. Deprivation of a person of his property and compulsory acquisition may be effectuated by the authority of law. It is superfluous to add that the law limiting the authority of the State must be within the competent of the Legislature enacting it, and not violative of a constitutional prohibition, nor impairing the guarantee of a fundamental right. This Court held in *Kesavaiah v. Kottarathil Kechani and others v. The State of Madras and others*²; *Suresh Maharena Shri Jayaramsinghji v. The State of Gujarat*³, and *Motor Transport Company (P.) Ltd. v. Sri Sankarasingam Mutt*⁴, that a person may be deprived of his property by authority of a statute only if it does not impair the fundamental rights guaranteed

1. (1954) S.C.J. 310 : (1954) 1 M.L.J. 493 : (1954) S.C.R. 779 at p. 785. 4. (1963) 1 S.C.R. (Supp.) 282 : (1964) 1 An. W.R. (S.C.) 146 : (1964) 1 S.C.J. 539 : (1964) 1 M.L.J. (S.C.) 146.
2. (1960) 3 S.C.R. 887 : (1961) 2 S.C.J. 443. 3. (1962) 2 S.C.R. (Supp.) 411, 438.

to him. It is again not contested on behalf of the Union that the law authorising acquisition of property must be within the competence of the law-making authority and must not violate a constitutional prohibition or impair the guarantee of any of the fundamental rights in Part III. But it is claimed that since Article 31 (2) and Article 19 (1) (f) while operating on the same field of the right to property are mutually exclusive, a law directly providing for acquisition of property for a public purpose cannot be tested for its validity on the plea that it imposes limitations on the right to property which are not reasonable.

By Article 31 (1) and (2) the right to property of individuals is protected against specific invasions by State action. The function of the two clauses—Clauses (1) and (2) of Article 31—is to impose limitations on the power of the State and to declare the corresponding guarantee of the individual to his right to property. Limitation on the power of the State and the guarantee of right are plainly complementary. Protection of the guarantee is ensured by declaring that a person may be deprived of his property by “authority of law”: Article 31 (1); and that private property may be compulsorily acquired for a public purpose and by the “authority of a law” containing provisions fixing or providing for determination and payment of compensation: Article 31 (2). Exercise of either power by State action results in abridgement—total or partial—of the right to property of the individual. Article 19 (1) (f) is a positive declaration in the widest terms of the right to acquire, hold and dispose of property, subject to restrictions (which may assume the form of limitations or complete prohibition) imposed by law in the interests of the general public. The guarantee under Article 19 (1) (f) does not protect merely an abstract right to property: It extends to concrete rights to property as well: *Swami Motor Transport Co. (P.) Ltd.’s case*¹.

The constitutional scheme declares the right to property of the individual and then delimits it by two different provisions: Article 19 (5) authorizing the State to make laws imposing reasonable restrictions on the exercise of that right, and clauses (1) and (2) of Article 31 recognizing the authority of the State to make laws for taking the property. Limitations under Article 19 (5) and Article 31 are not generically different, for the law authorizing the exercise of the power to take the property of an individual for a public purpose or to ensure the well-being of the community, and the law authorising the imposition of reasonable restrictions under Article 19 (5) are intended to advance the larger public interest. It is true that the guarantee against deprivation and compulsory acquisition operates in favour of all persons, citizens as well as non-citizens, whereas the positive declaration of the right to property guarantees the right to citizens. But a wider operation of the guarantee under Article 31 does not alter the true character of the right it protects. Article 19 (5) and Article 31 (1) and (2), in our judgment, operate to delimit the exercise of the right to hold property.

Under the Constitution, protection against impairment of the guarantee of fundamental rights is determined by the nature of the right the interest of the aggrieved party and the degree of harm resulting from the State action. Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection. To concentrate merely on power of the State and the object of the State action in exercising that power is therefore to ignore the true intent of the Constitution. In this Court, there is, however, a body of authority that the nature and extent of the protection of the fundamental rights is measured not by the operation of the State action upon the rights of the individual, but by its object. Thereby the constitutional scheme which makes the guaranteed rights subject to the permissible restrictions within their allotted fields fundamental got blurred and gave impetus to a theory that certain Articles of the Constitutions enact a code dealing exclusively with matters dealt with therein, and the protection which an aggrieved person may claim is circumscribed by the object of the State action.

1. (1964) 1 An.W.R. (S.C.) 146: (1964) 1 M.L.J. (S.C.) 146 : (1964) 1 S.C.J. 530.

Protection of the right to property or personal freedom is most needed when there is an actual threat. To argue that State action which deprives a person permanently or temporarily of his right to property, or personal freedom, operates to extinguish the right or the remedy is to reduce the guarantee to an empty platitude. Again to hold that the extent of, and the circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness. Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion, in our judgment, is inevitable that the validity of the State action must be adjudged in the right of its operation upon the rights of the individual and groups of individuals in all their dimensions.

But this Court has held in some cases to be presently noticed that Article 19 (1) (f) and Article 31 (2) are mutually exclusive.

Early in the history of this Court the question of inter-relation between the diverse provisions affording the guarantee of fundamental rights in Part III fell to be determined. In *A. K. Gopalan v. The State of Madras*¹, a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act (IV of 1950) applied to this Court for a writ of *habeas corpus* claiming that the Act contravened the guarantee under Articles 19, 21 and 22 of the Constitution. The majority of the Court (Kania, C.J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.) held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19 (1) (d) was infringed by his detention, and that validity of the law providing for making orders of detention will not be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than according to the procedure established by law. Fazl Ali, J., expressed a contrary view. This case has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action is relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive—each Article enacting a code relating to protection of distinct rights.

Kania, C.J., proceeded on the theory that different Articles guarantee distinct rights. He observed at page 100 :

".....it (Article 19) * * means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, * * * the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life".

The learned Chief Justice also observed that Article 19 (1) (d) had nothing to do with detention, preventive or punitive, and the concept of personal liberty in Article 21 being entirely different from the concept of the right to move freely throughout the territory of India, Article 22 was a complete code dealing with preventive detention.

Patanjali Sastri, J., observed at page 191 :

".....Article 19 seems * * to pre-suppose that the citizens to whom the possession of these fundamental rights in secured retains the substratum

1. (1950) S.C.R. 88 : (1950) S.C.J. 174 : (1950) 2 M.L.J. 42.

of personal freedom on which alone the enjoyment of these rights necessarily rest. * * Article 19 guarantees to the citizens the enjoyment of certain civil liberties while they are free, while Articles 20-22 secure to all persons—citizens and non-citizens—certain constitutional guarantees in regard to punishment and prevention of crime.”

Mahajan, J., was of the view that Article 22 was “self-contained in respect of laws on the subject of preventive detention.” Mukherjea, J., observed (at page 254) that there was no conflict between Article 19 (1) (d) and Article 22, for the former did not contemplate freedom from detention either punitive or preventive, but speaks of a different aspect or phase of civil liberty. In his view Articles 20 to 22 embodied the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty with regard to substantive as well as procedural law. He proceeded to observe at page 261.

“..... by reason of preventive detention, a man may be prevented from exercising the right of free movement within the territory in India * * *, but that is merely incidental to or consequential upon loss of liberty resulting from the order of detention.”

But the learned Judge observed at page 263 :

“It may not, I think, be quite accurate to state that the operation of Article 19 of the Constitution is limited to free citizens only and that the rights have been described in that Article on the pre-supposition that the citizens are at liberty. The deprivation of personal liberty may entail as a consequence the loss or abridgement of many of the rights described in Article 19, but that is because the nature of these rights is such that free exercise of them is not possible in the absence of personal liberty.”

Das, J., observed at page 304 :

“Therefore, the conclusion is irresistible that the rights protected by Article 19 (1), in so far as they relate to rights attached to the person, i.e., the rights referred to in sub-clauses (a) to (e) and (g) are rights which only a free citizen, who has the freedom of his person unimpaired, can exercise.”

The learned Judge further observed :

“..... a lawful detention, whether punitive or preventive, does not offend against the protection conferred by Article 19 (1) (a) to (e) and (g), for those rights must necessarily cease when the freedom of the person is lawfully taken away. In short, those rights end where the lawful detention begins. So construed, Article 19 and Article 21 may, therefore, easily go together and there is, in reality, no conflict between them.”

Fazal Ali, J., struck a different note : he observed at page 148 :

“the scheme of the Chapter dealing with the fundamental rights does not contemplate * * * * that each Article is a code by itself and is independent of the others. * * * The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19 (1) (d).”

At page 149 the learned Judge observed :

“The words used in Article 19 (1) (d) must be construed as they stand, and we have to decide upon the words themselves whether in the case of preventive detention the right under Article 19 (1) (d) is or is not infringed. But, * * * however literally we may construe the words used in Article 19 (1) (d) and however restricted may be the meaning we may attribute to those words, there can be

no escape from the conclusion that preventive detention is a direct infringement of the right guaranteed in Article 19 (1) (d)."

At page 170 he observed :

".....this Article (Article 22) * * * * does not exclude the operation of Articles 19 and 21, and it must be read subject to those two Articles, in the same way as Articles 19 and 21 must be read subject to Article 22. The correct position is that Article 22 must prevail in so far as there are specific provisions therein regarding preventive detention, but where there are no such provisions in that Article, the operation of Articles 19 and 21 cannot be excluded. The mere fact that different aspects of the same right have been dealt with in three different Articles will not make them mutually exclusive except to the extent I have indicated."

The view expressed in *A. K. Gopalan's case*¹, was re-affirmed in *Ram Singh and others v. The State of Delhi*².

The principle underlying the judgment of the majority was extended to the protection of the freedom in respect of property, and it was held that Article 19 (1) (f) and Article 31 (2) were mutually exclusive in their operation. In *A. K. Gopalan's case*¹, Das, J., suggested that if the capacity to exercise the right to property was lost, because of lawful compulsory acquisition of the subject of that right, the owner ceased to have that right for the duration of the incapacity. In *Ghironji Lal Chowdhuri's case*³, Das, J., observed at page 919 :

".....the right to property guaranteed by Article 19 (1) (f) would * * continue until the owner was under Article 31 deprived of such property by authority of law."

In *The State of West Bengal v. Subodh Gopal*⁴, the same learned Judge observed that "Article 19 (1) (f) read with Article 19 (5) pre-supposes that the person to whom the fundamental right is guaranteed retains his property over or with respect to which alone that right may be exercised". The principle so stated was given a more concrete shape in a later decision : *State of Bombay v. Bhanji Munji and another*⁵. In *Bhanji Munji's case*⁵, speaking for a unanimous Court, Bose, J., observed :

".....it is enough to say that Article 19 (1) (f) read with clause (5) postulates the existence of property which can be enjoyed, and over which rights can be exercised because otherwise the reasonable restrictions contemplated by clause (5) could not be brought into play. If there is no property which can be acquired held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold or dispose it of, and as clause (5) contemplates the placing of reasonable restrictions on the exercise of those rights it must follow that the Article postulates the existence of property over which the rights are to be exercised."

*Bhanji Munji's case*⁵, was accepted without any discussion in *Babu Barkya Thakur v. The State of Bombay*⁶; *Smt. Sitabati Debi and another v. State of West Bengal and another*⁷, and other cases. In these cases it was held that the substantive provisions of a law relating to acquisition of property were not liable to be challenged on the ground that they imposed unreasonable restrictions on the right to hold property.

*Bhanji Munji's case*⁵, it must be remembered, arose under Article 31 before it was amended by the Constitution (Fourth Amendment) Act. It was held by this Court that clauses (1) and (2) of Article 31 as they then stood dealt with the same subject-matter, i.e., compulsory acquisition of property : see *Subodh Gopal's case*⁴, and *Dwarkadas Shrinivas's case*⁸. But since the amendment by the Constitution (Fourth Amendment) Act it has been held that clauses (1) and (2) deal with different subject-matters. In *Kavalappara Kottarrathil Kochuni's case*⁹, Subba Rao, J.,

1. (1950) S.C.J. 174 : (1950) S.C.R. 88;
(1950) 2 M.L.J. 42.

2. (1951) S.C.R. 451 : (1951) S.C.J. 374.

3. (1951) S.C.J. 29.

4. (1954) S.C.R. 587 : (1954) S.C.J. 127.

5. (1955) 1 S.C.R. 777 : (1955) S.C.J. 10.

6. (1961) 1 S.C.R. 128 : (1961) 2 S.C.J. 392.

7. (1967) 2 S.C.R. 949.

8. (1954) S.C.J. 175.

9. (1961) 2 S.C.J. 443.

delivering the judgment of the majority of the Court observed that clause (2) of Article 31 alone deals with compulsory acquisition of property by the State for a public purpose, and not Article 31 (1), and he proceeded to hold that the expression "authority of law" means authority of a valid law, and on that account validity of the law seeking to deprive a person of his property is open to challenge on the ground that it infringes other fundamental rights, e.g., under Article 19 (1) (f). It was broadly observed that *Bhanji Munji's case*¹, after the Constitution (Fourth Amendment) Act "no longer holds the field". But *Kavalappara Kottarathil Kochuni's case*², did not deal with the validity of a law relating to compulsory acquisition. With the decision in *Kavalappara Kottarathil Kochuni's case*, there arose two divergent lines of authority: (1) "authority of law" in Article 31 (1) is liable to be tested on the ground that it violates other fundamental rights and freedoms including the right to hold property guaranteed by Article 19 (1) (f); and (2) "authority of a law" within the meaning of Article 31 (2) is not liable to be tested on the ground that it impairs the guarantee of Article 19 (1) (f) in so far as it imposes substantive restrictions—though it may be tested on the ground of impairment of other guarantees. The expression "law" in the two clauses had therefore different meanings. It was for the first time (*obiter dicta apart*) in *The State of Madhya Pradesh v. Ranojirao Shinde*³, this Court opined that the validity of the law in clause (2) of Article 31 may be adjudged in the light of Article 19 (1) (f). But the Court in that case did not consider the previous catena of authorities which related to the inter-relation between Article 31 (2) and Article 19 (1) (f).

We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individuals rights.

We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. Each freedom has different dimensions. Article 19 (1) (f) enunciates the right to acquire, hold and dispose of property: clause (5) of Article 19 authorizes imposition of restrictions upon the right. Article 31 assures the right to property and grants protection against the exercise of the authority of the State. Clause (5) of Article 19 and clauses (1) and (2) of Article 31 prescribe restrictions upon State action, subject to which the right to property may be exercised. Article 19 (5) is a broad generalization dealing with the nature of limitations which may be placed by law on the right to property. The guarantees under Articles 31 (1) and (2) arise out of the limitations imposed on the authority of the State by law to take over the individual's property. The true character of the limitations under the two provisions is not different. Clause (5) of Article 19 and clauses (1) and (2) of Article 31 are parts of a single pattern. Article 19 (1) (f) enunciates the basic right to property of the citizens and Article 19 (5) and clauses (1) and (2) of Article 31 deal with limitations which may be placed by law, subject to which the rights may be exercised.

Limitations prescribed for ensuring due exercise of the authority of the State to deprive a person of his property and of the power to compulsorily acquire his property

1. (1955) 1 S.C.R. 777 : (1955) S.C.J. 10.

2. (1961) 2 S.C.J. 443.

3. (1968) 3 S.C.R. 489 : (1968) 2 S.C.J. 760 : A.I.R. 1968 S.C. 1053.

are, therefore, specific classes of limitations on the right to property falling within Article 19 (1) (f). Property may be compulsorily acquired only for a public purpose. Where the law provides for compulsory acquisition of property for a public purpose it may be presumed that the acquisition or the law relating thereto imposes a reasonable restriction in the interest of the general public. If there is no public purpose to sustain compulsory acquisition, the law violates Article 31 (2). If the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation may, unless otherwise established, be presumed, but enquiry into reasonableness of the procedural provisions will not be excluded. For instance if a tribunal is authorised by an Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19 (1) (f).

In dealing with the argument that Article 31 (2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby, it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right : Articles 29 (1), 30 (1), 26, 25 and 32 ; in others to ensure protection of individual rights they take specific forms of restrictions on State action—legislative or executive—Articles 14, 15, 16, 20, 21, 22 (1), 27 and 28 ; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon : Articles 19 (1) and 19 (2) to (6) ; in some cases, it arises as an implication from the delimitation of the authority of the State, e.g. Articles 31 (1) and 31 (2); in still others, it takes the form of a general prohibition against the State as well as others : Article 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them : they seek to protect the rights of the individual or a groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields; they do not attempt to enunciate distinct rights.

We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31 (2). Article 31 (2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31 (2) is not sufficient to negate the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19 (1) (f) and 31 (2) are mutually exclusive.

The area of protection afforded against State action by the freedom under Article 19 (1) (f) and by the exercise of the power of the State to acquire property of the individual without his consent must still be reconciled. If property is compulsorily acquired for a public purpose, and the law satisfies the requirements of Articles 31 (2) and 31 (2-A), the Court may readily presume that by the acquisition a reasonable restriction on the exercise of the right to hold property is imposed in the interests of the general public. But that is not because the claim to plead infringement of the fundamental right under Article 19 (1) (f) does not avail the owner ; it is because the acquisition imposes a permissible restriction on the right of the owner of the property compulsorily acquired.

We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. In our judgment, the assumption in *A.K. Gopalan's case*¹, that certain Articles in the Constitution exclusively

deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity of "law" which authorises deprivation of property and "a law" which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon his right to hold property which are not reasonable restrictions in the interests of the general public. It is immaterial that the scope for such challenge may be attenuated because of the nature of the law of acquisition which providing as it does for expropriation of property of the individual for public purpose may be presumed to impose reasonable restrictions in the interests of the general public.

Whether the provisions of sections 4 and 5 of Act XXII of 1969 and the other related provisions of the Act impair the fundamental freedoms under Article 19 (1) (f) and (g) now falls to be considered. By section 4 the entire undertaking of each named bank vests in the Union, and the bank is prohibited from engaging in the business of banking in India and even in a foreign country, except where by the laws of a foreign country banking business owned or controlled by Government cannot be carried on, the named bank will be entitled to continue the business in that country. The business which the named banks carried on was—(1) the business of banking as defined in section 5 (b) of the Banking Regulation Act, 1949, and business incidental thereto; and (2) other business which by virtue of section 6 (1) they were not prohibited from carrying on, though not part of or incidental to the business of banking. It may be recalled that by Act XXII of 1969 the named banks cannot engage in business of banking as defined in section 5 (b) of the Banking Regulation Act, 1949, but may engage in other forms of business. By the Act, however, the entire undertaking of each named bank is vested in the new corporation set up with a name identical with the name of that bank, and authorised to carry on banking business previously carried on by the named bank, and its managerial and other staff is transferred to the corresponding new bank. The newly constituted corresponding bank is entitled to engage in business described in section 6 (1) of the Banking Regulation Act, and for that purpose to utilize the assets, goodwill and business connections of the existing bank.

The named banks are declared entitled to engage in business other than banking: but they have no assets with which that business may be carried on, and since they are prohibited from carrying on banking business, by virtue of section 7 of the Reserve Bank of India Act, they cannot use in their title the words "Bank", or "Banking" and even engage in "non-banking business" in their old names. A business organization deprived of its entire assets and undertaking, its managerial and other staff, its premises, and its name, even if it has a theoretical right to carry on non-banking business, would not be able to do so especially when even the fraction of the value of its undertaking made payable to it as compensation is not made immediately payable to it.

Validity of the provisions of the Act which transfer the undertaking of the named banks and prohibit those banks from carrying on business of banking and practically prohibit them from carrying on non-banking business falls to be considered in the light of Article 19 (1) (f) and Article 19 (1) (g) of the Constitution. By Article 19 (1) (f) right to acquire, hold and dispose of property is guaranteed to the citizens and by Article 19 (1) (g) the right to practise any profession or to carry on any occupation, trade or business is guaranteed to the citizens. These rights are not absolute: they are subject to the restrictions prescribed in the appropriate clause) of Article 19. By clause (5) it is provided, *inter alia*, that nothing in sub-cl. (f) of clause (1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law, imposing in the interests of the general public, reasonable restrictions on the exercise of the right conferred by that sub-

clause either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Clause (6) as amended by the Constitution (First Amendment) Act, 1951, reads :

“ Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and in particular nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making law relating to—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.”

Clause (6) of Article 19 consists of two parts: (1) the right declared by sub-clause (g) is not protected against the operation of any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by that sub-clause ; and (2) in particular sub-clause (g) does not affect the operation of any law relating, *inter alia*, to carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether or not such law provides for the exclusion, complete or partial, of citizens.

According to Mr. Palkhivala it was intended by the use of the expression “ in particular ”, to denote a special class of trade, business, industry or service out of the general class referred to in the first part, and on that account a law which relates to the carrying on by the State of any particular business, industry or service, to the exclusion—complete or partial—of citizens or otherwise, is also subject to the enquiry whether it imposes reasonable restrictions on the exercise of the right in the interests of the general public. Counsel urged that the law imposing restrictions upon the exercise of the right to carry on any occupation, trade or business is subject to the test of reasonable restrictions imposed in the interests of the general public, likewise, the particular classes specified in the second part of the Article must also be regarded as liable to be tested in the light of the same limitations. Counsel strongly relied upon the decision of the House of Lords in *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Housing and Local Government and another*¹. The House of Lords in that case did not lay down any general proposition. They were only dealing with the meaning of the words “ in particular ” in the context in which they occurred, and it was held that the expression “ in particular ” was not intended to confer a separate and distinct power wholly independent of that contained in the first limb. It cannot be said that the expression “ in particular ” used in Article 19 (1) (g) is intended either to particularise or to illustrate the general law set out in the first limb.

It was observed in *Saghir Ahmed v. The State of U.P. and others*², by Mukherjea, J., at page 727 :

“ The new clause—Article 19 (6)—has no doubt been introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business ; but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19 (6). The result of the amendment is that the State would not have to justify such action as reasonable at all in a Court of law, and no objection could be taken to it on the ground that it is an infringement of the rights guaranteed under Article 19 (1) (g) of the Constitution.”

1. (1952) 1 All E.R. 509 : (1952) A.C. 362. 2. (1955) 1 S.C.R. 707: (1954) S.C.J. 819.

In dealing with the validity of a law creating a State monopoly in *Akadasi Padhan v. State of Orissa*¹, this Court unanimously held, that the validity of a law creating a State monopoly which "indirectly impinges on any other right" cannot be challenged on the ground that it imposes restrictions which are not reasonable restrictions in the interests of the general public. But if the law contains other incidental provisions which do not constitute an essential and integral part of the monopoly created by it, the validity of those provisions is liable to be tested under the first part of Article 19 (6). If they directly impair any other fundamental right guaranteed by Article 19 (1), the validity of those provisions will be tested by reference to the corresponding clauses of Article 19. The Court also observed that the essential attributes of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created. They will depend upon the nature of the commodity, the nature of trade in which it is involved and other circumstances. At page 707, Gajendragadkar, J., speaking for the Court, observed:

"A law relating to a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19 (6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the first part of Article 19 (6)." He also observed at page 705 :

"....the amendment (First Amendment) clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of general public, so far as Article 19 (1) (g) is concerned."

This was reiterated in *Rasbihari Parida and others v. The State of Orissa*², *M/s. Vrajilal Manilal & Co. and another v. The State of Madhya Pradesh and others*³; and *Municipal Committee, Amritsar and others v. State of Punjab and others*⁴. These cases dealt with the validity of laws creating monopolies in the State. Clause (6) is however not restricted to laws creating State monopolies, and the rule enunciated in *Akadasi Padhan's case*¹, applies to all laws relating to the carrying on by the State of any trade, business, industry or service by Article 298 the State is authorized to carry on trade which is competitive, or excludes the citizens from that trade completely or partially. The "basic and essential" provisions of law which are "integrally and essentially connected" with the carrying on of a trade by the State will not be exposed to the challenge that they impair the guarantee under Article 19 (1) (g), whether the citizens are excluded completely or partially from carrying on that trade, or the trade is competitive. Imposition of restrictions which are incidental or subsidiary to the carrying on of trade by the State whether to the exclusion of the citizens or not must, however, satisfy the test of the main limb.

The law which prohibits after 19th July, 1969, the named banks from carrying on banking business, being a necessary incident of the right assumed by the Union, is not liable to be challenged because of Article 19 (6) (ii) in so far as it affects the right to carry on business.

There is no satisfactory proof in support of the plea that the enactment of Act XXII of 1969 was not in the larger interest of the nation, but to serve political ends, i.e. not with the object to ensure better banking facilities, or to make them available to a wider public, but only to take control over the deposits of the public with the major banks, and to use them as a political lever against industrialists who had built up industries by decades of industrial planning and careful manage-

1. (1964) 2 S.C.J. 37 : (1963) 2 S.C.R. (Supp.) 691.

3. A.I.R. 1970 S.C. 129.

2. (1969) 2 S.C.J. 680 : A.I.R. 1969 S.C. 108.

4. (1969) 2 S.C.J. 632 : A.I.R. 1969 S.C. 1100.

ment. It is true that social control legislation enacted by the Banking Laws (Amendment) Act LVIII of 1968 was in operation and the named banks were subject to rigorous control which the Reserve Bank was competent to exercise and did in fact exercise. Granting that the objectives laid down by the Reserve Bank were being carried out, it cannot be said that the Act was enacted in abuse of legislative power. Our attention was invited to a mass of evidence from the speeches of the Deputy Prime Minister, and of the Governor and the Deputy Governor of the Reserve Bank, and also extracts from the Reserve Bank Bulletins issued from time to time and other statistical information collected from official sources in support of the thesis of the petitioner that the performance of the named banks exceeded the targets laid down by the Reserve Bank in its directives; that the named banks had effectively complied with the requirements of the law; that they had served the diverse interests including small-scale sector, and had been instrumental in bringing about an increasing tempo of industrial and commercial activity, that they had discouraged speculative holding of commodities; and had followed essential priorities in the economic development of the nation coupled with a vigorous programme of branch development in the rural sector, bringing about a considerable expansion in deposits, and large advances to the small-scale business and industry. Mr. Palkhivala urged that under the scheme of social control the commercial banks had achieved impressive results comparing favourably with the performance of the State Bank of India and its subsidiaries in the public sector, and that the performance of the named banks could not be belittled by referring to the banking structure and development in highly developed countries like Canada, Japan, France, United States and the United Kingdom. On the other hand, the Attorney-General said that the commercial banks followed a conservative policy because they had to look primarily to the interests of the shareholders, and on that account could not adopt bold policies or schemes for financing the needy and worthy causes; that if the resources of the banking industry are properly utilised for the weaker sections of the people economic regeneration of the nation may be speedily achieved, that 28 per cent of the towns in India were not served by commercial banks that there had been unequal development of facilities in different parts of the country and deserving sections were deprived of the benefit of important national resources resulting in economic disparities, especially because the major banks catered to the large-scale industries.

This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural areas, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration, whether the Government administration will eschew the profit-motive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regenerations, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to consider the relative merits of the different political theories or economic policies. The Parliament has under Entry 45, List I the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto; it has the power to legislate for acquiring the undertaking of the the named banks under Entry 42, List III. Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws, results could be achieved which it is the object of the Act to achieve, is, in our judgment, not relevant in considering whether the Act amounts to abuse of legislative power. This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to

take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry.

By section 15 (2) (e) of the Act the banks are entitled to engage in business other than banking. But by the provisions of the Act they are rendered practically incapable of engaging in any business. By the provisions of the Act, a named bank cannot even use its name, and the compensation which is to be given will, in the absence of agreement, be determined by the Tribunal and paid in securities which will mature not before ten years. A named bank may, if it agrees to distribute among the shareholders the compensation which it may receive, be paid in securities an amount equal to half the paid-up share capital, but obviously the fund will not be available to the Bank. It is true that under section 15 (3) of the Act the Central Government may authorise the corresponding new banks to make advances to the named banks for any of the purposes mentioned in section 15 (2). But that is a matter which rests only upon the will of the Central Government and no right can be founded upon it.

Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot in practice be carried on, the Court will regard the imposition of the restrictions as unreasonable. In *Mohammad Yasin v. The Town Area Committee, Jalalabad and another*¹, this Court observed that under Article 19 (1) (g) of the Constitution a citizen has the right to carry on any occupation, trade or business and the only restriction on this right is the authority of the State to make a law relating to the carrying on of such occupation, trade or business as mentioned in clause (6) of that Article as amended by the Constitution (First Amendment) Act, 1951. In *Mohammad Yasin's case*¹, by the bye-laws of the Municipal Committee, it was provided that no person shall sell or purchase any vegetables or fruit within the limits of the municipal area of Jalalabad, wholesale or by auction, without paying the prescribed fee. It was urged on behalf of a wholesale dealer in vegetables that although there was no prohibition against carrying on business in vegetables by anybody, in effect the bye-laws brought about a total stoppage of the wholesaler's business in a commercial sense, for, he had to pay prescribed fee to the contractor, and under the bye-laws the wholesale dealer could not charge a higher rate of commission than the contractor. The wholesale dealer, therefore, could charge the growers of vegetables and fruit only the commission permissible under the bye-laws, and he had to make over the entire commission to the contractor without retaining any part thereof. The wholesale dealer was thereby converted into a mere tax-collector for the contractor or the Town Area Committee without any remuneration. The bye-laws in this situation were struck down as impairing the freedom to carry on business.

In *Dwarkanadas Shrinivas's case*², the Sholarpur Spinning and Weaving Company (Emergency Provisions) Ordinance II of 1950 and Act (XXVIII of 1950) passed by the Parliament to replace the Ordinance were challenged. Under the Ordinance the managing agent and the selected directors were dismissed and new directors were appointed by the State. The company was denuded of possession of its property and all that was left to the company was a bare legal title. In an appeal arising out of a suit challenging the validity of the Ordinance and the Act which replaced it, this Court held that the Ordinance and the Act violated the fundamental rights of the company and of the plaintiff a preference shareholder upon whom a demand was made for payment of unpaid calls. This Court held that the Ordinance and the Act in effect deprived the company of its property within the meaning of Article 31 without compensation. It was observed by Mahajan, J., that practically all incidents of ownership were taken over by the State and nothing was left with the company but the mere husk of title, and on that account the impugned statute had overstepped the limits of legitimate social control legislation.

1. (1952) S.C.J. 162 : (1952) S.C.R. 572: A. 2. (1954) 1 M.L.J. 355 : (1954) S.C.J. 175, I.R. 1952 S.C. 115.

If compensation paid is in such a form that it is not immediately available for restarting any business, declaration of the right to carry on business other than banking becomes an empty formality, when the entire undertaking of the named banks is transferred to and vests in the new banks together with the premises and the names of the banks, and the named banks are deprived of the services of its administrative and other staff.

The restriction imposed upon the right of the named banks to carry on "non-banking" business is, in our judgment, plainly unreasonable. No attempt is made to support the Act which while theoretically declaring the right of the named banks to carry on "non-banking" business makes it impossible in a commercial sense for the banks to carry on any business.

Protection of Article 14—

By Article 14 of the Constitution the State is enjoined not to deny any person equality before the law or the equal protection of the laws within the territory of India. The Article forbids class legislation, but not reasonable classification in making laws. The test of permissible classification under an Act lies in two cumulative conditions, (a) classification under the Act must be founded on an intelligible differentia distinguishing persons, transactions or things grouped together from others left out of the group; and (ii) the differentia has a rational relation to the object sought to be achieved by the Act; there must be a nexus between the basis of classification and the object of the Act; *Chiranjit Lal Chowdhary's case*¹, *The State of Bombay v. F. N. Balsara*²; *The State of West Bengal v. Anwar Ali Sarkar*³, *Budhan Choudhry and others v. The State of Bihar*⁴; *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and others*⁵; and *State of Rajasthan v. Mulkarchand and others*⁶.

The Courts recognize in the Legislature some degree of elasticity in the matter of making a classification between persons, objects and transactions. Provided the classification is based on some intelligible ground, the Courts will not strike down that classification, because in the view of the Court it should have proceeded on some other ground or should have included the class selected for special treatment some other persons, objects or transactions which are not included by the Legislature. The Legislature is free to recognize the degree of harm and to restrict the operation of a law only to those cases where the need is the clearest. The Legislature need not extend the regulation of a law to all cases it may possibly reach, and may make a classification founded on practical grounds of convenience. Classification to be valid must, however, disclose a rational nexus with the object sought to be achieved by the law which makes the classification. Validity of a classification will be upheld only if that test is independently satisfied. The Court in examining the validity of a statute challenged as infringing the equality clause makes an assumption that there is a reasonable classification and that the classification has a rational relation to the object to be achieved by the statute.

But the definition of "existing bank" in section 2 (d) of the Act, fourteen named banks in the First Schedule are, out of many commercial banks engaged in the business of banking, selected for special treatment, in that the undertaking of the named banks is taken over, they are prevented from carrying on in India and abroad banking business and the Act operates in practice to prevent those banks engaging in business other than banking.

By reason of the transfer of the undertaking of the named banks, the interests of the banks and the shareholders are vitally affected. Investment in bank-share is regarded in India, especially in the shares of larger banks, as a safe investment on attractive terms with a steady return and fluidity of conversion. Mr. Palkhivala has handed in a treatment setting out the percentage return of dividends on market:

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| 1. (1951) S.C.J. 29. | 5. (1959) S.C.R. 279, 300 : (1959) S.C.J. 147. |
| 2. (1951) 2 M.L.J. 141 : (1951) S.C.R. 652 : (1959) 1 An.W.R. (S.C.) 67 : (1959) 1 M.L.J. (S.C.) 67. | |
| 3. (1952) S.C.R. 284 : (1952) S.C.J. 55. | 6. (1964) 6 S.C.R. 903, 910 : (1964) 2 S.C.J. 556. |
| 4. (1955) 1 S.C.R. 1045 : (1955) S.C.J. 163. | |

rates in 1968. The rate works out at more than 10 per cent. in the case of the shares of Bank of Baroda, Central Bank of India, Dena Bank, Indian Bank, United Bank and United Commercial Bank, and at more than 9 per cent in the case of shares of Bank of India, Bank of Maharashtra, Canara Bank, Indian Bank, Indian Overseas Bank and United Bank of India. In the case of Allahabad Bank it worked out at 5 per cent, and in the case of shares of Punjab National Bank and Syndicate Bank the rates are not available. This statement is not challenged. Since the taking over of the undertaking, there has resulted a steep fall in the ruling market quotations of the shares of a majority of the named banks. The market quotations have slumped to less than 50 per cent in the case of Bank of India, Central Bank, Bank of Baroda and even at the quoted rates probably there are no transactions. Dividend may no longer be distributed, for the banks have no liquid assets and they are not engaged in any commercial activity. It may take many years before the compensation payable to the banks may even be finalised, and be available to the named banks for utilising it in any commercial venture open to the banks under the Act. Under the scheme of determination of compensation, the total amount payable to the banks will be a fraction of the value of their net assets, and that compensation will not be available to the banks immediately.

The ground for selection of the 14 banks is that those banks held deposits, as shown in the return as on the last Friday of June, 1969 furnished to the Reserve Bank under section 27 of the Banking Regulation Act, 1949, of not less than rupees fifty crores.

The object of Act XXII of 1969 is according to the long title to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with the national policy and objectives and matters connected therewith or incidental thereto. The national policy may reasonably be taken to be policy contained in the directive principles of State policy, especially Articles 38 and 39 of the Constitution. For achieving the needs of a developing economy in conformity with the national policy and objectives the resources of all the banks—foreign as well as Indian—are inadequate. Of the total deposits with commercial banks 27 per cent. are with the State Bank of India and its subsidiaries; the named commercial banks of which the undertaking is taken over hold approximately 56 per cent. of the deposits. The remaining 17 per cent of the deposits are shared by the foreign banks and the other scheduled and non-scheduled commercial banks. 83 per cent. of the total resources may obviously not meet wholly or even substantially the needs of development of the economy.

In support of the plea that there is a reasonable relation between the differentia—ground for making the distinction between the named banks and the other banks—Indian and foreign—and the object of the Act, it is urged that the policy of the Union is to control the concentration of private economic resources to ensure achievement of the directive principles of State policy, and for that purpose, selection has been made “with an eye, *inter alia*, to the magnitude and concentrations of the economic resources of such enterprises for inclusion in such law as would be essential or substantially conducive to the achievement of the national objectives and policy”. It is apparently claimed that the object of the Government—not of the statute—is to acquire ultimately all banking institutions, but the 14 named banks are selected for acquisition because they have “Larger business and wider coverage” in comparison with other bank not selected, and had also larger organization, better managerial resources and employees better trained and equipped. These are primarily grounds for classification and not for explaining the relation between the classification and the object of the Act. But in the absence of any reliable data, we do not think it necessary to express an opinion on the question whether selection of the undertaking of some out of many banking institutions, for compulsory acquisition, is liable to be struck down as hostile discrimination, on the ground that there is no reasonable relation between the differentia and the object of the Act which cannot be substantially served even by the acquisition of the undertakings of all the banks out of which the selection is made.

It is claimed that the depositor with the named banks have also a grievance. Those depositors who had made long-term deposits, taking into account the confidence they had in the management of the banks and the service they rendered, are now called upon to trust the management of a statutory corporation not selected by them, without an opportunity of being placed in the same position in which they would have been if they were permitted to transfer their deposits elsewhere. The argument is based on several imponderables and does not require any detailed consideration.

But two other grounds in support of the plea of impairment of the guarantee of equality clause require to be noticed. The fourteen named banks are prohibited from carrying on banking business—a disability for which there is no rational explanation. Banks other than the named banks may carry on banking business in India and abroad: new banks may be floated for carrying on banking business, but the named banks are prohibited from carrying on banking business. Each named bank had, even as claimed on behalf of the Union, by its superior management established an extensive business organization, and each bank had deposits exceeding Rs. 50 crores. The undertakings of the banks are taken over and they are prohibited from doing banking business. In the affidavit filed on behalf of the Union no serious attempt is made to explain why the named banks should be specially selected for being subjected to this disability.

The petitioner also contended that the classification is made on a wholly irrational ground, *viz.* penalizing efficiency and good management, for the major fourteen banks had made a sustained effort and had exceeded the Reserve Bank target and had fully complied with the directives under the social control legislation. This, it is said, is a reversal of the policy underlying section 36-A of the Banking Regulation Act under which inefficient and recalcitrant banks are contemplated to be taken over by the Government. We need express no opinion on this part of the argument. But the petitioner is on firm ground in contending that when after acquiring the assets, undertaking organization, goodwill and the names of the named banks they are prohibited from carrying on banking business, where as other banks—Indian as well as foreign—are permitted to carry on banking business, a flagrantly hostile discrimination is practised. Section 15 (2) of the Act which by the clearest implication prohibits the named banks from carrying on banking business is, therefore, liable to be struck down. It is immaterial whether the entire sub-section (2) is struck down, or as suggested by the Attorney-General that only the words “other than the business of banking” in section 15 (2) (e) be struck down. Again, in considering the validity of a section 15 (2) (e) in its relation to the guarantee of freedom to carry on business other than banking, we have already pointed out that the named banks are also, (though theoretically competent) in substance prohibited from carrying on non-banking business. For reasons set out by us for holding that the restriction is unreasonable, it must also be held that the guarantee of equality is impaired by preventing the named banks carrying on the non-banking business.

Protection of the guarantee under Article 31 (2)—

The guarantee under Article 31 (2) arises directly out of the restrictions imposed upon the power of the State to acquire private property, without the consent of the owner for a public purpose. Upon the exercise of the power to acquire or requisition property, by clause (2) two restrictions are placed: (a) power to acquire shall not be exercised save for a public purpose; and (b) that it shall not be exercised save by authority of a law which provides for compensation for the property acquired or requisitioned, and fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given. Sub-clause (2-A) in substance provides a definition of “compulsory acquisition or requisitioning of property.” Existence of a public purpose and provision for giving compensation for compulsory acquisition of property of an individual are conditions of the exercise of the power. If either condition be absent, the guarantee

under Article 31 (2) is impaired, and the law providing for acquisition will be invalid. But jurisdiction of the Court to question the law on the ground that compensation provided thereby is not adequate is, expressly excluded.

In the case before us we need not express any opinion on the question whether a composite undertaking of two or more distinct lines of business may be acquired where there is a public purpose for acquisition of the assets of one or more lines of business, but not in respect of all the lines of business. As we have already observed, there is no evidence that the named banks carried on non-banking business, distinct from banking business, and in respect of such non-banking business the banks owned distinct assets apart from the assets of the banking business.

The law providing for acquisition must again either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be determined and given. The owner whose property is compulsorily acquired is guaranteed the right to receive compensation and the amount of compensation must either be fixed by the law or be determined according to the principles and in the manner specified by the law. The law which does not ensure the guarantee will, except where the grievance only is that the compensation provided by the law is inadequate, be declared void.

The petitioner says that the expression "compensation" means a "just equivalent" in money of the property acquired and that the law providing for compulsory acquisition must "aim" at a just equivalent to the expropriated owner: If the law so aims at, it will not be deemed to impair the guarantee merely on the ground that the compensation paid to the owner is inadequate. The Attorney-General on the other hand says that "compensation" in Article 31 (2) does not mean a just equivalent, and it is not predicated of the validity of a law relating to compulsory acquisition that it must aim at awarding a just equivalent, for, if the law is not confiscatory, or the principles for determination of compensation are not irrelevant, "the Courts cannot go into the propriety of such principles or adequacy or reasonableness of the compensation."

Two questions immediately arise for determination. What is the true meaning of the expression "compensation" as used in Article 31 (2), and what is the extent of the jurisdiction of the Court when the validity of a law providing for compulsory acquisition of property for a public purpose is challenged?"

In its dictionary meaning "compensation" means anything given to make things equal in value: anything given as an acquivalent, to make amends for loss or damage. In all States where the rule of law prevails, the right to compensation is guaranteed by the Constitution or regarded as inextricably involved in the right to property.

By the 5th Amendment in the Constitution of the U.S.A. the right of eminent domain is expressly circumscribed by providing "Nor shall private property be taken for public use, without just compensation." Such a provision is to be found also in every State Constitution in the United States: Lewis Eminent Domain, 3rd edition. (pages 28-50). The Japanese Constitution, 1946, by Article 25 provides a similar guarantee. Under the Commonwealth of Australia Constitution, 1900, the Commonwealth Parliament is invested with the power of acquisition of property on "just terms": section 57 (XXXI).

Under the Common Law of England, principles for payment compensation for acquisition of property by the State are stated by Blackstone in his "Commentaries on the Laws of England," 4th edition, Vol. 1, at page 109:

"So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. * * * Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights,

as modelled by the municipal law. In this and similar cases the Legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the Legislature does, is to oblige the owner to alienate his possession for a reasonable price:
* * *

The British Parliament is supreme and its powers are not subject to any constitutional limitations. But the British Parliament has rarely, if at all, exercised power to take property without payment of the cash value of the property taken. In *Attorney-General v. De Keyser's Royal Hotel*,¹ the House of Lords held that the Crown is not entitled as of right either by virtue of its prerogative or under any statute, to take possession of the land or building of a subject for administrative purposes in connection with the defence of the realm, without compensation for their use and occupation.

Under the Government of India Act, 1935, by section 299 (2) it was enacted that:

"Neither the Federal or a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, it is to be determined."

Article 31 (2) before it was amended by the Constitution (Fourth Amendment) Act, 1955, followed substantially the same pattern.

Prior to the amendment of Article 31 (2) this Court interpreted the expression "compensation" as meaning "full indemnification". Patanjali Sastri, C.J., in *The State of West Bengal v. Mrs. Bela Banerjee and others*², in interpreting the guarantee under Article 31 (2) speaking on behalf of the Court, observed:

"While it is true that the Legislature is given the discretionary powers of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court."

In the view of the learned Chief Justice the expression "just equivalent" meant "full indemnification" and the expropriated owner was on that account entitled to the market value of the property on the date of deprivation of the property. This case was decided under a statute enacted before the Constitution (Fourth Amendment) Act, 1955. The principle of that case was approved in *A. B. Jeejeebhoy v. Assistant Collector, Thana Prant, Thana*³, a case under the Land Acquisition (Bombay Amendment) Act, 1948, and invoking the guarantee under section 299 (2) of the Government of India Act, 1935; in *Union of India v. Kamalabai Harjiwandas*

1. L.R. (1920) A.C. 508.

2. (1954) S.C.R. 558 : (1954) S.C.J. 95 : (1954)

1 M.L.J. 162.

3. (1965) 1 S.C.R. 636.

*Parekh and others*¹, a case under the Requisitioning and Acquisition of Immovable Property Act, 1952; and in *State of Madras v. D. Namasivaya Mudaliar*², a case arising under the Madras Lignite Acquisition of Land Act, 1953.

Article 31 (2) was amended with effect from 27th April, 1955, by the Constitution (Fourth Amendment) Act, 1955. By sub-clause (2-A) a definition of acquisition or requisitioning of properties was supplied and certain other formal changes were also made, with the important reservation that "no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate." In cases arising under statutes enacted after 27th April, 1955, this Court held that the expression "compensation" in Article 31 (2) as amended continued to mean "just equivalent" as under the unamended clause: *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and another*³, under the Land Acquisition (Madras Amendment) Act (XXIII of 1961); *Union of India v. The Metal Corporation of India Ltd and the other*⁴, under the Metal Corporation of India (Acquisition of Undertakings) Act (LIV of 1955); *Lachhman Dass and others v. Municipal Committee, Jalalabad*⁵, under section 20-B of the Displaced Persons (Corporation and Rehabilitation) Act, 1954, as amended by Act (II of 1960). In *Ranojirao Shinde's case*⁶, dealing with a case under the Madhya Pradesh Abolition of Cash Grants Act (XVI of 1963) it was observed that the compensation referred to in Article 31 (2) is a just equivalent of the value of the property taken. But this Court in *State of Gujarat v. Shantilal Mangaldas and others*⁷, observed that compensation payable for compulsory acquisition of property is not, by the application of any principles, determinable as a precise sum, and by calling it a "just" or "fair" equivalent, no definiteness could be attached thereto; that valuation of lands, buildings and incorporeal right has to be made on the application of different principles, e.g., capitalization of net income at appropriate rates, reinstatement, determination of original value reduced by depreciation break-up value of properties which had outgrown their utility; that the rules relating to determination of value of lands, buildings, machinery and other classes of property differ, and the application of several methods or principles lead to widely divergent amounts, and since compensation is not capable of precise determination by the application of recognized rules, by qualifying the expression "compensation" by the adjective "just" the determination was made more controversial. It was observed that the Parliament amended the Constitution by the Fourth Amendment Act declaring that adequacy of compensation fixed by the Legislature as amended according to the principles specified by the Legislature for determination will not be justiciable. It was then observed that:

"The right declared by the Constitution guarantees that compensation shall be given before a person is compulsorily expropriated of his property for a public purpose. What is fixed as compensation by statute, or by the application of principles specified for determination of compensation is guaranteed; it does not mean, however, that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts, for, to do so, would be to grant charter of arbitrariness, and permit a device to defeat the constitutional guarantee. But compensation fixed or determined on principles specified by the Legislature cannot be permitted to be challenged on the somewhat indefinite plea that it is not a just or fair equivalent. Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. A challenge to a statute that the principles specified by it do not award a just equi-

1. (1965) 1 S.C.R. 463 : (1968) 2 S.C.J. 114.
2. (1964) 6 S.C.R. 936 : (1965) 2 An.W.R. (S.C.) 82 : (1965) 2 M.L.J. (S.C.) 82 : (1965) 2 S.C.J. 563.
3. (1964) 2 An.W.R. (S.C.) 173 : (1964) 2 M.L.J. (S.C.) 173 : (1965) 1 S.C.R. 614 : (1964) 2 S.C.J. 703.

4. (1967) 1 S.C.R. 255 : (1967) 1 Comp.L.J. 43 : (1967) 1 S.C.J. 182.
5. (1969) 2 S.C.J. 648 : A.I.R. 1969 S.C. 1126.
6. (1968) 2 S.C.J. 760.
7. (1969) 2 S.C.J. 322 : A.I.R. 1969 S.C. 634.

valent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable."

This Court held in *Mrs. Bela Banerjee's case*¹, that by the guarantee of the right to compensation for compulsory acquisition under Article 31 (2), before it was amended by the Constitution (Fourth Amendment) Act, the owner was entitled to receive a "just equivalent" or "full indemnification." In *P. Vajravelu Mudaliar's case*², this Court held that notwithstanding the amendment of Article 31 (2) by the Constitution (Fourth Amendment) Act, and even after the addition of the words "and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate," the expression "compensation", occurring in Article 31 (2) after the Constitution (Fourth Amendment) Act continued to have the same meaning as it had in section 299 (2) of the Government of India Act, 1935, and Article 31 (2) before it was amended, viz., "just equivalent" or "full indemnification."

There was apparently no dispute that Article 31 (2) before and after it was amended guaranteed a right to compensation for compulsory acquisition of property and that by giving to the owner, for compulsory acquisition of his property, compensation which was illusory, or determined by the application of principles which were irrelevant, the constitutional guarantee of compensation was not complied with. There was difference of opinion on one matter between the decisions in *P. Vajravelu Mudaliar's case*², and *Shantilal Mangaldas's case*³. In the former case it was observed that the constitutional guarantee was satisfied only if a just equivalent of the property was given to the owner: in the latter case it was held that "compensation" being itself incapable of any precise determination, no definite connotation could be attached thereto by calling it "just equivalent" or "full indemnification," and under Acts enacted after the amendment of Article 31 (2) it is not open to the Court to call in question the law providing for compensation on the ground that it is inadequate, whether the amount of compensation is fixed by the law or is to be determined according to principles specified therein. It was observed in the judgment in *Shantilal Mangaldas's case*³, at page 651:

"Whatever may have been the meaning of the expression 'compensation' under the unamended Article 31 (2), when the Parliament has expressly enacted under the amended clause that 'no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate,' it was intended clearly to exclude from the jurisdiction of the Court an enquiry that what is fixed or determined by the application of the principles specified as compensation does not award to the owner a just equivalent of what he is deprived."

In *P. Vajravelu Mudaliar's case*², again the Court in dealing with the effect of the amendment observed (at page 627):

"Therefore, a more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. To illustrate, a law is made to acquire a house; its value at the time of acquisition has to be fixed; there are many modes of valuation, namely, estimate by an engideer, value reflected by comparable sales, capitalisation of rent and similar others. The application of different principles may lead to different results. The adoption of one principle may give a higher value and the adoption of another principle may given a lesser value. But nonetheless they are principles on which and the manner in which compensation is determined. The Court cannot obviously say that the law should have adopted one principle and not the other, for it relates only to the question of ade-

1. (1954) S.C.J. 95 : (1954) 1 M.L.J. 162: (S.C.) 173 : (1964) 2 M.L.J. (S.C.) 173: (1965) 1 (1954) S.C.R. 558
 2. (1964) 2 S.C.J. 703 : (1964) 2 An.W.R. 3. (1969) 2 S.C.J. 322: A.I.R. 1969 S.C. 634.
 S.C.R. 614.

quacy. On the other hand, if a law lays down principles which are not relevant to the property acquired, or to the value of the property at or about the time it is acquired, it may be said that they are not principles contemplated by Article 31 (2) of the Constitution."

The Court then applied that principle to the facts of the case and held that the Land Acquisition (Madras Amendment) Act, 1961, which provided that—(i) the owner of land acquired for housing shall get only the value of the land at the date of the notification under section 4 (1) of the Land Acquisition Act, 1894, or an amount equivalent to the average market value of the land during the last five years immediately preceding such date, whichever was less; (ii) the owner shall get a solatium of only 5 per cent, and not 15 per cent, and (iii) in valuing the land acquired any increase in its suitability or adaptability for any use other than the use to which the land was put at the date of the notification under section 4 (1) of the Land Acquisition Act, 1894, shall not be taken into consideration, did not impair the right to receive compensation. The Court observed at page 631:

"In awarding compensation if the potential value of the land is excluded, it cannot be said that the compensation awarded is the just equivalent of what the owner has been deprived of. But such an exclusion only pertains to the method of ascertaining the compensation. One of the elements that should properly be taken into account in fixing the compensation is omitted: it results in the adequacy of the compensation, * * *. We, therefore, hold that the Amending Act does not offend Article 31 (2) of the Constitution."

The compensation provided by the Madras Act, according to the principles specified, was not the full market value at the date of acquisition. It did not amount to "full indemnification" of the owner; the Court still held that the law did not offend the guarantee under Article 31 (2) as amended, because the objection was only as to the adequacy of compensation. In *Shantilal Mangaldas's case*¹, the Court held that the Constitution (Fourth Amendment) Act, Article 31 (2) guarantees a right to receive compensation for loss of property compulsorily acquired, but compensation does not mean a just equivalent of the property. If compensation is provided by law to be paid and the compensation is not illusory or is not determinable by the application of irrelevant principles, the law is not open to challenge on the ground that compensation fixed or determined to be paid is inadequate.

Both the lines of thought which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of compensation and is a recognised principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in *P. Vajravelu Mudaliar's case*², or in *Shantilal Mangaldas's case*¹, the Act, in our judgment, is liable to be struck down as it fails to provide to the expropriated banks compensation determined according to relevant principles. Section 4 of the Act transfers the undertaking of every named bank to and vests it in the corresponding new bank. Section 6 (1) provides for payment of compensation for acquisition of the undertaking, and the compensation is to be determined in accordance with the principles specified in the Second Schedule. Section 6 (2) then provides that though separate valuations are made in respect of the several matters specified in Schedule II of the Act, the amount of compensation shall be deemed to be a single compensation. Compensation being the equivalent in terms of money of the property compulsorily acquired, the principle for determination of compensation is intended to award to the expropriated owner the value of the property acquired. The science of valuation of property recognizes several principles or methods for determining the value to be paid as compensation to the owner for loss of his property;

1. (1969) 2 S.C.J. 322 : A.I.R. 1969 S.C. (S.C.) 173: (1964) 2 M.L.J. (S.C.) 173: (1965) 1 S.C.R. 614.

2. (1964) 2 S.C.J. 703: (1964) 2 An.W.R.

there are different methods applicable to different classes of property in the determination of the value to be paid as recompense for loss of his property. A method appropriate to the determination of value of one class of property may be wholly inappropriate in determining the value of another class of property. If an appropriate method or principle for determination of compensation is applied, the fact that by the application of another principle which is also appropriate, a different value is reached, the Court will not be justified in entertaining the contention that out of the two appropriate methods, one more generous to the owner should have been applied by the Legislature.

We are unable to hold that a principle specified by the Parliament for determining compensation of the property to be acquired is conclusive. If that view be accepted, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process, the constitutional guarantee of the right to compensation may be severely impaired. The principle specified must be appropriate to the determination of compensation for the particular class of property sought to be acquired. If several principles are appropriate and one is selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles is not open to challenge, for the selection must be left to the wisdom of the Parliament.

The broad object underlying the principle of valuation is to award to the owner the equivalent of his property with its existing advantages and its potentialities. Where there is an established market for the property acquired, the problem of valuation presents little difficulty. Where there is no established market for the property, the object of the principle of valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future, without taking into account the urgency of acquisition, the disinclination of the owner to part with the property, and the benefit which the acquirer is likely to obtain by the acquisition. Under the Land Acquisition Acts compensation paid is the value to the owner together with all its potentialities and its special adaptability if the land is peculiarly suitable for a particular use, if it gives an enhanced value at the date of acquisition.

The important methods of determination of compensation are—(i) market value determined from sales of comparable properties, proximate in time to the date of acquisition, similarly situated, and possessing the same or similar advantages and subject to the same or similar disadvantages. Market value is the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase, (ii) capitalization of the net annual profit out of the property at a rate equal in normal cases to the return from gilt-edged securities. Ordinarily value of the property may be determined by capitalizing the net annual value obtainable in the market at the date of the notice of acquisition; (iii) where the property is a house, expenditure likely to be incurred for constructing a similar house, and reduced by the depreciation for the number of years since it was constructed; (iv) principle of reinstatement, where it is satisfactorily established that reinstatement in some other place is *bona fide* intended, there being no general market for the property for the purpose for which it is devoted (the purpose being a public purpose) and would have continued to be devoted, but for compulsory acquisition. Here compensation will be assessed on the basis of reasonable cost of reinstatement; (v) when the property has outgrown its utility and it is reasonably incapable of economic use, it may be valued as land plus the break-up value of the structure. But the fact that the acquirer does not intend to use the property for which it is used at the time of acquisition and desires to demolish it or use it for other purpose is irrelevant; and (vi) the property to be acquired has ordinarily to be valued as a unit. Normally an aggregate of the value of different components will not be the value of the unit.

These are, however, not the only methods. The method of determining the value of property by the application of an appropriate multiplier to the net annual income or profits is a satisfactory method of valuation of lands with buildings, only,

if the land is fully developed, *i.e.*, it has been put to full use legally permissible and economically justifiable, and the income out of the property is the normal commercial and not a controlled return, or a return depreciated on account of special circumstances. If the property is not fully developed, or the return is not commercial the method may yield a misleading result.

The expression "property" in Article 31 (2) as in Entry 42 of List III is wide enough to include an undertaking, and an undertaking subject to obligations may be compulsorily acquired under a law made in exercise of power under Entry 42, List III. The language of the amended clause (2) of Article 31 compared with the language of the clause before it was amended by the Constitution (Fourth Amendment) Act leaves no room for doubt. Before it was amended, the guarantee covered the acquisition of "property movable or immovable including, and interest in, or in any company owning any commercial or industrial undertaking". In the amended clause only the word "property" is used, deleting the expressions which did not add to its connotation. But when an undertaking is acquired as a unit the principles for determination of compensation must be relevant and also appropriate to the acquisition of the entire undertaking. In determining the appropriate rate of the net profits the return from gilt-edged securities may, unless it is otherwise found unsuitable, be adopted.

Compensation to be determined under the Act is for acquisition of the undertaking, but the Act instead of providing for valuing the entire undertaking as a unit provides for determining the value of some only of the components, which constitute the undertaking, and reduced by the liabilities. It also provides different methods of determining compensation in respect of each such component. This method for determination of compensation is *prima facie* not a method relevant to the determination of compensation for acquisition of the undertaking. Aggregate of the value of components is not necessarily the value of the entirety of a unit of property acquired, especially when the property is a going concern, with an organized business. On that ground alone, acquisition of the undertaking is liable to be declared invalid, for it impairs the constitutional guarantee for payment of compensation for acquisition of property by law. Even if it be assumed that the aggregate value of the different components will be equal to the value of the undertaking of the named bank as a going concern the principles specified, in our judgment, do not give a true recompense to the banks for the loss of the undertaking. Schedule II by clause (1) provides :

"The compensation * * * in respect of the acquisition of the undertaking thereof shall be an amount equal to the sum total of the value of the assets of the existing bank as on the commencement of this Act, calculated in accordance with the provisions of Part I, less the sum total of the liabilities computed and obligations of the existing bank calculated in accordance with the provisions of Part II."

For the purpose of Part I "assets" means the total of the heads (a) to (h) and the expression "liabilities" is defined as meaning the total amount of all outside liabilities existing at the commencement of the Act and contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources. Compensation payable to the named banks is accordingly the aggregate of some of the components of the undertaking, reduced by the aggregate of liabilities determined in the manner provided in the Schedule. It appears clear that in determining the compensation for undertaking—(i) certain important classes of assets are omitted from the heads (a) to (h), (ii) the method specified for valuation of lands and buildings is not relevant to determination of compensation, and the value determined thereby in certain circumstances is illusory as compensation; and (iii) the principle for determination of the aggregate value of liabilities is also irrelevant.

The undertaking of a banking company taken over as a going concern would ordinarily include the goodwill and the value of the unexpired period of long-term leases in the prevailing conditions in urban areas. But goodwill of the

banks is not one of the items in the assets in the Schedule, and in cl. (f) though provision is made for including a part of the premium paid in respect of leasehold properties proportionate to the unexpired period, no value of the leasehold interest for the unexpired period is given.

Goodwill of a business is an intangible asset: it is the whole advantage of the reputation and connections formed with the customers together with the circumstances making the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years or in excess of normal amounts because of its reputation, location and other features : *Trego v. Hunt*¹. Goodwill of an undertaking therefore is the value of the attraction to customers arising for the name, and reputation for skill, integrity, efficient business management, or efficient service.

Business of banking thrives on its reputation for probity of its dealings, efficiency of the service it provides, courtesy and promptness of the staff, and above all the confidence it inspires among the customers for the safety of the funds entrusted. The Reserve Bank, it is true, exercises stringent control over the transactions which banks carry on in India. Existence of these powers and exercise thereof may and do ensure to a certain extent the safety of the funds entrusted to the Banks. But the business which a bank attracts still depends upon the confidence which the depositor reposes in the management. A bank is not like a grocer's shop : a customer does not extend his patronage to a bank merely because it has a branch easily accessible to him. Outside the public sector, there are 50 Indian scheduled banks, 13 foreign banks, beside 16 non-scheduled banks. The deposits in the banks not taken over under the Act range between Rs. 400 crores and a few lakhs of rupees. Deposits attracted by the major private commercial banks are attributable largely to the personal goodwill of the management. The regulatory provisions of the Banking Companies Act and the control which the Reserve Bank exercises over the banks may to a certain extent reduce the chance of the resources of the banks being misused, but a banking company for its business still largely depends upon the reputation of its management. We are unable to agree with the contention raised in the Union's affidavit that a banking establishment has no goodwill, nor are we able to accept the plea raised by the Attorney-General that the value of the goodwill of a bank is insignificant and it may be ignored in valuing the undertaking as a going concern.

Under clause (j) of Schedule II provision is made for valuing a proportionate part of the premium paid in respect of all leasehold properties to the unexpired duration of the leases, but there is no provision made for payment of compensation for the unexpired period of the leases. Having regard to the present day conditions it is clear that with rent control on leases operating in various States the unexpired period of leases has also a substantial value.

The value determined by excluding important components of the undertaking, such as the goodwill and value of the unexpired period of leases, will not in our judgment, be compensation for the undertaking.

The other defects in the method of valuation, it was claimed by Mr. Palkhivala, are the inclusion of certain assets such as cash, choses in action and similar assets which under the law are not regarded as capable of being acquired as property. This inclusion, it is contended, vitiates the scheme of acquisition. Under clause (a) of Part I—Assets—the amount of cash in hand and with the Reserve Bank and the State Bank of India (including foreign currency notes which shall be converted at the market rate of exchange) are liable to be included. Cash in hand is not an item which is capable of being compulsorily acquired, not because it is not property, but because taking over the cash and providing for acquisition thereof, compensation payable at some future date amounts to levying a "forced loan" in the guise of acquisition. This Court in *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbanga and others*², held that cash and choses in action are not capable of compul-

1. L.R. (1896) A.C. 7 : 65 L.J. Ch. 1.

2. (1952) S.C.R. 889 : (1952) S.C.J. 354.

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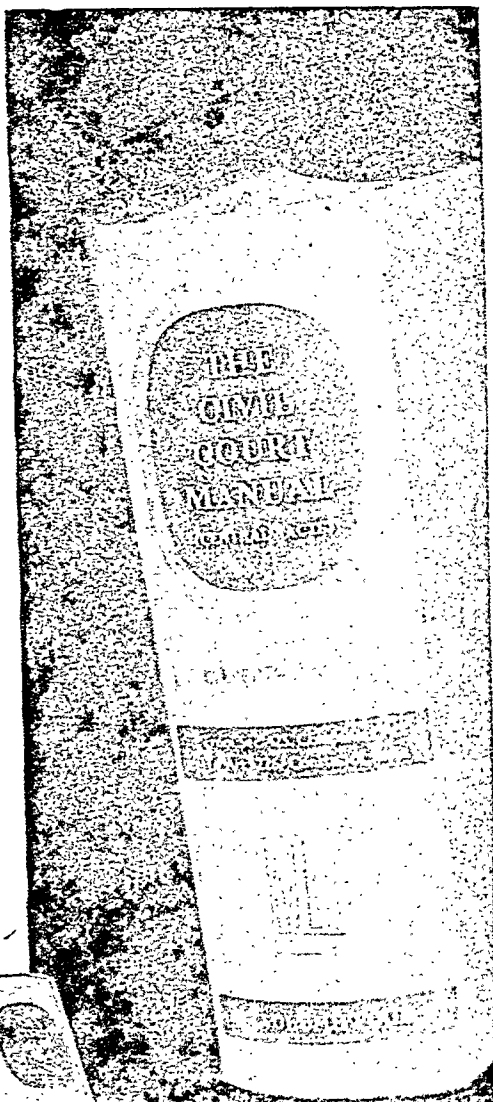
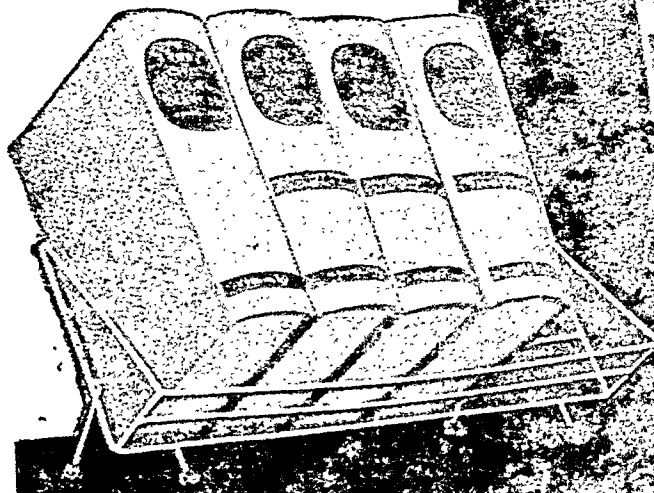
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[S.C. N. C. 63.]

M. Hidayatullah, C. J.,
A. N. Ray and
I. D. Dua, JJ.
25-2-1970.

Bihar School Examination Board v.
Subhas Chandra Sinha.
C.A. No. 2620 of 1969.

Bihar Schools Examinations Board Act, sections 6 (2) and 9 (3)—Cancellation of examination on the ground that unfair means were practised at the examination on a mass scale—Chairman of Bihar Schools Examinations Board if has powers—Examinees if entitled to hearing before cancellation—Principles of natural justice.

Under section 6 (2) of the Bihar Schools Examinations Board Act, the Board considers, moderates, determines and publishes the result of examinations. It also admits candidates to examinations, disqualifies them for any reason which it considers to be adequate. Under section 9 (3) of the Act in an emergency the power of the Chairman of the Board are co-terminus with those of the Board and he can take action himself and later report it to the Board. In this case action was taken by the Chairman and he reported it to the Board which fully endorsed it. Therefore, the cancellation of the examinations cannot be challenged on the ground that it was incompetently made.

It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board should hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means.

The essence of the examinations is that the worth of every person is appraised without any assistance from an outside source. If at a centre the whole body of students receive assistance and manage to secure success in the neighbourhood of 100 per cent when others at other centres are successful only at an average of 50 per cent, it is obvious that the university or the Board must do something in the matter. It cannot hold a detailed quasi-judicial inquiry with a right to its *alumni* to plead and lead evidence, etc. before the results are with-held or the examinations are cancelled. If there is sufficient material on which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that you should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not. To do this would encourage indiscipline if not also perjury.

V.K.

Appeal allowed.

[S.C. N.C. 64.]

J. C. Shah, J.
K. S. Hegde and
A. N. Grover, JJ.
26-2-1970.

Mathura Prasad Bajoo Jaiswal v.
Dissibai N. B. Jeejeebhoy.
C.A. Nos. 1061 and 1627-1629 of 1966.

Civil Procedure Code (V of 1908), section 11—Decision on pure question of law or a question relating to jurisdiction of Court—If can operate as *res judicata* in subsequent proceedings.

A decision on an issue of law will operate as *res judicata* in a subsequent proceeding between the same parties. If the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declared valid a transaction which is prohibited by law.

A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in operate as *res judicata*. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as *res judicata* between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

Thus, where the decision is on a question of law, *i.e.*, the interpretation of a statute, it will be *res judicata* in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in section 11 of the Code of Civil Procedure, means the right litigated between the parties, *i.e.*, the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law, and relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a rule of procedure cannot supersede the law of the land.

Conflict in case law discussed.

V.K.

Appeals allowed.

[S.C. N.C. 65]

J. C. Shah,
K. S. Hegde and
K. N. Grover, JJ.
27-2-1970.

Century Spinning & Manufacturing Company Ltd. v.
The Ulhasnagar Municipal Council.
C.A. Nos. 2130 and 2131 of 1969.

Constitution of India (1950), Article 226—Exercise of extraordinary jurisdiction under—When may properly be declined.

Evidence Act (I of 1872), section 115—Estoppel—Public body like a municipality making a representation that something will be done in future—Such representation acted upon by another—Public body if can be compelled to perform its obligation.

The High Court may, in exercise of its discretion, decline to exercise its extraordinary jurisdiction under Article 226 of the Constitution. But the discretion is judicial: if the petition makes a claim which is frivolous, vexatious, or *prima facie* unjust, or may not appropriately be tried in a petition invoking extraordinary jurisdiction, the Court may decline to entertain the petition. But a party claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high-handed, arbitrary or unjust is entitled to a hearing of its petition on the merits.

Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process of a civil suit against a public body, when the question of fact raised by the petition are elementary.

There is undoubtedly a clear distinction between a representation of an existing fact and a representation that something will be done in the future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon that representation. A representation that a something will be done in the future may result in a contract if another person to whom it is addressed acts upon it. A representation that something will be done in future is not a representation that it is true when made. But between a representation of a fact which is untrue and a representation, express or implied, to do something in future, there is no clear antithesis. A representation that something will be done in future may involve an existing

intention to act in future in the manner represented. If the representation is acted upon by another person, it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law; if the statute requires that the agreement shall be in a certain form, no contract may result from the representation and acting thereon, but the law is not powerless to raise in appropriate cases an equity against him to compel performance of the obligation arising out of his representation.

Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice.

If our nascent democracy is to thrive, different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, not exempt from liability to carry out its obligations arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.

V.K.

Main appeal allowed.

[S.C. N.C. 66.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
27-2-1970.

The Nagar Rice and Flour Mills v.
N. Teekappa Gowda & Bros.
C.A. No. 2228 of 1969.

Rice Milling Industry (Regulation) Act (XXI of 1958), sections 5 (4) and 8 (3) (c) — Contravention of section 8 (3) (c) — Effect — Issue of sanction for change of location of an existing rice mill — Sanctioning authority if bound to take into account matters specified under section 5 (4).

Section 8 (3) (c) is merely regulatory, if it is not complied with, the appellants (owners of the offending rice mill) may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the appellants from exercising their right to carry on business because of the default, nor can the rice mill of the appellants be regarded as a new rice mill. Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under Article 19 (6) of the Constitution, but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely.

The considerations which are prescribed by sub-section (4) of section 5 only apply to the grant of a permit in respect of a new rice mill or a defunct rice mill. They have no application in considering the shifting of the location of an existing rice mill. In respect of a new or defunct rice mill a permit and licence are both required; in respect of an existing rice mill only a licence is required. The conditions prescribed by sub-section (4) of section 5 only apply to the grant of a permit and not to a licence. By section 8 (3) (c) it is made one of the conditions of the licence that the location of the rice mill shall not be shifted without the previous permission of the Central Government. It is true that the appropriate authority clothed with the power must consider the expediency of permitting a change of location. But there is no statutory obligation imposed upon him to take into consideration the matters prescribed by sub-section (4) of section 5 in granting the permission to change the location.

V. K.

Appeal allowed.

[S.C. N.C. 67.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
27-2-1970.

A. P. State Road Transport Corporation v.
K. Venkataramireddy.
C.A. Nos. 1188 and 1189 of 1968.

Motor Vehicles Act (IV of 1939), section 62—Application under—Proper form.

A temporary permit can be granted only if the permit is required for the purposes or reasons mention in clauses (a) to (d) of section 62. Where, therefore, an application for the grant of a temporary permit does not specify any reason or purpose for which it is asked for, it has to be dismissed *in limini* by the Regional Transport Authority.

V.K.

Appeals dismissed.

sory acquisition. That view was repeated by this Court in *Bombay Dyeing and Manufacturing Co., Ltd. v. State of Bombay*¹, and *Ranajirao Shinde's case*². We do not propose to express our opinion on the question whether in adopting the method of determination of compensation, by aggregating the value of assets which constitute the under taking, the rule that cash and choses in action are incapable of compulsory acquisition may be applied.

Under item (e) the value of any land or buildings is one of the assets. The first *Explanation* provides that for the purpose of this clause (e) "value" shall be deemed to be the market value of the land or buildings, but where such market value exceeds the "ascertained value" determined in the manner specified in *Explanation 2*, the value shall be deemed to mean such "ascertained value." The value of the land and buildings is therefore the market value or the "ascertained value" whichever is less. Under *Explanation 2*, clause (1) "ascertained value" in respect of buildings which are wholly occupied on the date of the commencement of the Act is twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let from year to year reduced by certain specified items. This provision, in our judgment, does not lay down a relevant principle of valuation of buildings. In the first place, making a provision for payment of capitalised annual rental at twelve times the amount of rent cannot reasonably be regarded as payment of compensation having regard to the conditions prevailing in the money market. Capitalization of annual rental which is generally based on controlled rent under some State Acts at rates pegged down to the rates prevailing in 1940 and on the footing that investment in buildings yields $8\frac{1}{3}$ per cent. return furnishes a wholly misleading result which cannot be called compensation. Value of immovable property has spiralled during the last few years and the rental which is mostly controlled does not bear any reasonable relation to the economic return from property. If the building is partly occupied by the Bank itself and partly by a tenant, the ascertained value will be twelve times the annual rental received, and the rent for which the remaining part occupied by the Bank may reasonably be expected to be let out. By the Act the corresponding new banks take over vacant possession of the lands and buildings belonging to the named banks. There is in the present conditions considerable value attached to vacant business premises in urban areas. True compensation for vacant premises can be ascertained by finding out the market value of comparable premises at or about the time of the vesting of the undertaking and not by capitalising the rental—actual or estimated. Vacant premises have a considerably larger value than business premises which are occupied by tenants. The Act instead of taking into account the value of the premises as vacant premises adopted a method which cannot be regarded as relevant. *Prima facie*, this would not give any reliable basis for determining the compensation for the land and buildings.

Again in determining the compensation under clause (e), the annual rent is reduced by several outgoings and the balance is capitalized. The first item of deduction is one-sixth of the amount thereof on account of maintenance and repairs. Whether the building is old or new, whether it requires or does not require maintenance or repairs $16\frac{2}{3}$ per cent. of the total amount of rent is liable to be deducted towards maintenance and repairs. The vice of items (v) and (vi) of clause (1) of *Explanation 2* is that they provide for deduction of a capital charge out of the annual rental which according to no rational system of valuing property by capitalization of the rental method is admissible. Under item (v) where the building is subject to a mortgage or other capital charge, the amount of interest on such mortgage or charge, and under item (vi) where the building has been acquired, constructed, repaired, renewed or re-constructed with borrowed capital, the amount of any interest payable on such capital, are liable to be deducted from the annual rental for determining the ascertained value. These encumbrances are also liable to be deducted under the head "liabilities". A simple illustration may suffice to pinpoint the inequity of

1. (1958) S.C.R. 1122 : (1958) S.C.J. 620.

2. (1968) 2 S.C.J. 760.

the method. In respect of a building owned by a bank of the value of Rs. 10 lakhs and mortgaged for say Rs. 7,50,000 interest at the rate of 8 per cent. (which may be regarded as the current commercial rate) would amount to Rs. 60,000. The estimated annual rental which would ordinarily not exceed Rs. 60,000 has under clause (e) to be reduced in the first instance by other outgoing. The assets would show a minus figure as value of the building, and on the liabilities side the entire amount of mortgage liability would be debited. The method provided by the Act permits the annual interest on the amount of the encumbrance to be deducted before capitalization, and the capitalized value is again reduced by the amount of the encumbrance. In effect, a single debt is, in determining the compensation debited twice, first, in computing the value of assets, and again, in computing the liabilities.

We are unable to accept the argument raised by the Attorney-General that under the head "liabilities" in Part II only those mortgages or capital charges in respect of which the amount has fallen due are liable to be included on the liabilities side. Under the head "liabilities" the total amount of all outside liabilities existing at the commencement of the Act, and all contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources on or after the date of commencement of the Act will have to be included. When even contingent liabilities are included in the total amount of all outside liabilities, a mortgage debt or capital charge must be taken into account in determining the liabilities by which the aggregate of the value of assets is to be reduced, even if the period of the mortgage or capital charge has not expired. The liability under a mortgage or capital charge exists whether the period stipulated under the deed creating the encumbrance has expired or not.

Under clause (2) of *Explanation 2*, it is provided that buildings which are partly occupied the valuation shall be made on the basis of the "plinth area" occupied and multiplying it by the proportion which that area bears to the total plinth area of the buildings. The use of the expression "plinth area" appears to be unfortunate. What was intended is "floor area". If the expression "plinth area" is understood to mean "floor area", no fault may be found with the principle underlying clause (2) of *Explanation 2*.

Under clause (3) of *Explanation 2*, where there is open land which has no building erected thereon, or which is not appurtenant to any building, the value is to be determined "with reference to the prices at which sales or purchases of similar or comparable lands have been made during the period of three years immediately preceding the date of the commencement of" the Act. Whereas the value of the open land is to be the market value, the value of the land with buildings to be taken into account is the value determined by the method of capitalization of annual rent or market value whichever is less. The *Explanation* does not take into account whether the construction on the land fully develops the land, and the rental is economic.

We are, therefore, unable to hold that item (e) specifies a relevant principle for determination of compensation for lands and buildings. It is not disputed that the major Banks occupy their own buildings in important towns, and investments in buildings constitute a part of the assets of the Banks which cannot be treated as negligible. By providing a method of valuation of buildings which is not relevant the amount determined cannot be regarded as compensation.

We have already referred to item (f) under which a proportionate part of the premium paid is liable to be included in the assets but not the value for the unexpired period of the leases. Item (h) provides for the inclusion of the market or realizable value, as may be appropriate, of other assets appearing on the books of the bank, no value being allowed for capitalized expenses, such as share-selling commission, organizational expenses and brokerage, losses incurred and similar other items.

Mr. Palkhivala urged that certain assets which do not appear in the books of account still have substantial value, and they are omitted from consideration in

computing the aggregate of the value of assets. Counsel said that every bank is permitted to have secret reserve and those secret reserves may not appear in the books of account of the banks. We are unable to accept that contention. A banking company is entitled to withhold from the balance-sheet its secret reserve, but there must be some account in respect of these secret reserves. The expression "books of the Bank" may not be equated with the balance sheets or the books of account only.

The expression "liabilities" existing at the commencement of "the Act includes all debts due or to become due. Under the head "liabilities" contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources on or after the date of commencement of the Act are to be debited. The clause is badly drafted. The present value of the contingent liabilities at the date of the acquisition and not the total contingent liabilities may on any rational system of accounting be debited against the aggregate value of the assets. For instance, if a banking company is liable to pay to its employees gratuity, the present value of the liability to pay gratuity at the date of the acquisition made on actuarial calculation may alone be debited, and not the total face value of the liability.

The Attorney-General contended that even if the goodwill of a banking company is of substantial value, and inclusion of the goodwill is not provided for, or the value of buildings and lands is not the market value, or that there is a departure from recognized principles for determination of compensation, the deficiencies in the Act result merely in inadequate compensation within the meaning of Article 31 (2) of the Constitution and the Act cannot on that account be challenged as invalid. We are unable to agree with that contention. The constitution guarantees a right to compensation an equivalent in money of the property compulsorily acquired. That is the basic guarantee. The law must therefore provide compensation, and for determining compensation relevant principles must be specified, if the principles are not relevant the ultimate value determined is not compensation.

The Attorney-General also contended that if in consequence of the adoption of the method of valuation, an amount determined as compensation is not illusory, the Courts have no jurisdiction to question the validity of the law, unless the law is expropriatory, for, in the ultimate analysis the grievance relates to the adequacy of compensation. He contended that the exclusion of one of the elements in fixing the compensation, or application of a principle which is not a recognized principle, results in inadequate price, and is not open to challenge, and relied in support upon the observations made in *P. Vajravelu Mudaliar's case*¹, which we have already quoted in another context in relation to the challenge to the validity of the Land Acquisition (Madras Amendment) Act, 1961, which excluded in determining compensation the potential value of the land. The Court held that exclusion of potential value amounted to giving inadequate compensation and was not a fraud on power. The principle of that case has no application when valuation of an undertaking is sought to be made by breaking it up into several heads of assets, and important heads are excluded and others valued by the application of irrelevant principles, or principles of which the only claim for acceptance is their novelty. The Constitution guarantees that the expropriated owner must be given the value of his property, i.e., what may be regarded reasonably as compensation for loss of the property and that such compensation should not be illusory and not reached by the application of irrelevant principles. In our view, determination of compensation to be paid for the acquisition of an undertaking as a unit after awarding compensation for some items which go to make up the undertaking and omitting important items amounts to adopting an irrelevant principle in the determination of the value of the undertaking, and does not furnish compensation to the expropriated owner.

1. (1964) 2 An.W.R. (S.C.) 173; (1954) 2 M.L.J. (S.C.) 173; (1964) 2 S.C.J. 703. 1 S.C.R. 614 at 631.

The Attorney-General contended that the total value of the undertaking of the named banks even calculated according to the method provided in Schedule II exceeded the total market value of the shares, and on that account there is no ground for holding that the law providing for compensation denies to the shareholders the guarantee of the right to compensation under Article 31 (2). But there is no evidence on this part of the case.

Compensation may be provided under a statute, otherwise than in the form of money : it may be given as equivalent of money, e.g., a bond. But in judging whether the law provides for compensation, the money value at the date of expropriation of what is given as compensation, must be considered. If the rate of interest compared with the ruling commercial rate is low, it will reduce the present value of the bond. The Constitution guarantees a right to compensation—an equivalent of the property expropriated and the right to compensation cannot be converted into a loan on terms which do not fairly compare with the prevailing commercial terms. If the statute in providing for compensation devises a scheme for payment of compensation by giving it in the form of bonds, and the present value of what is determined to be given is thereby substantially reduced, the statute impairs the guarantee of compensation.

A scheme for payment of compensation may take many forms. If the present value of what is given reasonably approximates to what is determined as compensation according to the principles provided by the statute, no fault may be found. But if the law seeks to convert the compensation determined into a forced loan, or to give compensation in the form of a bond of which the market value at the date of expropriation does not approximate the amount determined as compensation, the Court must consider whether what is given is in truth compensation which is inadequate, or that it is not compensation at all. Since we are of the view that the scheme in Schedule II of the Act suffers from the vice that it does not award compensation according to any recognized principles, we need not dilate upon this matter further. We need only observe that by giving to the expropriated owner compensation in bonds of the face-value of the amount determined maturing after many years and carrying a certain rate of interest, the constitutional guarantee is not necessarily complied with. If the market value of the bonds is not approximately equal to the face-value, the expropriated owner may raise a grievance that the guarantee under Article 31 (2) is impaired.

We are of the view that by the method adopted for valuation of the undertaking, important items of assets have been excluded, and principles some of which are irrelevant and some not recognised are adopted. What is determined by the adoption of the method adopted in Schedule II does not award to the named banks compensation for loss of their undertaking. The ultimate result substantially impairs the guarantee of compensation, and on that account the Act is liable to be struck down.

IV. *Infringement of the guarantee of freedom of trade, commerce and intercourse under Article 301—*

In the view we have taken the provisions relating to determination and payment of compensation for compulsory acquisition of the undertaking of the named banks impair the guarantee under Article 31 (2) of the Constitution, we do not deem it necessary to decide whether Act XXII of 1969 violates the guarantee of freedom of trade, commerce and intercourse in respect of the (1) agency business; (2) business of guarantee and indemnity carried on by the named banks.

V. *Validity of the retrospective operation given to Act XXII of 1969 by section 1 (2) and section 27—*

The argument raised by Mr. Palkhivala that, even if the Act is within the competence of the Parliament and does not impair the fundamental rights under Articles 14, 19 (1) (f) and (g) and 31 (2) in their prospective operation, section 1 (2) and section 27 (2), (3) and (4) which give retrospective operation as from 19th July, 1969, are invalid, need not also be considered.

Nor does the argument about the validity of sub-sections (1) and (2) of section 11 and section 26 of the Act survive for consideration.

Accordingly we hold that—

(a) the Act is within the legislative competence of the Parliament ; but

(b) it makes hostile discrimination against the named banks in that it prohibits the named banks from carrying on banking business, whereas other Banks—Indian and Foreign—are permitted to carry on banking business, and even new Banks may be formed which may engage in banking business ;

(c) it in reality restricts the named banks from carrying on business other than banking as defined in section 5 (b) of the Banking Regulation Act, 1949 ; and

(d) that the Act violates the guarantee of compensation under Article 31 (2) in that it provides for giving certain amounts determined according to principles which are not relevant in the determination of compensation of the undertaking of the named banks and by the method prescribed the amounts so declared cannot be regarded as compensation.

Section 4 of the Act is a kingpin in the mechanism of the Act. Sections 4, 5 and 6 read with Schedule II provide for the statutory transfer and vesting of the undertaking of the named banks in the corresponding new banks and prescribe the method of determining compensation for expropriation of the undertaking. Those provisions are, in our judgment, void as they impair the fundamental guarantee under Article 31 (2). Sections 4, 5 and 6 and Schedule II are not severable from the rest of the Act. The Act must, in its entirety, be declared void.

Petitions Nos. 300 and 298 of 1969 are therefore allowed, and it is declared that the Banking Companies (Acquisition and Transfer of Undertakings) Act XXII of 1969 is invalid and the action taken on deemed to be taken in exercise of the powers under the Act is declared unauthorised. Petition No. 222 of 1969 is dismissed. There will be no order as to costs in these three petitions.

Ray, J.—There are 89 commercial banks operating in India. Of these 89 banks 73 are Scheduled and 16 are non-Scheduled banks. The 73 Scheduled banks comprise State Banks with 7 subsidiaries aggregating 8, 15 foreign banks, 14 banks which are the subject-matter of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance (VIII of 1969) (hereinafter referred to for the sake of brevity as the 1969 Ordinance) and the Banking Companies (Acquisition and Transfer of Undertakings) Act (XXII of 1969) (hereinafter referred to for the sake of brevity as the 1969 Act) and 36 banks which are outside the scope of the 1969 Act. The State Banks have 27 per cent. of the aggregate deposit of all commercial banks and 32 per cent. of the credit of all commercial banks. The State Bank and its 7 subsidiaries have Rs. 1,239 crores including current account in the total deposit and the total credit of the State Bank and its subsidiaries in Rs. 1,186 crores. The 14 Scheduled Banks each of which has over Rs. 500 crores of deposit which are the subject-matter of the 1969 Ordinance and the 1969 Act (hereinafter referred to for the sake of brevity as the 14 banks) and have Rs. 2,632 crores of deposit and the credit amounts to Rs. 1,829 crores. In other words, these 14 banks have 56 per cent of the total deposit and little over 50 per cent. of the total credit of the commercial banks. The 36 scheduled banks which are outside the 1969 Ordinance and the 1969 Act have Rs. 296 crores of deposit, viz., 6.3 per cent. of the aggregate deposit and the credit in Rs. 197 crores, or in other words, 4.5 per cent. of the total credit of the commercial banks. The 15 foreign banks have 10 per cent. of the credit and 10 per cent. of the deposit. These foreign banks have Rs. 478 cores of deposit and the credit is Rs. 385 crores. The 16 non-scheduled banks have Rs. 28 crores of deposit and the credit is about Rs. 16 crores. The non-scheduled banks have less than 1 per cent. of the total credit and of the deposit. The aggregate deposits of the State Bank of India and its 7 subsidiaries and of the 14 banks is 82.8 per cent. (26.5 per cent. + 56.3

per cent.) of the total deposits of 89 commercial banks and the aggregate credit of the said banks is 83.4 per cent. (32.8 per cent. + 50.6 per cent.) of the total credit of the 89 commercial banks.

Of the 89 commercial banks the State Banks have 2,454 branches, namely, 30 per cent. of the branch offices. The 15 foreign banks have 138 branch offices including branches. The 36 scheduled banks which are outside the 1969 Ordinance and the 1969 Act have 1,324 offices. The 16 non-scheduled banks have 216 offices. The 14 banks have 4,130 offices which represent about little over 50 per cent. of the offices. The aggregate of the number of offices of the State Bank and its 7 subsidiaries and the 14 banks is 6,584 being 79.8 per cent. of the total number of branch offices of the 89 commercial banks.

On 19th July, 1969 Ordinance VIII of 1969 called the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969 was promulgated by the Vice-President acting as President. It was an Ordinance to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with national policy and objectives and for matters connected therewith or incidental thereto. *The Ordinance came into force on 19th July, 1969. The Ordinance was repealed on 9th August, 1969, by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 which came into force on 9th August, 1969. The object of the Act was similar to that of the Ordinance. There are some differences between the Ordinance and the Act but it is not necessary for the purpose of the present matter to refer to the same.*

Broadly stated, as a result of the 1969 Act the undertaking of every existing bank was transferred to and vested in the corresponding new bank on the commencement of the Act. The existing banks mean the 14 banks. The corresponding new banks mean the banks mentioned in the First Schedule to the 1969 Act in which is vested the undertakings of the existing banks. Section 5 of the 1969 Act deals with the effect of vesting. First, the undertaking shall be deemed to include all assets, rights, powers, authorities and privileges and all property, movable or immovable, cash balances, reserve funds, investments and all other rights and interests arising out of such property as were immediately before the commencement of the Act in the ownership, possession, power or control of the existing banks in relation to the undertaking, whether within or without India, and all books of accounts, registers, records and all other documents of whatever nature relating thereto. Secondly, the undertaking shall also be deemed to include all borrowings, liabilities (including contingent liabilities) and obligations of whatever kind then subsisting of the existing bank in relation to the undertaking. Thirdly, if according to the laws of any country outside India, the provisions of the 1969 Act by themselves are not effective to transfer or vest any asset or liability situated in that country which forms part of the undertaking of an existing bank to, or in, the corresponding new bank, the affairs of the existing bank in relation to such assets or liability shall, on and from the commencement of this Act, stand entrusted to the chief executive officer for the time being of the corresponding new bank who will take all steps as required by the laws of the Foreign Country for the purpose of affecting such transfer or vesting. Fourthly, all contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature, subsisting or having effect immediately before the commencement of the 1969 Act and to which the existing bank is a party and which are in favour of the existing bank shall be of as full force and effect against or in favour of the corresponding new bank and may be enforced or acted upon as fully and effectually as if in the place of the existing bank the corresponding new bank had been a party thereto or as if they had been issued in favour of the corresponding new bank. Fifthly, there are provisions that suits, appeals, or other proceedings pending by or against the existing bank be continued, prosecuted and enforced by or against the corresponding new bank.

Section 6 of the 1969 Act provides for payment of compensation and the second Schedule to the Act sets out the principles of determination of compensation by excluding liabilities from assets. Section 11 of the Act enacts that the corresponding new bank shall be guided by such directions in regard to matters of policy involving public interest as the Central Government may, after consultation with the Governor of the Reserve Bank, give, and if any question arises whether a direction relates to a matter of policy involving public interest, it shall be referred to the Central Government and the decision of the Central Government thereon shall be final. Section 12 provides for appointment of an Advisory Board to advise the custodian of the corresponding new bank. The custodian is the chief executive officer of the corresponding new bank. The Chairman of the existing bank holding office before the commencement of the Act becomes a custodian of the corresponding new bank. The custodian is to hold office during the pleasure of the Central Government. Section 13 of the Act provides power of the Central Government to make scheme. Section 15 is an important provision in the Act. Under that section a Chairman, managing or whole-time director of an existing bank shall, on the commencement of the Act, be deemed to have vacated office and every other director of such bank shall, until directors are duly elected by such existing bank, be deemed to continue to hold such office. The said Board may transact all or any of the various kinds of business mentioned in section 15. The other provision in section 15 is that the existing bank may carry on any business other than banking.

The Act of 1969 by reason of section 1 (2) thereof is deemed to have come into force on 19th July, 1969. Section 27 of the Act contains four sub-sections providing for the repeal of the Ordinance and enacting first, that notwithstanding the repeal of the Ordinance, anything done or any action taking including any order made, notification issued or direction given, under the said Ordinance shall be deemed to have been done, taken, made, issued or given, as the case may be, under the corresponding provisions of this Act; secondly, that no action or thing done under the said Ordinance shall, if it is inconsistent with the provisions of this Act, be of any force or effect and thirdly notwithstanding anything contained in the Ordinance no right, privilege, obligation or liability shall be deemed to have been acquired, accrued or incurred thereunder.

The petitioner Rustom Cavasjee Cooper is a shareholder of the Central Bank of India Ltd., and of 3 other existing banks and has current and fixed deposit accounts with these banks and is also a director of the Central Bank of India. The petitioner has challenged the validity of the 1969 Ordinance and the 1969 Act and has contended that his fundamental rights under Articles 14, 19 and 31 have been infringed by these measures.

Mr. Palkhivala, counsel for the petitioner Contended that the Act of 1969 was effective only from 9th August, 1969 and could not have any effect on or from 19th July, 1969 until 9th August, 1969 because there could not be any retrospective effect given to any piece of legislation which affected the fundamental right to property. It was said that the validation would be effective as from the date when the law was actually passed and any retrospective effect would offend Article 31 (2) of the Constitution. It was said that acquisition under Article 31 (2) could only be by authority of law and authority of law could only mean a law in force at the date of the taking. It was emphasised that the law must be in existence at the material time and there was no difference between a law under Article 20 (1) and law in relation to Articles 31 (1) or Article 31 (2) of the Constitution.

The Attorney-General on the other hand contended that the validity of any law either prospective or retrospective affecting all or any of the fundamental rights under Article 19 has to be judged by the requirement laid down in Article 19 and the validity of a law either prospective or retrospective acquiring property has to be judged by the requirements laid down in Article 31 (2).

This Court dealt with retrospective legislations in the cases of *M/s. West Ramnad Electric Distribution Company Ltd. v. State of Madras*¹, and *State of Mysore v. Achiah Chetty*². In the case of *M/s. West Ramnad Electric Distribution Company Ltd.*¹, this Court held that there was difference between the provisions contained in Article 20 (1) and Article 31 (2) of the Constitution. Article 20 (1) refers to law in force at the time of the commission of the act charged as an offence whereas Article 31 (2) does not contain any such word of limitation as to law being in force at the time but speaks only of authority of a law. This vital distinction between Article 20 (1) and Article 31 (2) is to be kept in the forefront in appreciating the soundness of the proposition that retrospective legislation as to acquisition of property does not violate Article 31 (2).

In the case of *M/s. West Ramnad Electric Distribution Company*¹, the 1954 Madras Act incorporated the main provisions of the earlier Madras Act of 1949 in validating actions taken under the earlier 1949 Act. The 1949 Act had been challenged in earlier proceedings when this Court held the 1949 Act to be *ultra vires*. Section 24 of the 1954 Madras Act was intended to validate a notification of acquisition of undertaking issued on 21st September, 1951 under the 1949 Act by providing that orders made, decisions or directions given, notifications issued if they would have been validly made under the 1949 Act were declared to have been validly made except the extent to which the order was repugnant to the provisions of the later 1954 Act. In the Madras case it was contended that the notification under the 1949 Act in the year 1951 was not supported by any authority or any pre-existing law because there was no valid law. That contention was repelled by Gajendra-gadkar, J., who spoke for the Court "If the Act is retrospective in operation and section 24 has been enacted for the purpose of retrospectively validating actions taken under the provisions of the earlier Act, it must follow by the very retrospective operation of the relevant provisions that at the time when the impugned notification was issued, these provisions were in existence. That is the plain and obvious effect of the retrospective operation of the statute. Therefore in considering whether Article 31 (1) has been complied with or not, we must assume that before the notification was issued, the relevant provisions of the Act were in existence and so, Article 31 (1) must be held to have been complied with in that sense."

Article 20 (1) cannot by its own terms have any retrospective operation whereas Article 31 (2) can and that is a vital distinction between the two Articles. That is why there cannot be a retrospective legislation with regard to creation of an offence. If people at the time of the commission of an act did not know that it was an offence retrospective creation of a new offence in regard to such an act would put people to new peril which was not in existence at the time of the commission of the act. Counsel for the petitioner contended that retrospective validation of acquisition fell within the mischief of the decision of *Punjab Province v. Daulat Singh and others*³, where the Judicial Committee dealing with section 5 of the Punjab Alienation Act which provided for the avoidance of benami transactions as therein specified which were entered into either before or after the commencement of the Act of 1938 held that the same was *ultra vires* the Provincial Legislature because it would operate as a prohibition to affect the past transactions. The retrospective element however was severed in that case by the deletion of the words "either before or" in the section and the rest of the provisions were left to operate prospectively and validly. The ratio of the decision is that past transactions which had been closed and title which had been acquired were sought to be re-opened or set aside and the same could not be within the legislative competence of section 298 of the Government of India Act, 1935 which conferred power to prohibit the sale or mortgage of transactions. The words 'prohibit sale or mortgage' in section 298 of the Government of India Act, 1935 were construed to mean prospective or future prohibition as the words used plainly refer to things or transactions in future.

1. (1964) 1 An.W.R. (S.C.) 126 : (1964) 1 S.C.J. 484 : (1964) 1 M.L.J. (S.C.) 126 : (1963) 2 S.C.R. 747.

2. (1969) 1 S.C.J. 709 : A.I.R. 1969 S.C. 477.
3. (1946) 73 I.A. 59 : (1946) 1 M.L.J. 426.

The decisions of this Court in *M/s. West Ramnad Electric Distribution Company*¹, and *State of Mysore v. Achiah Chetty*², are ample authorities for the proposition that there can be retrospective legislation affecting acquisition of property and such retrospective operation and validation of actions with regard to acquisition does not offend Article 31 (2) of the Constitution. In *State of Mysore and another v. D. Achiah Chetty, etc.*², Hidayatullah, C.J., considered the Bangalore Acquisition of Lands Act, 1962 which consisted of two sections whereof the second was in relation to validation of certain acquisition of lands and orders connected therewith. In short that section provided that all acquisitions, proceedings, notifications or orders were validly made, held or issued with the result that the Act validated all past actions notwithstanding any breach of City of Bangalore Improvement Act, 1945. Hidayatullah, C.J., said:

“What the legislation has done is to make retrospectively a single law for the acquisition of these properties. The Legislature could always have repealed retrospectively the Improvement Act rendering all acquisitions to be governed by the Mysore Land Acquisition Act alone. This power of the Legislature is not denied. The resulting position after the Validating Act is not different. By the *non-obstante* clause the Improvement Act is put out of the way and by the operative part the proceedings for acquisition are wholly brought under the Mysore Land Acquisition Act to be continued only under that Act. The Validating Act removes altogether from consideration any implication arising from Chapter III or section 52 of the Improvement Act in much the same way as if that Act had been passed.”

The correct legal position on the authority of these decisions of this Court is that a legislation which has retrospective effect affecting acquisition or requisition of property is not unconstitutional and is valid. The Act of 1969 which is retrospective in operation does not violate Article 31 (2) because it speaks of authority of a law without any words of limitation or restriction as to law being in force at the time.

Counsel for the petitioner next contended that the expression “authority of a law” in Article 31 (2) would have the same meaning as the expression “authority of law” in Article 31 (1) and therefore a law acquiring property would have to satisfy the tests required in Article 19 (1) (f) of the Constitution. Both Articles 31 (2) and 19 (1) (f) relate to property. Both appear in Part III of the Constitution under fundamental rights. The Attorney-General contended that Article 31 (2) and 31 (2-A) constituted a self-contained code relating to acquisition and requisition of property, and once a property had been acquired by a law in compliance with the requirements of Article 31 (2) there would not be any right left under Article 19 (1) (f) and the validity of such a law of acquisition of property for public purpose could not be examined again by the requirements of Article 19 (5) which is a relaxation of Article 19 (1) (f).

The two requirements of a law relating to acquisition or requisition of property under Article 31 (2) are: first, that the acquisition or requisition of property can be made only for a public purpose, and secondly, it can only be by authority of a law which provides for compensation. Article 31 (2-A) further enacts that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned, controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property.

The question for interpretation of Article 22 of the Constitution in the light of Article 19 came up for consideration in the case of *A. K. Gopalan v. State of Madras*³. Kania, C.J., Patanjali Sastri, Mahajan, Mukherjea and Das, JJ. expressed the opinion that Article 19 of the Constitution had no application to a law which related directly to preventive detention even though as a result of an order of detention,

1. (1964) 1 S.C.J. 484.

2. (1969) 1 S.C.J. 709.

3. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : (1950) S.C.R. 88.

the rights referred to in sub-clauses (a) to (e) and (g) in general and sub-clause (d) in particular, of clause (1) of Article 19 might be restricted or abridged. Fazl Ali, J. however expressed a contrary opinion. The consensus of opinion in *Gopalan's case*¹ was that so far as substantive law was concerned, Article 22 of the Constitution gave a clear authority to the Legislature to take away fundamental rights relating to arrest and detention which were secured by the first two clauses of that Article. Mukherjea, J., said about preventive detention in relation to right of freedom under Article 19

"Any legislation on the subject would only have to conform to the requirements of clauses (4) to (7) and provided that is done, there is nothing in the language employed nor in the context in which it appears which affords any ground for suggestion that such law must be reasonable in its character and that it would be reviewable by the Court on that ground. Both Articles 19 and 22 occur in the same Part of the Constitution and both of them purport to lay down the fundamental rights which the Constitution guarantees. It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts and the presumption would be that no conflict or repugnance was intended by its framers."

I shall now deal with some decisions of this Court as to whether a law acquiring property under Article 31 (2) will have to comply with Article 19 (1) (f) or in other words whether such law of acquisition of property for public purpose must also according to Article 19 (5) be a reasonable restriction on the right to hold property in the interests of the General public. There are decisions of this Court to the effect that acquisition of property under Article 31 (2) as it stood prior to amendment in 1955 is an instance of deprivation of property mentioned in Article 31 (1) and the two clauses of Article 31 are to be read together with the result that Article 19 (1) (f) has no application where a law amounts to acquisition or requisition of property for a public purpose under Article 31 (2). When Article 31 (2) was amended by the Constitution Fourth Amendment Act, 1955, the decisions of this Court on that Article held that Article 19 (1) (f) applies only to a deprivation of property under Article 31 (1) but not to a law of acquisition of property for public purpose under Article 31 (2). I shall now refer to these decisions.

In the case of *State of West Bengal v. Subodh Gopal Bose*², the majority view of this Court was that clauses (1) and (2) of Article 31 as these stood before the Constitution Fourth Amendment Act, 1955 are not mutually exclusive in scope and content but are to be read together and understood as dealing with the same subject, namely the protection of the right to property by means of limitations on the power of the State and the deprivation contemplated in clause (1) was held to be no other than the acquisition or taking possession of the property referred to in clause (2).

The view in *Gopalan's case*¹, was again applied by this Court in *State of Bombay v. Bhanji Munji and another*³,—also a pre-Amendment case—where it was contended that Article 31 (2) did not exclude the operation of Article 19 (1) (f) in relation to Bombay Land Acquisition Act, 1940. In dealing with the contention as to whether the Bombay Act was hit by Article 19 (1) (f) on the ground of unreasonable restriction having been imposed on the right of the respondent to acquire, hold and dispose of property Bose, J., said at page 780 of the Report:

"It is enough to say that Article 19 (1) (f) read with clause (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by clause (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold or dispose of it, and as clause (5) contemplates the placing of reasonable restrictions on the exercise of those rights it must follow that the Article postulates the existence of property over which these rights can be exercised."

1. (1950 S.C.J. 174 : (1950) 2 M.L.J. 42:
(1950) S.C.R. 88.

2. (1954) S.C.R. 587 : (1954) S.C.J. 127.
3. (1955) 1 S.C.R. 777 : (1955) S.C.J. 10.

Bose, J., thereafter said that when every form of enjoyment of and interest in property is taken away leaving the mere husk of title Article 19 (1) (f) is not attracted.

The principle laid down in *Bhanji Munji's case*¹, was considered in the case of *Kavalappara Kottarathil Kochuni and others v. The State of Madras and others*². In that case a question arose whether the Madras Marumakkathayam (Removal of Doubts) Act, 1955 infringed the provisions of the Constitution. The Act was passed after the Privy Council had declared the properties in possession of the Sthanee to be Sthanam properties in which the members of the Tarwad had no interest. The Madras Act, 1955 declared that:

“notwithstanding any decision of Court, any sthanam under certain conditions mentioned in the section shall be deemed to be and shall be deemed always to have been a Marumakkathayam Tarwad and the properties appertaining to such a sthanam shall be deemed to be and shall be deemed always to have been properties belonging to the Tarwad.”

Subba Rao, J. speaking for the majority view on the question as to whether Article 31 (1) had to be read along with Article 19 (1) (f) said:

“that legislation in a welfare State could be achieved only within the framework of the Constitution and that is why reasonable restrictions in the interest of the general public on the fundamental rights were recognised in Article 19.”

In that context this Court held that a law made depriving a citizen of his property shall be void, unless the law so made complied with the provisions of clause (5) of Article 19 of the Constitution. At page 916 of the Report Subba Rao, J. said that the observations in *Gopalan's case*³, would have no bearing on Article 31 (1) of the Constitution after clause (2) of Article 31 had been amended and clause (2-A) had been inserted in that Article by the Constitution Fourth Amendment Act, 1955. Before the Constitution Fourth Amendment Act this Court held that clauses (1) and (2) of Article 31 were not mutually exclusive in scope and content but were to be read together, namely, that the words “acquisition or taking possession” referred to in clause (2) of Article 31 prior to the Amendment in 1955 were to be read as an instance of deprivation of property within the meaning of Article 31 (1) and therefore the same was not subject to Article 19. This is how the decision in *Bhanji Munji's case*¹, was explained by Subba Rao, J. in *Kochuni's case*², with the observation that “the decision in *Bhanji Munji's case*¹, no longer holds the field after the Constitution Fourth Amendment Act, 1955.” It may be stated here that *Kochuni's case*², was decided after the amendment of Article 31 and that was emphasised by Subba Rao, J. to establish that Article 31 (1) which dealt with deprivation of property other than by way of acquisition by the State was to be a valid law or in compliance with limitations imposed in Article 19 (1) (f) and (5).

The question whether Article 19 (1) (f) is to be read along with Article 31 (1) again raised its head in the case of *Smt. Sitabati Devi and another v. State of West Bengal and another*⁴. *Kochuni's case*¹, was decided on 4th May, 1960 and *Smt. Sitabati's case*⁴, was decided on 1st December, 1961 though it was reported much later in the Supreme Court Reports. In *Smt. Sitabati's case*⁴, the question for consideration was the validity of the West Bengal Land (Requisition and Acquisition) Act, 1948. The Act provided for requisition and also for acquisition of land by the State Government for maintaining supplies and services essential to the life of the community and for other purposes mentioned therein. The Act also provided for payment of compensation in respect of requisition and acquisition. In *Smt. Sitabati's case*⁴, it was contended that the Act offended Article 19 (1) (f) of the Constitution as it put unreasonable restrictions on the right to hold property. The High Court held that the Act providing for acquisition of property by the State could not be attacked for the reason that it offended Article 19 (1) (f) on the authority of the decision in *Bhanji Munji v.*

1. (1953) 1 S.C.R. 777 : (1955) S.C.J. 10.
2. (1960) 3 S.C.R. 887 : (1961) 2 S.C.J. 443.

3. (1950) S.C.J. 174; (1950) 2 M.L.J. 42.
4. (1967) 2 S.C.R. 949.

*State of Bombay*¹. The High Court further held that the decision in *Kochani's case*², did not hold that Article 31 (2) of the Constitution did not excluded the applicability of Article 19 (1) (f). Sarkar, J. speaking for the Court said that the High Court was right on both these points. Sarkar, J. pointed out that *Kochani's case*², dealt with Article 31 (1) and it was not a case of acquisition or requisition of property by the State but was concerned with the law by which deprivation of property was brought about in other ways and there Article 19 of the Constitution had to be complied with. In *Smt. Sitabati's case*³, it was said that the observation in *Kochani's case*², that *Bhanji Munji's case*⁴, "no longer holds the field" was to be understood as meaning that it no longer governed the case of deprivation of property by means other than requisition and acquisition by the State. To my mind it appears that the view of this Court in *Kochani's case*², and *Smt. Sitabati's case*³ is that Article 31 (2) after the Constitution Fourth Amendment Act, 1955 relates entirely to acquisition or requisition of property by the State and is totally distinct from the scope and content of Article 31 (1) with the result that Article 19 (1) (f) will not enter the area of acquisition or requisition of property by the State.

This Court in the recent decision of *State of Gujarat v. Shankilal Mangaldas and others*⁴, again considered the applicability of Article 19 (1) (f) in relation to acquisition or requisition of property under the authority of a law mentioned in Article 31 (2). The Bombay Town Planning Act of 1955 was challenged as unreasonable and a violation of Article 19 (1) (f) and (5). Shah, J., speaking for the Court considered Article 31 (2) as it stood after the Constitution Fourth Amendment Act, 1955 and said "clause (1) operates as a protection against deprivation of property save by authority of law which it is beyond question, must be a valid law, i.e., it must be within the legislative competence of the State Legislature and must not infringe any other fundamental right. Clause (2) guarantees that property shall not be acquired or requisitioned [except in cases provided by clause (5)] save by authority of law providing for compulsory acquisition or requisition and further providing for compensation for the property so acquired or requisitioned and either fixes the amount of compensation or specifies the principles on which, and the manner in which the compensation is to be determined or given."

Thereafter Shah, J. speaking for the Court said in repelling the contention advanced that the impugned statute was unreasonable.

"This Court however held in *Smt. Sitabati Devi v. State of West Bengal*⁵, that a law made under clause (2) of Article 31 is not liable to be challenged on the ground that it imposes unreasonable restrictions upon the right to hold or dispose of property within the meaning of Article 19 (1) (f) of the Constitution. In *Smt. Sitabati Devi's case*⁵, an owner of land whose property was requisitioned under the West Bengal Land (Requisition and Acquisition) Act, 1948 questioned the validity of the Act by a writ petition filed in the High Court of Calcutta on the plea that it offended Article 19 (1) (f) of the Constitution. This Court unanimously held that the validity of the Act relating to acquisition and requisition cannot be questioned on the ground that it offended Article 19 (1) (f) and cannot be decided by the criterion under Article 19 (5)."

In my opinion Article 19 (1) (f) does not have any application to acquisition or requisition of property for a public purpose under authority of a law which provides for compensation as mentioned in Article 31 (2) for these reasons. First, the provisions of the Constitution are to be interpreted in a harmonious manner. No provision of the Constitution is superfluous or redundant. [See *Gopalan's case*⁶ at page 252 per Mukherjea, J.]. It cannot be suggested that acquisition of property for public purpose is not of the same content as acquisition for public interest or in the interest of the public. It will be pedantry to say that acquisition for public purpose is not in the interest of the public. Secondly, the contention on behalf of the petitioner that Article 31 (2) will have to be read along with Article 19 (1) (f)

1. (1955) S.C.J. 10; (1955) 1 S.C.R. 777.

2. (1963) S.C.R. 887; (1961) 2 S.C.J. 443.

3. (1967) 2 S.C.R. 949.

4. A.I.R. 1969 S.C. 634; (1969) 2 S.C.J. 322.

5. (1950) 2 M.L.J. 42; (1953) S.C.J. 174.

for the purpose of deciding the place of legislation on the anvil of reasonableness of restrictions in the interest of the general public will mean that acquisition or requisition for a public purpose under Article 31 (2) is embraced within Article 19 (5). That would be not only depriving the provisions of the Constitution of harmony but also making Article 31 (2) otiose and a dead letter. By harmonising is meant that each provision is rendered free to operate, with full vigour in its own legitimate field. If acquisition or requisition of property for a public purpose has to satisfy again the test of reasonable restriction in the interest of the general public then harmony is repelled and Article 31 (2) becomes a mere repetition and meaningless. It could not be said that when Article 31 (2) was specifically enacted to deal with a case of acquisition or requisition of property for a public purpose the framers of the Constitution were not aware that it was a form of public deprivation of property. That is why it is important to notice the distinction between deprivation of property under Article 31 (1) which will relate to all kinds of deprivation of property other than acquisition or requisition by the State and Article 31 (2) which deals only with such acquisition or requisition of property. Thirdly, Article 31 (2) and 31 (2-A) is a self contained code because (a) it provides for acquisition or requisition with authority of a law, (b) the acquisition or requisition is to be for a public purpose, (c) the law should provide for compensation by fixing the amount of compensation or specifying the principles on which, and the manner in which, the compensation is to be determined and given and (d) finally, it enacts that adequacy of compensation is not to be questioned. In the case of acquisition or requisition of property for public purpose with the authority of a law providing for compensation there is nothing more to guide and govern the law for acquisition or requisition than those crucial words occurring in clause (2). Finally, the amendment of Article 31 indicates in bold relief the separate and distinctive field of law for acquisition and requisition by the State of property for public purpose.

Mahajan, J. in the case of *State of Bihar v. Maharaja Darbhanga*¹, spoke of public purpose in the background of Article 39 which speaks of the Directive Principles. Article 39 enacts that the State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. In the *Darbhanga case*¹, land which was in the hands of few individuals was to be made available to the public. The purpose behind the Bihar Land Reforms Act was to bring general benefit to the community. Mahajan, J., said that "Legislature is best judge of what is good for the community, by whose suffrage it comes into existence and it is not possible for this Court to say that there was no purpose behind the acquisition contemplated by the impugned statute. The purpose of the statute is in accordance with the letter of the Constitution of India. It is fallacious to contend that the object of the Act is to ruin 5½ million people in Bihar..... Its difficult to hold in the present day conditions of the world that the measures adopted for the welfare of the community and sought to be achieved by process of legislation so far as to carry on the policy of nationalization of land can fall on the ground of public purpose. The phrase 'public purpose' has to be construed according to the spirit of times in which particular legislation is enacted and so construed, the acquisition of the estates has to be held to have been made for the public purpose." The meaning of the phrase 'public purpose' is predominantly a purpose for the welfare of the general public. These 14 banks are acquired for the purpose of developing the national economy. It is intended to confer benefit on weaker sections and sectors. It is not that the legislation will have the effect of denuding the depositors in the 14 banks of their deposits. The deposits will all be there. The object of the Act according to the legislation is to use the deposits in wider public interest. What was true of public purpose when the Constitution was ushered in the mid century is a greater truth after two decades. One cannot be guided either by passion for property on the

one hand or prejudice against deprivation on the other. Public purpose steers, clear of both passion and prejudice.

In regard to property rights the State generally has power to take away property and justify such deprivation on the ground of reasonable restriction on the interest of the general public, but in case of deprivation of property by acquisition or requisition the Constitution has conferred power when the law passed provides compensation for the property acquired by the State. Therefore, the acquisition or requisition for public purpose is a restriction recognised by the Constitution in regard to property rights. In *Kochuni's case*¹, this Court approved the observation of Harries, C.J. in the case of *Iswari Prasad v. A. R. Sen*², that the phrase "in the interest of the general public" means nothing more than "in the public interest." A public purpose is a purpose affecting the interest of the general public and therefore the Welfare State is given powers of acquisition or requisition of property for public purpose.

Counsel for the petitioner contended that the word 'banking' would have the same meaning as the definition of 'banking' occurring in section 5 (b) of the Banking Regulation Act of 1949 hereinafter referred to for the sake of brevity as the 1959 Act. This contention was amplified to exclude four types of business from the banking business and therefore the Act of 1969 was said to be not within the legislative competence of Banking under Entry 45 in List I. These four types of business are: (1) the receiving of scrips or other valuables on deposit or for safe custody and providing of safe deposit vaults, (2) agency business, (3) business of guarantee, giving of indemnity and underwriting and (4) business of acting as executors and trustees. 'Banking' was defined for the first time in the 1949 Act as meaning the acceptance for the purpose of lending or investments of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft or otherwise. In England there is no statutory definition of banking by the Courts have evolved a meaning and principle as to what the legitimate business of a bank is.

In the case of *Tennant v. The Union Bank of Canada*³, a question arose as to whether warehouse receipts taken in security by a bank in the course of business of banking are matters coming within the class of subjects described in section 91, sub-section 15 of the British North America Act, namely, 'banking, incorporation of Banks, and the issue of paper money.' Lord Watson said that the word 'banking' comprehends an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker. In *Palmer's Company Precedents*, 17th edition page 317 form No. 98 will be found the usual memorandum of objects of a bank. These objects comprise business of banking in all branches including the receiving of money and valuables on deposit or for safe custody, or otherwise, the collecting and transmitting money and securities and transacting all kinds of agency business commonly transacted by bankers. The other objects in the form are to undertake and execute any trusts the undertaking whereof may seem desirable, and also to undertake the office of executor, administrator, receiver, treasurer, registrar or auditor. In *Banbury v. Bank of Montreal*⁴, the House of Lords considered the authority of the bank to give advice as to investments and Lord Finlay, L.C. said that

"the limits of banker's business cannot be laid down as a matter of law. The nature of business is a question of fact, on which the jury are entitled to have regard to their own knowledge of business and it is in this context that the present case must be considered. It cannot be treated as if it was a matter of pure law."

In India, the Negotiable Instruments Act, 1881, Stamp Act, 1889 and Bankers Book Evidence Act, 1891 refer to the expression banking without a definition. In the Indian Companies Act, 1913 for the first time in 1936 provisions were introduced to govern banking companies. Entry 38 in List I of the Government of India Act,

1. (1961) 2 S.C.J. 443.
2. A.I.R. 1952 Cal. 273.

3. L.R. (1894) A.C. 31 : 35 L.J.P.C. 25.
4. L.R. (1918) A.C. 626 : 87 L.J.K.B. 1155.

1935 used the words "banking that is to say the conduct of banking business of a Corporation carried on only in that State." It must be observed that Entry 45. in List I of the 7th Schedule to the Constitution is only a 'banking' and it does not contain any qualifying words like the conduct of business occurring in Entry 38: of the Government of India Act, 1935. The Indian Companies Act, 1913 in section 277-F however defined 'banking company' but not 'banking' by reference to the principal business and other business usually undertaken by reputable bankers. Section 277-G of the Indian Companies Act prescribes that the memorandum must be limited to the activities mentioned in section 277-F. Section 277-M of the Indian Companies Act, 1913 contained provisions similar to section 19 of the Act of 1949, namely, that a banking company could not form any subsidiary company except a subsidiary company, formed for one or more of the following purposes, namely, the undertaking and executing of trusts, the undertaking of the administration of estates as executors trustees or otherwise, the providing of safe deposit vaults or, with the previous permission in writing of the Reserve Bank carrying on such other purposes as are incidental to the business of banking. It will appear from the Select Committee Report which was prepared for the introduction of the Indian Companies Amendment Act in 1936 that the list of business mentioned in section 277-F which included the principal business and other business undertaken by reputable bankers was inserted to escape the danger of hampering a company in the performance of any form of business undertaken by reputable bankers.

It is in this background that the 1949 Banking Regulation Act was enacted. 'Banking' is defined in section 5 (b) of the 1949 Act as meaning the acceptance for the purpose of lending or investment of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft order or otherwise. Section 6 of the 1949 Act contains two sub-sections. In sub-section (1) it is enacted that in addition to the business of banking, a banking company may engage in one or more of the forms of business mentioned therein. In sub-section (1) there are clauses marked (a) to (n). In sub-section (2) of section 6 of the 1949 Act it is enacted that no banking company shall engage in any business other than those referred to in sub-section (1). Clause (a) of section 6 (1) enumerates the various forms of business, *inter alia*, the borrowing, raising, or taking up of money, the lending or advancing of money either upon or without security, the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hundees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments and securities whether transferable or negotiable or not, the granting and issuing of letters of credit, traveller's cheques and circular notes, the buying, selling and dealing in bullion and specie, the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise, the providing of safe deposit vaults, the collecting and transmitting of money and securities. Clause (b) speaks of acting as agents for any Government or local authority or any other person or persons, the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of the customers, but excluding the business of a company. Clause (c) speaks of undertaking and executing trusts. Clause (i) speaks of undertaking the administration of estates as executor, trustee or otherwise. It will, therefore, appear that under section 61 (1) of the 1949 Act the four types of business disputed by Counsel for the petitioner not to be within the businesses of a bank are recognised by the statute as legitimate forms of business of a banking company.

Keeping valuables for safe custody, the providing of safe deposit vaults occur in clause (a) of section 6 (1) along with various types of business like borrowing, raising or taking up of money, or lending or advancing of money. It will appear from clause (n) of section 6 (1) of the 1959 Act that in addition to the forms of business mentioned in clauses (a) to (n) a banking company may engage in "doing all such other things as are incidental or conducive to the promotion or advancement of

the business of the company." The words 'other things' appearing in clause (n) after enumeration of the various types of business in clauses (a) to (m) point to one inescapable conclusion that the businesses mentioned in clauses (a) to (m) are all incidental or conducive to the promotion or advancement of the business of the company. Therefore these businesses are not only legitimate businesses of the banks but these also come within the normal business activities of commercial banks of repute. Entry 45 in List I of the 7th Schedule of the Constitution, namely, 'banking' will therefore have the wide meaning to include all legitimate businesses of a banking company referred to in section 5 (b) as well as in section 6 (1) of the 1949 Act. The contention on behalf of the petitioner that the four disputed businesses are not banking businesses is not supportable either on logic or on principle when businesses mentioned in the sub-clauses of section 6 (1) of the 1949 Act are recognised to be legitimate business activities of a banking company by statute and practice and usage fully supports that view.

Clause (o) of section 6 (1) of the 1949 Act contemplates that the Central Government might by notification specify any other form of business and therefore the Government could ask a banking company to engage in a form of business which is not a usual type of business done by a banking company. In the first place, it would not be reasonable to think that the Government would ask a bank to do business of that type. Secondly, even if a bank were asked to do so that would not rob the other permissible and legitimate forms of business mentioned in section 6 (1) of the Act of their true character. Section 6 (2) of the 1949 Act provides that no banking company shall engage in any form of business other than those referred to in sub-section (1). The restriction contained in sub-section (2) establishes that the various types of business mentioned in sub-section (1) are normal, recognised legitimate businesses and a banking company is therefore not entitled to participate in any other form of business.

In the case of *Commonwealth of Australia and others v. Bank of New South Wales and others*¹, the Judicial Committee in hearing the appeal from the High Court of Australia considered the meaning and content of banking. The question for consideration was the effect of the Australian Banking Act, 1947 and section 46 thereof. At page 303 of the Report the Judicial Committee said "the business of banking, consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities is a part of the trade commerce and intercourse of a modern society and, in so far as it is carried on by, means of inter-State transactions, is within the ambit of section 92". The business of a bank will therefore consist not only of the hard core of banking business defined in the 1949 Act but also of the diverse kinds of lawful business which have grown to be inextricably bound up in the form of chain or string transactions. The words 'banker', 'banking' have different shades of meaning at different periods of history and their meaning may not be uniform today in countries of different habits of life and different degrees of civilisation. See *Bank of Chettinad v. T.C. of Colombo*², and *United Dominions Trust Ltd. v. Kirkwood*³.

At this stage reference may be made to various statutes starting from Act VI of 1839 Bank of Bengal's Third Charter and ending with the State Bank of India Act, 1955 to show the meaning and content of the word 'banking'. The Bank of a Bengal's Third Charter of 1839 empowered the Bank of Bengal in clauses 25 to 33 to do business as mentioned therein which included receiving deposits of goods and safe-keeping of the same. Thereafter the Bank of Bengal Charter was repealed by Act IV of 1862 which by clause 27 empowered the bank to transact pecuniary business of agency on commission. The Presidency Banks Act, 1876 by section 36 thereof empowered the Presidency Banks, *inter alia*, to do business of receiving of deposits, agency business, acceptance of valuables, jewels. Section 37 of the Act of 1876 forbade

1. L.R. (1950) A.C. 235 : 65 T.L.R. 633 : (1949) 2 All E.R. 755.

2. L.R. (1948) A.C. 378 (P.C.).

3. (1966) 1 Q.B. 783 : (1965) 3 W.L.R. 817 : (1965) 2 All E.R. 992.

the bank to do any business or loan or advance on mortgage or in other manner upon the security of any immovable property, or the documents of title relating thereto. The Imperial Bank of India Act, 1920 in Schedule I as mentioned in section 8 of the Act authorised the bank to carry on several kinds of business including receiving of deposits, keeping cash accounts, the acceptance of the charge and management of plate, jewels, title deeds or other valuable goods on terms, transacting of pecuniary agency business on commission and the entering into of contracts of indemnity, suretyship or guarantee with specific security or otherwise, the administration of estates for any purpose whether as an executor, trustee or otherwise, and the acting as agent on commission in the transaction of various kinds of business mentioned therein.

The Indian Companies Act, 1913 did not define banking company or banking business though various sections, namely, 4, 133, 136, 138 and 145 and Schedule Form G referred to banking companies. The Indian Companies Amendment Act in 1936 for the first time defined a banking company in section 277-F as a company which carried on the principal business of accepting of deposits on current account or otherwise, notwithstanding that it engaged in any one or more of the businesses as mentioned in clauses (1) to (17) thereof. It may be stated here that clauses (1) to (17) in section 277-F of the Indian Companies Act, 1913 are similar to the various forms of business mentioned in section 6 (1) of the 1949 Banking Regulation Act. In 1942, the Indian Companies Act, 1913 was amended by Act XXI of 1942 and it will appear from the statement of objects and reasons there that the definition of banking companies in section 277-F of the Indian Companies Act created difficulties in deciding whether a company was a banking company or not. The chief difficulty arose out of the use of the term 'principal business' in section 277-F. With the object of removing these difficulties a proposal was made that any company which used as part of its name the word 'bank,' 'banker' or 'banking' shall be deemed to be a banking company irrespective of whether the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order was its principal business or not. In that context Ordinance IV of 1946 was promulgated under section 72 of the Government of India Act, 1935 empowering the Reserve Bank to cause inspection of any banking company and to do various other things by way of prohibiting a banking company from receiving deposits. Thereafter came the Banking Companies Restriction of Branches Act, 1946. There a banking company was defined as a banking company defined in section 277-F of the Indian Companies Act, 1913. There was restriction on opening and removal of branches and the Reserve Bank was permitted to cause inspection of banks. It is in this context that Ordinance XXV of 1948 was promulgated conferring power on the Reserve Bank to control advances given by the banking companies. In 1948 a confidential note on the Banking Companies Bill was prepared. The necessity of legislation was felt because there was insufficient paid up capital and reserve and insufficient liquidity of funds, unrestricted loans to directors. In that confidential note it was said that it was difficult to evolve any satisfactory definition of banking and difficulties arose because of the incorporation of the words 'principal business' in relation to banks in section 277-F of the Indian Companies Act, 1913.

In this background the Banking Regulation Act, 1949 was enacted. I have already referred to the provisions of sections 5 and 6 of the 1949 Act and the businesses mentioned in section 6 (1) and the definition of banking business in section 5 (b). A most noticeable feature with regard to all these types of business of a banking company is that a banking company engages not only in the banking business but other businesses mentioned in section 6 of the 1949 Act with depositors' money. The entire business is one integrated whole. The provisions contained in section 6 (1) of the 1949 Act are the statutory restatement of the gradual evolution over a century of the various kinds of business of banking companies which are similar to those to be found in the State Bank of India Act, 1955 hereinafter called the State Bank Act. The business with regard to deposit of valuables and safe deposit vaults is to be found in section 3 (viii) of the State Bank Act, the agency business is mentioned in section 33 (xii) of the State Bank Act. The business of guarantee, underwriting and indem-

nity is found in section 33 (xi) (xii) (a) of the State Bank Act and the business of trusteeship and executorship is specifically found in the Banking Regulation Act, 1949 and in the previous Acts referred to hereinbefore.

It was suggested by Counsel for the petitioner that by banking business is meant only the hard core of banking, as defined in section 5 (b) of the 1949 Act. It is unthinkable that the business of banks is only confined to that aspect and not to the various forms of business mentioned in section 6 (1) of the 1949 Act. Receiving valuables on deposit or for sale custody and providing for safe deposit vaults which are contemplated in clause (a) of section 6 (1) of the 1949 Act cannot be dissociated from other forms of unchallenged business of a bank mentioned in that clause because any such severance would be illogical particularly when deposit for safe custody and safe deposit vaults are mentioned in the long catalogue of businesses in clause (a). The agency business which is mentioned in clause (b) of section 6 (1) is one of the recognised forms of business of commencing banks with regard to mercantile transactions and payment or collection of price. Agency is after all a comprehensive word to describe the relationship of appointment of the bank as the constituents' representative. The forms of agency transactions may be varied. It may be acting as collecting agent or disbursing agent or as depository of parties. The categories of agency can be multiplied in terms of transactions. That is why the business of agency mentioned in clause (b) is first in the general form of acting as an agent for any Government or local authority, secondly carrying on of agency business of any description including the clearing and forwarding of goods and thirdly acting as attorney on behalf of the customers. The business of guarantee is in the modern commercial world practically indissolubly connected with a bank and forms a part of the business of the bank. It is almost common place for Courts to insist on bank guarantee in regard to furnishing of security. There may be so many instances of guarantee. As to the business of trusteeship and executorship it may be said that this is the wish of the seller who happens to be a constituent of the bank appointing the bank as executor or trustee because of the utmost faith and confidence that the constituent has in the solvency and stability of the bank and also to preserve the continuity of the trustee or the executor irrespective of any change by reason of death or any other incapacity. It is needless to state that these four disputed forms of business all spring out of the relation between the bank on the one hand and the customer on the other and the bank earns commission on these transactions or charges fees for the services rendered. Although trust accounts may be kept in a separate account all moneys arising out of the trust money go to the general pool of the bank and the bank utilises the money and very often trust moneys may be kept in fixed deposit with the trustee bank and expenses on account of the trust are met out of the general funds of the trustee bank. Payments to beneficiaries are made by crediting the beneficiaries' accounts in the trustee bank and if they are not constituents other modes of payment through other banks are adopted. The position of the banks as executor is similar to that of a trustee. Whatever moneys the bank may spend are recouped by the bank out of the accounts of the trust estate.

After the definition of banking company had been introduced for the first time in 1936 in the Indian Companies Act, 1913 it appeared that the banks were not being managed properly and the definition of a banking company gave rise to administrative difficulties in determining whether a company was a banking company or not. A number of banking and loan companies particularly in Bengal claimed that they were not banking companies within the scope of the definition given in section 277-F of the Companies Act and in some cases their contention was upheld by the Court. The failure of the Travancore National & Quilon Bank Ltd., in 1938 and the subsequent banking crisis in South India posed a big question as to the desirability of better legislation. An attempt was made to prescribe certain minimum capital, the amount of capital depending upon the area of the operation of the bank. The banks were also asked to maintain a percentage of their assets in cash or approved securities. Thereafter the Indian Companies (Amendment) Act was passed in 1942 by which a proviso was added to section 277-F to the effect that any company which used as part of its name the word 'bank', 'banker' or 'banking' shall be deemed

to be a banking company notwithstanding the fact that the acceptance of deposits on current account subject to withdrawal by cheque is not the principal business of the company. In the mid-forties it became desirable that steps should be taken to safeguard the banking structure against possible repercussion in the post-war period and it was considered necessary that comprehensive banking legislation should be introduced.

There are various provisions in the 1949 Act to indicate that a banking company cannot carry on business of a managing agent or Secretary and treasurer of a company and that it cannot acquire, construct, maintain, alter any building or works other than those necessary or convenient for the purpose of the company. A banking company cannot acquire or undertake the whole or any portion of any business unless such business is of one of those enumerated in section 6 (1) of the 1949 Act. A bank cannot deal in buying or selling or bartering of goods except in connection with certain purposes related to some of the businesses enumerated in the aforesaid section 6 (1). These provisions also establish that businesses mentioned in section 6 of the 1949 Act are incidental and conducive to banking business. A bank cannot employ any person whose remuneration is in the form of a commission or a share in the profits of the banking company or whose remuneration is in the opinion of the Reserve Bank excessive. One of the most important provisions is section 35 of the 1949 Act, which states that the Reserve Bank at any time may and on being directed so to do by the Central Government cause an inspection to be made by one or more of its officers of the books of account and to report to the Central Government on any inspection and the Central Government thereafter if it is of opinion after considering the report that the affairs of the banking company are being conducted to the detriment of the interests of its depositors, may prohibit the banking company from receiving fresh deposits or direct the Reserve Bank to apply under section 38 for the winding up of the banking company. Another important provision in the 1949 Act is found in section 27 which provides for monthly returns in the prescribed form and manner showing assets and liabilities. The power of the Reserve Bank under section 27 and 35 of the 1949 Act relates to the affairs of the banking company which comprehend the various forms of business of the bank mentioned in section 6 of the 1949 Act. Then again section 29 of the 1949 Act contemplates accounts relating to accounts of all business transacted by the bank. Section 35-A of the 1949 Act confers power on the Reserve Bank to give directions with regard to the affairs of a bank. These provisions indicate beyond any measure of doubt that all forms of business mentioned in section 6 (1) of the 1949 Act are lawful, legitimate businesses of a bank as these have grown along with increase of trade and commerce. The word 'banking' has never had any static meaning and the only meaning will be the common understanding of men and the established practice in relation to banking. That is why all these disputed forms of business come within the legitimate business of a bank.

The next question is the legislative competence in regard to the Act of 1969. Counsel for the petitioner contended that the Act was for nationalisation of banks and there was no legislative entry regarding nationalisation and therefore that was incompetent. There is no merit in that contention. The Act is for acquisition of property; the undertaking of a banking company is acquired. The legislative competence is under Entry 42 in List III of the 7th Schedule and also under Entry 45 in List I of the 7th Schedule. Entry 42 in List III is acquisition and requisitioning of property. Entry 45 in List I is 'banking'. The Act of 1969 is valid under these entries. A question arose whether the Act of 1969 pertains to Entry 43 in List I which deals with incorporation, regulation and winding up of trading corporations including banks. It is not necessary to deal with that entry because of my conclusion as to entries No. 42 in List III and No. 45 in List I. Counsel for the petitioner contended that the Act of 1969 trenched upon Entry 26 in List II, namely trade and commerce within the State. I am unable to accept that contention for the obvious reason that the legislation is for acquisition of undertakings of banking companies. The pith and substance of the legislation is to be found out and meaning is to be given to the entries 'banking' and acquisition of property. In the case of

*United Provinces v. Mst. Atiga Begum and others*¹, Gwyer, C. J., said that it would be practically impossible to define each item in the provincial legislation as to make it exclusive of every other item in that list and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. The doctrine of pith and substance used in *Union Colliery Company of British Columbia v. Bryden*², is nothing but an illustration of the principle that when the legislation is referable to one or more entries the Courts try to find out what the pith and substance of the legislation is. In the present case the Act is beyond any doubt one for acquisition of property and is also in relation to banking. The legislation is valid with reference to the entries, namely, Entry 42 (Requisition) in List III, Entry 45 (Banking) in List I.

Counsel for the petitioner contended that undertaking of banking companies could not be the subject-matter of acquisition and acquisition of all properties in the undertaking must satisfy public purpose as contemplated in Article 31 (2). This contention was amplified to mean that undertaking was not property capable of being acquired and some assets like cash money could not be the subject-matter of acquisition. The Attorney General on the other hand contended first that undertaking is property within the meaning of Article 31 (2), secondly, undertaking in its normal meaning refers to going concern and thirdly it is a complete unit as distinct from the ingredients composing it and therefore it could not be said that acquisition of the undertaking was an infraction of any constitutional provision. The term 'undertaking' is explained in Halsbury's Laws of England, 3rd Edition Volume 6 paragraph 75 at page 43 to mean not the various ingredients which go to make up an undertaking but the completed work from which the earnings arise. As an illustration reference is made to mortgage of the undertaking of a company.

In *Gardner v. London Chatham and Dover Railway Co.*³, the undertaking of a railway company which was pledged was held to be a railway which was to be made and maintained, by which tolls and profits were to be earned, which was to be worked and managed by a company, according to certain rules of management, and under a certain responsibility. In an undertaking there will be money for the working of the undertaking and money will be earned thereby. Again in *Re Panama, New Zealand and Australian Royal Mail Company*⁴, the undertaking of a steamship company was explained to have reference not only to all the property of the company which existed at the date of the debenture but which might become the property of the company and further that the word 'undertaking' referred to the application of funds which came into the hands of the company in the usual course of business. Undertaking will therefore relate to the entire business though there may be separate ingredients, or items of work or assets in the undertaking. The undertaking is going concern and it cannot be broken up into pieces to create a security over the undertaking [See *Re Portsmouth (Kingston, Fratton and Southsea) Tramway Co.*⁵, and *H.H. Vivian and Company Ltd.*⁶].

The word 'undertaking' is used in various statutes of our country, viz., the Indian Electricity Act, 1910, (Sections 6, 7, 7-A), Indian Companies, Act [Sections 125 (4) (f), 293 and 394] Banking Regulation Act, 1949 (Section 14-A), Cotton Textile Companies (Management of Undertaking, Liquidation and Reconstruction) Act, 1967 [Sections 4 (1), 5 (1) (2)]. By the word 'undertaking' is meant the entire organisation. These provisions indicate that the company whether it has a plant or whether it has an organisation is considered as one whole unit and the entire business of the going concern is embraced within the word 'undertaking.' In the case of sale of an undertaking as happened in *Doughly v. Lomagunda Reefs, Ltd.*⁷, the purchaser was required to pay all debts due by and to perform outstanding contracts comprised in the entire undertaking. The word 'undertaking' is used in the Indian Electricity Act, the Air Corporation Act, 1953, the Imperial Bank of India

1. (1941) 1 M.L.J. (Supp.) 65 : (1940) F.C.R. 110.

2. (1899) A.C. 580 : 68 L.J.P.C. 118 : 15 T.L.R. 508.

3. (1867-7) 2 C.A. 201 : 36 L.J. Cal. 323.

4. (1870) 5 Ch. A. 318 : 39 L.J. Ch. 482.

5. (1892) 2 Ch. 362 : 61 L.J. Ch. 462.

6. (1900) 2 Ch. 654 : 69 L.J. Ch. 659.

7. (1902) 2 Ch. D. 837 : 71 L.J. Ch. 888.

Act, 1920 (Sections 3, 4, 6 and 7), the State Bank of India Act, 1955 [Section 6 (1) (g)], the State Bank Subsidiaries Banks Act, 1959 [Section 10 (1)], the Banking Regulation Act, 1949 [Section 36-AE (1)] and there have been legislative provisions for acquisition of some of these undertakings.

Under section 5 of the Act of 1969 the undertaking of each existing bank shall be deemed to include all assets, rights, powers, authorities and privileges and all property, movable and immovable, cash balances, reserve funds, investments and all other rights and interests arising out of such property as were immediately before the commencement of this Act in the ownership, possession, power or control of the existing bank in relation to the undertaking. This Court accepted the meaning of property given by Rich, J., in the *Minister for State for the Army v. Dalziel*¹, to be a bundle of rights which the owner has over or in respect of a thing, tangible or intangible, or the word 'property' may mean the thing itself over or in respect of which the owner may exercise those rights. In the case of *Commissioner Hindu Religious Endowments, Madras v. Sri Lakshminidra Thirtha Swamikal of Sri Shirur Mutt*², this Court again gave wide meaning to the word 'property' and Mukherjea, J., said that there is no reason why the word 'property' as used in Article 19 (1) (f) of the Constitution should not be given a liberal and wide connotation and would not be extended to those well recognised types of interest which have the insignia or characteristics of proprietary right. In the case of *J.K. Trust, Bombay v. The Commissioner of Income-tax Excess Profits Tax, Bombay*³, this Court held the managing agency business to be a property. The undertaking of a bank will therefore be the entire integrated organisation consisting of all property, movable or immovable and the totality of undertaking is one concept which is not divisible into components or ingredients. That is why in relation to a company the word 'undertaking' is used in various statutes in order to reach every corner of property, right, title and interest therein. The decision in *State of Madhya Pradesh v. Ranajirao Shinde and another*⁴, is an authority for the proposition that money cannot be acquired under Article 31 (2). The impugned Act in *Ranajirao Shinde's*⁴, case abolished cash grants which the respondents were entitled to receive from the Government of Madhya Pradesh, but provided for the payment of certain compensation to the grantees. *Ranajirao Shinde's case*⁴ did not deal with the case of an undertaking and has therefore no application to the present case. The undertaking is an amalgamation of all ingredients of property and is not capable of being dismembered. That would destroy the essence and innate character of the undertaking. In reality the undertaking is a complete and complex web and the various types of business and assets are threads which cannot be taken apart from the web. I am, therefore, of opinion that undertaking of a banking company is property which can be validly acquired under Article 31 (2) of the Constitution.

The next question for consideration is whether Article 19 (6) of the Constitution is attracted. Counsel for the petitioner contended that as a result of the Constitution First Amendment Act, 1951, Article 19 (6) was clarified to the effect that the word 'restrictions' would include prohibition or exclusion which was dealt with in the second limb of Article 19 (6). It may be stated here that prior to the amendment of Article 19 (6) the second limb spoke only of law prescribing qualifications for practising any profession or carrying on any occupation, trade or business. As a result of the amendment, the second limb of Article 19 (6) consisted of two sub-articles the first sub-article relating to qualifications for practising profession or carrying on any occupation, trade or business and the second sub-article relating to carrying on by the State of trade, business industry to the exclusion complete or partial of citizens or otherwise. The second sub-article was really an enlargement of clause (6) of Article 19 as a result of the amendments. The main contention of Counsel for the petitioner was that the second limb of Article 19 (6) after the expression 'in particular' must also satisfy the test of reasonable restriction contained in the first limb of Article 19 (6) and emphasis was placed on the word 'in particular' to show that it

1. 68 C.L.R. 261.

2. (1954) 3 S.C.R. 1005 : (1954) S.C.J. 335 :
(1954) 1 M.L.J. 596.

3. (1958) S.C.R. 65 : (1957) S.C.J. 845.

4. (1968) 3 S.C.R. 489 : (1968) 2 S.C.J. 760.

indicated that the second limb was only an instance of the first limb spoke only of the prescribing qualifications for practising any profession enacted really to enable the State to carry on business to the exclusion, complete or partial of citizens or otherwise as will appear from the amendment of Article 19 (6).

In the case of *Akadasi Padhan v. State of Orissa*¹, this Court considered the Orissa Kendu Leaves (Control of Trade) Act, 1961 by which the State acquired monopoly in the trade of Kendu leaves and put restrictions on the fundamental rights of the petitioner. In that case, Gajendragadkar, J., speaking for the Court referred to the decision of the Allahabad High Court in *Motilal v. Government of the State of Uttar Pradesh*², where a monopoly of transport sought to be created by the U.P. Government in favour of the State operated Bus Service known as the 'Government Roadways' was struck down as unconstitutional because such a monopoly totally deprived the citizens of their rights and that is why Article 19 (6) came to be amended. The necessity of the amendment of Article 19 (6) was explained in the case of *Akadasi Padhan*¹. The view expressed by this Court in that case is that the two sub-articles of the second limb deal with two different forms of legislation. The first sub-article deals with restrictions on the exercise of the right to practise any profession or to carry on any trade, occupation or business. The second sub-article deals with carrying on by the State of any trade, business or industry to the exclusion, complete or partial of citizens or otherwise. The effect of the amendment was stated by Gajendragadkar, J., to be that a State Monopoly in respect of any trade or business must be presumed to be reasonable and in the interest of the general public so far Article 19 (1) (g) is concerned. The words 'in particular' in that case in Article 19 (6) were held to indicate that restrictions imposed on the fundamental rights guaranteed by Article 19 (1) (g) which are reasonable and which are in the interest of the general public are saved by Article 19 (6) as it originally stood and the validity of the laws covered by the amendment would no longer be left to be tried in Courts.

Counsel for the petitioner relied on the decision of the House of Lords in the case of *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Housing and Local Government and another*³, in support of the proposition that the words 'in particular' in Article 19 (6) were used to place the accent on reasonable restrictions in that clause as the saving feature of a law affecting Article 19 (1) (g). Section 43 (1) of the Town and Country Planning Act, 1947 which was considered was as follows :

"(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development."

It was held that the sub-section conferred a single power on the Central Land Board and not two powers, *viz.*, that the boards have power to acquire land for the purpose connected with the performance of their functions and the words in the second limb of the section were no more than a particular instance of that which the Legislature regarded as part of the Board's functions. The purpose referred to in the second part of the sub-section there introduced by the words 'in particular' was held to be purpose connected with the performance of the function within meaning of the first part of the sub-section. The language of the sub-section in the case before the House of Lords is entirely different from the language in Article 19 (6). Article 19 (6) in the two limbs and in the two sub-articles of the second limb deals with separate matters and in any event State monopoly in respect of trade or business is not open to be reviewed in Courts on the ground of reasonableness. This Court in the case of *Municipal Committee of Amritsar v. State of Punjab*⁴, held that so far as monopoly business by the State was concerned under Article 19 (6) it was not open to challenge.

1. (1963) 2 S.C.R. (Supp.) 691 : (1964) 2 S.C. J. 37.

3. (1952) AC. 362 : (1952) 1 All E.R. 509.

4. (1969) 2 S.C.J. 632 : A.I.R. 1969 S.C. 1100.

2. I.L.R. (1951) 1 All. 269.

The four businesses which were disputed by Counsel for the petitioner to be within the business of banking were contended to be not only acquisition of property in violation of Article 19 (1) (f) but also not to be reasonable restriction in the interest of the general public under Article 19 (5) or under Article 19 (6). Emphasis was placed on section 15 (2) of the Act of 1969 to contend that after the acquisition of the undertaking of the bank the provision permitting the banks to carry on business other than banking would be empty and really amount to prohibition of carrying on of the business because the assets pertaining to the four disputed businesses with which the business could be carried on had been taken away. I have already expressed my opinion that the four disputed businesses are the legitimate businesses of a banking company as mentioned in section 6 (1) of the 1949 Act and are comprised in the undertaking of the bank and Article 19 (1) (f) is not attracted in case of acquisition or requisition of property dealt with by Article 31 (2). I have also held that Article 19 (6) confers power on the State to have a valid monopoly business. Section 15 (2) of the 1969 Act allows the existing banks to carry on business other than banking. If as a result of acquisition, the bank will complain of lack of immediate resources to carry on these businesses the Act provides compensation and the existing bank will devise ways and means for carrying on the businesses. Constitutionality of the Act cannot be impeached on the ground of lack of immediate resources to carry on business. In the present case, the acquisition is not constitutional and the bank is free to carry on all business other than banking. It cannot be suggested that after compensation has been provided for the State will have to provide moneys to enable the existing bank to carry on these businesses. That would be asking for something beyond the limits of the Constitution. If the entire undertaking of a banking company is taken by way of acquisition the assets cannot be separated to distinguish those belonging to banking business from other belonging to "non-banking business" because assets are not in fact divided on any such basis. Furthermore that would be striking at the root of acquisition of the entire undertaking. It would be strange to hold in the teeth of express provisions in the Act of 1969 permitting the banks to carry on business other than banking that the same will amount to a prohibition on the bank to carry on those businesses. I find it difficult to comprehend the contention of the petitioner that a permissive provision allowing the banks to carry on these businesses other than banking becomes unreasonable. If that provision was not there the businesses could be carried on and the argument would not be available at all. The express making of the provision obviously for greater safety cannot change the position. The petitioner's contention on Article 19 (6) therefore fails.

Counsel for the petitioner contended that section 11 of the 1969 Act suffered from the vice of excessive delegation and there were no guidelines for reaching the objectives set out in the Preamble of the Act and the decision of Government regarding policy involving public interest was made final and therefore it was unconstitutional. Section 11 of the Act of 1969 is in two sub-sections. The first sub-section enacts that corresponding new bank shall, in the discharge of its functions, be guided by such directions in regard to matters of policy involving public interest as the Central Government may after consultation with the Governor of the Reserve Bank, give. The second sub-section enacts that if any question arises whether a direction relates to a matter of policy involving public interest, it shall be referred to the Central Government and the decision of the Central Government thereon shall be final. Section 25 (1) (c) of the Act of 1969 provides that the words "corresponding new bank" constituted under section 3 of the 1969 Act or any other banking institution notified by the Central Government shall be substituted for the words 'or any other banking institution notified by the Central Government in this behalf', in section 51 of the 1949 Act. Sections 7, 17 (15-A) of the Reserve Bank Act of 1934 contain similar powers on the part of the Central Government to give directions to the Reserve Bank in regard to management and exercise of powers and functions in performance of duties entrusted to the bank under the Reserve Bank Act. A statute of this nature whereby the controlling interest of the business of banks is acquired renders it not only necessary but also desirable that policy involving public interest should be left to the Government.

The Act of 1969 contains enough guidance. First, the Government may give directions only in regard to policy involving public interest; secondly directions can only be given by the Central Government and none else; Thirdly, these directions can only be given by the Central Government after consultation with the Governor of the Reserve Bank; fourthly, directions given by the Government are in regard to matters involving public interest which means that this is objective and subject to judicial scrutiny and both the Central Government and the Governor of Reserve Bank are high authorities.

As a result of section 25 (1) (c) of the Act of 1969, 14 banks will be subject to the provisions of the 1949 Act enumerated in sections 15, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 31, 34, 35, 35-A, 36 and 48. These sections principally deal with restrictions as to payment of dividend, prohibition of floating charge on assets, creation of reserve fund, restrictions on subsidiary company, restrictions on loans and advances power of the Reserve Bank to control advances by banking companies, restrictions on the opening of new places of business, maintenance of percentage of assets, return of unclaimed deposits, furnishing of returns to the Reserve Bank publication of information by the Reserve Bank, submission of account and balance sheet to the Reserve Bank, inspection by the Reserve Bank, power of the Reserve Bank to give directions with regard to management, and imposition of penalties for contravention of the provisions of the Act.

There are other statutes which provide powers of the Central Government to give directions. I have already referred to the Reserve Bank of India Act, 1934. There are similar statutes conferring powers on the Government to give directions, namely, State Bank of India Act, 1955, State Financial Corporation Act, 1951, University Grants Commission Act, 1956, Life Insurance Act, 1956, Deposit Insurance Act, 1961, National Co-operative Development Corporation Act, 1962, Agricultural Refinance Corporation Act, 1963 and State Agricultural Credit Corporations Act, 1968. There are English statutes which contain similar provisions of exercise of power or directions by the Government in regard to the affairs of the undertakings covered by the statutes. These are the Bank of England Act, 1946, Cotton (Centralised Buying) Act, 1947, Coal Industry Nationalisation Act, 1946, Civil Aviation Act, 1946, Electricity Act, 1947, Gas Act, 1948, Iron and Steel Act, 1949 and Air Corporations Act, 1949. It is explicable that where the Government acquires undertakings of industries, the matters of policy involving public interest or national interest should be left to be decided by the Government. There is nothing unconstitutional in such provisions.

The Preamble to the Act of 1969 states that the object of the Act is "to serve better the needs of the development of the economy in conformity with national policy and objectives". National policy and objectives are in accordance with the Directive Principles in Part IV of the Constitution. It is stated by the respondents in their affidavits that there are needs of the development of the economy in conformity with the Directive Principles and these are to be achieved by a mobilisation of the savings of the community and employing the large resources of the 14 banks to develop national economy in several spheres of activity by a more equitable distribution of economic resources, particularly, where there are large credit gaps. In the case of *Harishankar Bagla another v. The State of Madhya Pradesh*¹, Mahajan, C.J., at pages 388-9 of the report said:

"The Preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy."

It is manifest that in working the Act of 1969 directions from the Central Government are necessary to deal with policy and other matters to serve the needs of national economy.

Counsel on behalf of the petitioner next contended that acquisition of the 14 banks and the prohibition of banking business by the existing banks violated

Article 301 and was not saved by Article 302 because it is not required in the public interest. As to the four disputed businesses which the existing banks can under the Act carry on, it was said that the same was an infraction of Article 301. Article 305 to my mind directly applies to a law relating to banking and all businesses necessarily incidental to it carried on by the State to the complete or partial exclusion of 14 banks. Article 302 can have no application in such a case. An individual cannot complain of violation of Article 301.

Article 305 applies in the present case and therefore neither Article 301 nor Article 302 will apply. Article 302 is an enabling provision and it has to be read in relation to Article 301. Acquisition of property by itself cannot violate Article 301 which relates to free trade, commerce throughout India. The object of acquisition is that the State shall carry on business to the exclusion, complete or partial, of the 14 banks.

Counsel for the petitioner contended that the 1969 Act violated the provisions of Article 14 on these grounds: First, the Act discriminated against 14 banks as against other Indian scheduled banks, secondly, the selection of 14 banks has no reasonable connection to the objects of the Act; thirdly, banks which may be described to be inefficient and which are liable to be acquired under section 36-AE of the 1949 Act are not acquired whereas 14 banks who have carried on their affairs with efficiency are acquired; fourthly under section 15 (2) (d) (e) of the 1969 Act the 14 banks cannot do any banking business whereas other Indian scheduled banks or any other new banking company can do banking business.

In order to appreciate these contentions it is necessary to remember the background of growth of Indian banks. At the beginning I referred to the position that State Bank of India and its several subsidiaries and the 14 banks occupy today in contrast with foreign banks and other scheduled or non-scheduled Indian banks. These 14 banks are not in the same class as other scheduled banks. The classification is on the basis of the 14 banks having deposit of Rs. 50 crores and over. The object of the Act is to control the deposit resources for developing national economy and as such the selection of 14 banks having regard to their larger resources, their greater coverage, their managerial and personnel resources and the administrative and organisational factor involved in expansion is both intelligible and related to the object of the Act. There is no evidence to show that the 14 banks are more efficient than the others as Counsel for the petitioner contended. Section 15 (2) (d) (e) of the 1969 Act states that these 14 banks after acquisition are not to carry on any banking business for the obvious reason that these 14 banks are not in the same class as the other Indian banks. Besides, it is also reasonable that the 14 banks should not be permitted to carry on banking business as the corresponding new banks. Therefore the classification of the 14 banks is also a rational and intelligible classification for the purposes of the Act. The object of the 1969 Act was to meet credit gaps and to have a wider distribution of economic resources among the weaker sections of the economy, namely, agricultural, small scale industry and retail trade.

The Act of 1969 is for development of national economy with the aid of banks. There are needs of various sectors. The Legislature is the best Judge of what should subserve public interest. The relative need is a matter of legislative judgment. The Legislature found 14 banks to have special features, namely, large resources and credit structure and good administration. The categorisation of Rs. 50 crores and over *vis-à-vis* other banks with less than Rs. 50 crores is not only intelligible but is also a sound classification. From the point of view of resources these 14 banks are better suited than others and therefore speed and efficiency which are necessary for implementing the objectives of the Act can be ensured by such classification.

In the case of *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and others*¹, it was said that the Court would take into consideration the history of the times and

1. (1959) S.C.R. 279 : (1959) S.C.J. 147 : (S.C.) 67.
(1959) 1 An.W.R. (S.C.) 67 : (1959) 1 M.L.J.

could also assume the state of facts existing at the time of legislation. A presumption also arises in regard to constitutionality of a piece of legislation. In the case of *P. V. Sivarajan v. The Union of India and another*¹, the Coir Industry Act was considered in relation to registration of dealers for export. The Act provided minimum quantity of export preceding 12 months the commencement of the Act as one of the qualifying terms for registration. This quantitative test was held good. The legislative policy as to the necessity is a matter of legislative judgment and the Court will not examine the propriety of it. The legislation need not be all embracing and it is for the Legislature to determine what categories will be embraced. In *Dalmia's case*², it was said that the two tests of classification were first that there should be an intelligible differentia which distinguished persons or things grouped from others left out and secondly the differentia must have a rational relation to the object sought to be achieved by the statute. There has to be a line of demarcation somewhere and it is reasonable that these 14 banks which are in a class by themselves because of their special features in regard to deposit, credit, administration, organisation should be prohibited from carrying on banking business. These special circumstances are the reasons for classification. This distinction between the 14 banks and others reasonably justified different treatment. An absolute symmetry or an accurate classification is not possible to be achieved in the task of acquisition of undertakings of banking companies. It cannot, therefore, be said that companies whose deposits were in the range of Rs. 45 to Rs. 50 crores should have been taken.

In *Kathi Rawat v. State of Saurashtra*³, this Court said that the necessity for judicial enquiries would arise when there was an abuse of power and the differences would have no relation to the object. In the case of *The Board of Trustees, Ayazuddin and Unani Tibbia College, Delhi v. The State of Delhi and another*⁴, the Court supported legislation on a reasonable ground that the case of *Tibbia College*⁴, had exceptional features which were not found in others. In *Dalmia's case*², the Legislature was said to be free to recognise the degrees of harm and to confine its restriction to those cases where the need was deemed to be the greatest. It is in this sense that usefulness to society was found to form a basis of classification in the case of *Md. Hanif Qureshi v. State of Bihar*⁵. In the case of *Harnam Singh and others v. Regional Transport Authority, Calcutta and others*⁶ Mahajan, J., said that in considering Article 14 the Court should not adopt an attitude which might well choke all beneficial legislation and legislation which was based on a rational classification was permissible. It will not be sound to suggest that there are other banks which can be acquired and these 14 banks should be spared. There is always possibility of discerning some kind of inequality and therefore grouping has to be made. Where the Legislature finds that public need is great and these 14 banks will be able to supply that need for the development of national economy classification is reasonable and not arbitrary and is based on practical grounds and consideration supported by the large resources of over Rs. 50 crores of each of these 14 banks and their administration and management. I am, therefore, of opinion that the acquisition of the undertakings does not offend Article 14 because of intelligible differentia and their rational relation to the object to be achieved by the Act of 1969 and it follows that these banks cannot therefore be allowed to carry on banking business to nullify the very object of the Act.

Counsel for the petitioner contended that the Act of 1969 infringed Article 31 (a) because there was no just compensation. It was said that compensation in Article 31 (a) meant just compensation and if the 1969 Act did not aim at just compensation, it would be unconstitutional. It was contended that cash could not be taken and further that the four disputed businesses could not be acquired.

1. (1959) 1 S.C.R. (Supp.) 779; (1959) S.C.J. 431.

2. (1959) S.C.J. 147; (1959) 1 A.L.W.R. (S.C.) 67; (1959) 1 M.L.J. (S.C.) 67; (1959) S.C.R. 279.

3. (1952) S.C.R. 435; (1952) S.C.J. 165.

4. (1952) 1 S.C.R. (Supp.) 156.

5. (1959) S.C.R. 629; (1959) S.C.J. 975;

(1959) M.L.J. (S.C.) 77.

6. (1954) S.C.R. 371; (1954) S.C.J. 46; (1954) 1 M.L.J. 79.

I have already expressed my view that the Act acquired the entire undertaking of the banks, and, therefore, there is no question of taking of cash. I have also expressed my view that the four disputed businesses are all within the business of bank, and, therefore, the Act is valid.

It was said by Counsel for the petitioner that the word 'compensation' in Article 31 (2) was given the meaning of just equivalent in earlier decisions of this Court and since the word 'compensation' was retained in Article 31 (2) after the Constitution Fourth Amendment Act, 1955 there was no change in the meaning of the expression 'compensation' and it would have the same meaning of just equivalent. In view of the fact that after the Constitution Fourth Amendment Act the question of adequacy of compensation is not justiciable it was said by Counsel for the petitioner that the only question for Courts is whether the law aimed at just equivalent. Counsel for the petitioner relied on the decision of this Court in *Vajravelu Mudaliar v. Special Deputy Collector, Madras and another*¹ and submitted that the decision in *State of Gujarat v. Shantilal Mangaldas*², was a wrong interpretation of Article 31 (2).

The Attorney General on the other hand contended first that after the Constitution Fourth Amendment Act, Article 31 (2) enacted that no law shall be called in question on the ground that the compensation provided by that law is not adequate and therefore compensation in that Article could not mean just equivalent. It was also said that Article 31 (2) refers to a law which provide for compensation and not to a law which aims at just equivalent. Secondly, it was said that the whole of Article 31 (2) had to be read and the meaning of the word 'compensation' in the first limb was to be understood by reference to the second limb and if the petitioner's arguments were accepted the Constitution would read that unless law provided for a just equivalent it shall be called in question. It was, therefore, said by the Attorney General that if just equivalent was to be aimed at the second limb of Article 31 (2), namely, that inadequacy would not be questioned would become redundant and meaningless. If the law enjoined that there was to be compensation and either principle for determination of compensation or amount of compensation was fixed the Court could not go into the question of adequacy or reasonableness of compensation and the Court could not also go into the question of result of application, propriety of principle or reasonableness of the compensation.

In *Vajravelu Mudaliar's case*¹, this Court referred to the decision of *Bela Banerjee's case*³, case where it was held that compensation in Article 31 (2) meant just equivalent or full indemnification. In *Vajravelu Mudaliar's case*¹, it was contended that the Land Acquisition Madras Amendment Act, 1961 had provided for acquisition of land for housing schemes and laid down principles for compensation different from those prescribed in the Land Acquisition Act, 1894 and thereby Article 31 (2) was infringed because the Act did not provide for payment of compensation within the meaning of Article 31 (2). Subba Rao, J., speaking for the Court said that if the terms 'compensation' had received judicial interpretation it must be assumed that the term was used in the sense in which it had been judicially interpreted unless a contrary intention appeared. That is how reference was made to the decision of this Court in *Bela Banerjee's case*³, to emphasise that a law for requisition or acquisition should provide for a just equivalent of what the owner has been deprived of. Subba Rao, J., then dealt with the clause excluding the jurisdiction of the Court where the word 'compensation' was used and said at page 627 of the Report :

"The argument that the word 'compensation' means 'just equivalent' for the property acquired, and, therefore, the Court can ascertain whether it is just equivalent or not makes the amendment of the Constitution nugatory. It

1. (1964) 2 S.C.J. 703 : (1964) 2 M.L.J. (S.C.) 173 : (1964) 2 An.W.R. (S.C.) 173 : (1965) 1 S.C.R. 614.

2. (1969) 2 S.C.J. 322 : (1969) 2 M.L.J. (S.C.)

59 : (1969) 2 An.W.R. (S.C.) 59 : A.I.R. 1969 S.C. 634.

3. (1954) S.C.R. 558 : (1954) S.C.J. 95 : (1954) 1 M.L.J. 162.

will be arguing in a circle. Therefore, a more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of inadequacy of compensation fixed or arrived at by the working of the principles".

This Court then said that when value of a house at the time of acquisition had to be fixed there could be several methods of valuation, namely, estimate by engineer or value reflected by comparable sales or capitalisation of rent and similar others with the result that the adoption of one principle might give a higher value but they would nevertheless be principles of the manner in which the compensation has to be determined and the Court could not say that the Act should have adopted one principle and not the other because it would relate to the question of adequacy. In that case it was said that if a law lays down principles for determining compensation which are not relevant to the property acquired or to the value of the property at or about the time it is acquired it might be said that these are not principles contemplated by Article 31 (2). This was illustrated by saying that if a law says that though a house is acquired it would be valued as an agricultural land or though it is acquired in 1950 its value in 1930 should be given and though 100 acres are acquired only 50 acres will be paid for, these would not enter the question or area of adequacy of compensation. Another rule which was laid down in *Vajravelu Mudaliar's case*¹, is that the law may prescribe compensation which is illusory. To illustrate a property worth a lakh of rupees might be paid for at the sum of Rs. 100 and the question in that context would not relate to the adequacy of compensation because there was no compensation at all.

Two broad propositions which were laid down in *Vajravelu Mudaliar's case*² are these. First, if principles are not relevant to the property acquired or not relevant to the value of the property at or about the time it is acquired, these are not relevant principles. The second proposition is that if a law prescribes a compensation which is illusory the Court could question it on the ground that it is not compensation at all.

In the case of *Shantilal Mangaldas*³, the Bombay Town Planning Act of 1950 which was repealed by the Bombay Town Planning Act of 1955 came up for consideration. There was a challenge to the Bombay Act of 1955 on the ground of infringement of Article 31 (2) of the Constitution. Section 53 of the Bombay Act contemplated transfer of ownership by law from private owners to the local authority. It was argued that under section 53 of the Bombay Act when a plot was reconstituted and out of that plot a smaller area was given to the owner and the remaining area was utilised for public purpose the area so utilised vested in the local authority for a public purpose, but the Act did not provide for giving compensation which was a just equivalent of the land expropriated at the date of extinction of interest and therefore Article 31 (2) was infringed. It was also argued that when the final scheme was framed in lieu of the ownership of the original plot and compensation in money was determined in respect of the land appropriated to public purpose such a scheme for compensation violated Article 31 (2) because compensation for the entire land was not provided and secondly payment of compensation in money was not provided in respect of the land appropriated to public use.

Shah, J., speaking for the Court in the case of *Shantilal Mangaldas*⁴, said that the decision of this Court in the cases of *Bela Banerjee*⁵, and *Subodh Gopal Bose*⁶, "raised more problems than they solved", because the Court did not indicate the meaning of just equivalent and "it was easier to state what was not just equivalent than to define what a just equivalent was." In this state of law Article 31 was amended by Constitution Fourth Amendment Act, 1955. Shah, J., said first that adequacy of compensation fixed by the Legislature or awarded according to principles specified by the Legislature is not justifiable and secondly if the amount of compensation is fixed it cannot be challenged apart from a plea of abuse of legislative power because

1. (1964) 2 S.C.J. 703 : (1964) 2 M.L.J. (S.C.) 59 : (1969) 2 An.W.R. (S.C.) 59 : A.I.R. (S.C.) 173 : (1964) 2 An.W.R. (S.C.) 173 : 1969 S.C. 634.

(1965) 1 S.C.R. 614.

3. (1954) S.C.J. 95.

2. (1969) 2 S.C.J. 322 : (1969) 2 M.L.J.

4. (1954) S.C.J. 127.

otherwise it would be a challenge to the adequacy of compensation. In *Shantilal Mangaldas's case*¹, Shah, J., also said that the compensation fixed or determined on principles specified by the Legislature cannot be challenged on the indefinite plea that it is not a just or fair equivalent. Shah, J., further said that principles of compensation could not be challenged on the plea that what was awarded as a result of the application of those principles was not just or fair compensation.

If the quantum of compensation fixed by the Legislature is not liable to be challenged before the Court on the ground that it is not a just equivalent the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of these principles is not a just equivalent. The right declared by the Constitution guarantees compensation before a person is compulsorily expropriated of the property for public purpose. Principles may be challenged on the ground that they are not relevant to the property acquired or the time of acquisition of the property but not on the plea that the principles are not relevant to the determination of a fair or just equivalent of the property acquired. A challenge to the statute that a principle specified by it does not provide or award a just equivalent will be a clear violation of the Constitutional declaration that inadequacy of compensation provided for is not justifiable.

Shah, J., referred to the decision of this Court in the case of *Union of India v. The Metal Corporation of India Ltd., and another*², and expressed disagreement with the following view expressed in the *Metal Corporation case*² "the law to justify itself has to provide a payment of just equivalent to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary the adequacy of the resultant product cannot be questioned in the Court of law. The validity of the principles judged by the above tests falls within judicial scrutiny and if they stand the test the adequacy of the product falls outside justification". In *Metal Corporation case*² compensation was to be equated to the cost price in the case of unused machinery in good condition and written down value as understood in income-tax law was to be the value of the used machinery and both were said to be irrelevant to the fixation of the value of machinery as on the date of acquisition. Shah, J., speaking for the Court expressed inability to agree with that part of the judgment and then said "the Parliament has specified the principles for determining compensation of undertaking of the company. The principles expressly related to the determination of compensation payable in respect of unused machinery in good condition and used machinery. The principles were not irrelevant to the determination of compensation and the compensation was not illusory". If what is specified is a principle for determination of compensation the challenge to that principle on the ground that a just equivalent is not reached is barred by the plain words of Article 31 (2) of the Constitution.

These two decisions have one feature in common, namely, that if compensation is illusory the Court will be able to go into it. By the word "illusory" is meant something which is obvious, patent and shocking. If for a property worth Rs. 1 lakh compensation is fixed at Rs. 100 that would be illusory. One need not be astute to find out as to what would be at sight illusory. Furthermore, illusoriness must be in respect of the whole property and there cannot be illusoriness as to part in regard to the amount fixed or the result of application of principles laid down.

When principles are laid down in a statute for determination of compensation all that the Court will see is whether those principles are relevant for determination of compensation. The relevancy is to compensation and not to adequacy. I am unable to hold that when the relevant principle set out is "ascertained value" the petitioner could yet contend that market value should be the principle. It would really be going into adequacy of compensation by preferring the merits of the principle to those of the other for the oblique purpose of arriving at what is suggest-

1. (1969) 2 S.C.J. 322.

2. (1967) 1 S.C.R. 255 : 37 Comp. Cas. 1 :

(1967) 1 Comp.L.J. 43 : (1967) 1 S.C.J. 182.

ed to be just equivalent. To my mind it is unthinkable that the Legislature after the Constitution Fourth Amendment Act intended that the word 'compensation' would mean just equivalent when the Legislature put a bar on challenge to the adequacy of compensation. Just compensation cannot be inadequate and anything which is impeached as unjust or unfair is impinging on adequacy. Therefore, just equivalent cannot be the criterion in finding out whether the principles are relevant to compensation or whether compensation is illusory. In *Vajravelu Mudaliar's case*¹, the Court noticed continuous rise in land price but accepted an average price of 5 years as a principle. An average price over 5 years in the teeth of a continued rise in price would not aim at just equivalent according to the petitioner's contention there. Again potential value of land which was excluded in the Act in *Vajravelu Mudaliar's case*¹, was said there to pertain to the method of ascertaining compensation and its exclusion resulting in inadequacy of compensation. I am, therefore, of opinion that if the amount fixed is not obviously and shockingly illusory or the principles are relevant to determination of compensation, namely, they are principles in relation to property acquired or are principles relevant to the time of acquisition of property there is no infraction of Article 31 (2) and the owner cannot impeach it on the ground of 'just equivalent' of the property acquired.

Counsel on behalf of the petitioner contended that section 6 of the 1969 Act was an infraction of Article 31 (2) on these grounds. First, no time limit was mentioned with regard to payment of compensation is section 6 (1); secondly, section 6 (6) was an unreasonable restriction; thirdly, the four disputed businesses are not subject-matter of acquisition for public purpose; fourthly, debentures cannot be subject-matter of acquisition; fifthly, currency notes, cash, coins cannot be subject-matter of acquisition. It was said that securities and cash which are maintained under section 42 of the Reserve Bank Act, 1934 and section 24 of the 1949 Act can be taken but reserves and investments and shareholders' accumulated past profits cannot be subject-matter of acquisition and finally undertaking is not property and each asset is to be paid for.

Section 6 (1) of the Act provides for payment of compensation if it can be fixed by agreement and if agreement cannot be reached there shall be reference to a tribunal. There is no question of time within which agreement is to be reached or determination is to be made by a tribunal.

Section 6 (6) relates to interim payment of "one half of the amount of paid up share capital" and any existing bank may apply to the Central Government for such payment before the expiry of 3 months or within such further time not exceeding 3 months as the Central Government may by notification specify. If the bank will apply the Government will pay the money only if the bank agrees to pay to shareholders. Section 6 (6) is a provision for the benefit of the bank and the shareholders. There is no unreasonableness in it.

I have already held that the four disputed businesses come within the legitimate business of banks and therefore they are valid subject-matter of acquisition. No acquisition or requisition of the undertaking of the banking company is complete or comprehensive without all businesses which are incidental and conducive to the entire business of the bank.

The entire undertaking is the subject-matter of acquisition and compensation is to be paid for the undertaking and not for each of the assets of the undertaking. There is no uniform established principle for valuing an undertaking as a going concern but the usual principle is assets minus liabilities. If it be suggested that no compensation has been provided for any particular asset that will be questioning adequacy of compensation because compensation has been provided for the entire undertaking. The compensation provided for the undertaking cannot be called illusory because in the present case principles have been laid down. The Second Schedule of the Act of 1969 deals with the principles of compensation for the undertaking. The Second Schedule is in two parts. Part I relates to assets and Part II

relates to liabilities. The compensation to be paid shall be equal to the sum total of the value of assets calculated in accordance with the provisions of Part I less the sum total of liabilities computed and obligations of existing banks calculated in accordance with the provisions of Part II. In Part I assets are enumerated.

Counsel for the petitioner contended that with regard to assets either there was no principle or the principle was irrelevant or the compensation was illusory or it was not just equivalent. As to securities, shares, debentures Part I (c) Explanation (iv) was criticised on the ground that there was no principle because period was not fixed and was left to be determined by some other authority. Explanations (iv) and (v) to Part I (c) will be operative only when market value of shares, debentures is not considered reasonable by reason of its having been affected by abnormal factors or when market value of shares debentures is not ascertainable. In the former case the basis of average market value over any reasonable period and in the latter case the dividend paid during 5 years and other relevant factors will be considered. In both cases principles have been laid down, namely, how valuation will be made taking into account various factors and these principles are relevant to determination of compensation for the property.

Part I (c) Explanation I was criticised by Counsel for the petitioner to be an instance of value being brought down from 'just equivalent'. Part I (c) Explanation 1 states that value shall be deemed to be market value of land or buildings, but where such market value exceeds the ascertained values determined in the manner specified in Explanation, 2 it shall be deemed to mean such ascertained value. This criticism suggests that compensation should be just equivalent meaning thereby that what is given is not just and, therefore, indirectly it is challenging the adequacy. In *Vajravelu Mudaliar's case*¹, there was a provision for compensation on the basis of the market value on the date of the notification or on the basis of average market value during past 5 years whichever was less. That principle was not held to be bad. The owner of the property is not entitled to just equivalent. Explanation 1 lays down the principle. Market value is not the only principle. That is why the Constitution has left the laying down of the principles to the Legislature. Ascertained value is a relevant and sound principle based on capitalisation method which is accepted for valuation of land and properties.

It was next said by Counsel for the petitioner that Explanation 2 (1) in Part I was an irrelevant principle because it was a concept borrowed from Income-tax Act for calculating income and not capital value. It was said that 12 times the annual rent was not a relevant principle and was not an absolute rule and compensation might be illusory. It was also said that Explanation 2 (1) would be irrelevant where 2 plots were side by side, one with building and the other vacant land because the latter would get more than the former and in the former standard rent was applied and the value of land was ignored and therefore it was an irrelevant principle. That will not be illusoriness. Standard rent necessarily takes into account value of land on which the building is situated because no rent can be thought of without a building situated on a plot of land. Article 31 (2) does not enjoin the payment of full or just equivalent or the payment of market value of land and buildings. There should be a relevant principle for determining compensation for the property acquired. Capitalisation method is not available for land because land is not generally let out. If rental method be applied to land the value may be little. In any event, it is a principle relevant to determination of compensation. Furthermore there was no case in the petition that there was land with building side by side with vacant land.

Another criticism with regard to Explanation 2 (1) (i) was that amount required for repairs which was to be deducted in finding out ascertained value should not be deducted against capital value. I am unable to accept the contention because this deduction on account of maintenance and repairs is essential in the capitalisation method. It was next said by Counsel for the petitioner that Explanation 2 (1) (ii)

which speaks of deduction of insurance premium would reduce the value. Insurance would also be an essential deduction in the capitalisation method and it could not be assumed that the bank would insure for a value higher than what was necessary. Annual rent would also vary in different buildings. Amounts mentioned in Explanations 2 (i) (iii) and (iv) were said on behalf of the petitioner not to be deductible against capital value because annual charge or ground rent would be paid from income. These relate to Municipal tax and ground rent which are also taken into consideration in capitalisation method. Payment of tax or ground rent may be out of income but these have to be provided for in ascertaining value of the building under the capitalisation method.

Explanation 2 (i) (vi) which speaks of deduction of interest on borrowed capital with which any building was constructed was said to be included twice, namely, under Explanation 2 (i) (vi) and also under liabilities in Part II. Explanation 2 in Part I which relates to finding out ascertained value of building enacts that where building is wholly occupied 12 times the annual rent or the rent at which the building may be expected to let out less deductions mentioned therein would be the ascertained value. These deductions are made to arrive at the value of the building under the capitalisation method to find out how much will be paid in the shape of interest on mortgage or borrowed capital. Interest on mortgage or borrowed capital will be one of the deductions in calculating outgoing under capitalisation method. In Part II, the liabilities are those existing at the commencement of the Act and contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources on or after the commencement of the Act. Interest payable on mortgage or borrowed capital at or after the commencement of the Act will not be taken into account as outgoings deducted under capitalisation method.

Explanation 2 (2) was criticised by Counsel for the petitioner on the ground that plinth area related to the floor area and if a floor was not occupied the plinth area thereof was not taken into account. Explanation 2 (i) relates to determination of compensation by finding out ascertained value in the case of building which is wholly occupied. Explanation 2 (2) relates to the case of a building which is partially occupied. Explanation 2 (3) refers to land on which no building is erected or which is not appurtenant to any building. In the case of partial occupation Explanation 2 (2) sets out the principle of compensation of partially occupied building. Again in Explanation 2 (3) the criticism on behalf of the petitioner that if there is a garage or one storeyed structure the principle will not apply is explained on the ground that the expression 'appurtenant' means land belonging to the premises. If there is a small garage or a one storeyed building the land will not be appurtenant to the garage or building.

Counsel for the petitioner contended that Part I (h) which spoke of market or realisable value of other assets did not include goodwill, benefit of contract, agencies claims in litigation, and, therefore, there was no compensation for these. Part I (h) is a residuary provision. Whatever appears in books would be included. Goodwill does not appear in the books. Goodwill may arise when an undertaking is sold as a going concern. The contention as to exclusion of goodwill goes to the question of adequacy and will not vitiate the principle of valuation which has been laid down. Reference may be made to Schedule VI of the Companies Act which refers to goodwill under Fixed Assets but the Banking Regulation Act, 1949 does not contain goodwill under property and assets.

Goodwill in the words of Lord Eldon in *Grutwell v. Lye*¹, means "the probability that the old customers will resort to the old place". The term 'goodwill' is generally used to denote the benefit arising from connection and reputation. Whether or not the goodwill has a saleable value the question of fact is to be determined in each case. Upon sale of a business there may be restriction as to user of the name of the business sold. That is another aspect of sale of goodwill of a business. The 14

banks carried on business under licence by reason of section 22 of the Act of 1949. The concept of sale in such a situation is unreal. Furthermore, the possibility of nationalisation of undertakings like banks cannot be ruled out. Possibility of nationalisation will affect the value of goodwill. In the case of compulsory acquisition it is of grave doubt whether goodwill passes to the acquiring authority. No facts have been pleaded in the petition to show as to what goodwill the bank has. Goodwill is not shown in assets. In the present case the names of the 14 banks and the corresponding new banks are not the same and it cannot therefore be said that any goodwill has been transferred. The 14 banks will be able to carry on business other than banking in their names. Again under the Act compensation is being paid for the assets and secret reserves which are provided for by depreciating the value of assets will also be taken into account. Any challenge as to compensation for goodwill falls within the area of adequacy.

As to Part II of the Schedule Counsel for the petitioner said that liabilities not appearing in the books would be deducted but in the case of assets only those appearing in the books will be taken into account. Nothing has been shown in the petition that there are assets apart from those appearing in the books. It would not be appropriate to speak of liabilities like current income-tax liability, gratuity, bonus claims as liabilities appearing in the books.

It was said on behalf of the petitioner that interest from the date of acquisition was not provided for. That would again appertain to the adequacy of compensation. Furthermore, interest has been provided for under section 6 (3) (a), (b) of the 1969 Act. It was also said that if there was a large scale sale of promissory notes or stock certificates the value would depreciate. Possibility of depreciation does not vitiate the principle or constitutionality of a measure.

The principles which have been set out in the 1969 Act are relevant to the determination of compensation. When it is said that principles will have to be relevant to the compensation, the relevancy will not be as to adequacy of compensation but to the property acquired and the time of acquisition. It may be that adoption of one principle may confer lesser sum of money than another but that will not be a ground for saying that the principle is not relevant. The criticism on behalf of the petitioner that compensation was illusory is utterly unmeritorious.

The Attorney-General contended that even if Article 19 (1) (f) or 19 (1) (g) applied, the 1969 Act would be upheld as a reasonable restriction in the interest of the general public. It is said that social control scheme is a constitutional way of fulfilling the Directive Principles of State Policy. The 14 banks paid a total of 4.35 crores of rupees as dividend in 1968. This amount is said in the affidavit of the respondent not to be of great significance and that the bank should expand and attract more deposits. The comparative position of India along with other countries is focussed in the study group Report referred to in the affidavit in opposition. Commercial bank deposits and credit as proportion of national income form hardly 14 per cent. and 10 per cent. respectively in India as against 84 per cent. and 19 per cent. in Japan, 56 per cent. and 36 per cent. in U.S.A. 49 per cent. and 29 per cent. in Canada whereas the average population served in India by banks is as high as 73,000 as against 4000 in U.S.A. and Canada and 15,000 in Japan. Then it is said that more than 4/5th of the credit goes to industry and commerce, retail has about 2 per cent and agriculture less than 1 per cent. Small borrowers it is said have no facilities. It is said that institutional credit is virtually non-existent in relation to small borrowers. The suggestion is that there is flow of resources from smaller to larger population and from rural to urban centres. There are many places which have no banks. In different States there is uneven spread of banking offices. There is greater expansion in urban banking. 5 major cities are said to have 46 per cent. deposit but 65 per cent. credit. Banks are more developed in States which are economically and socially advanced but even in such developed States banks are sparsely located.

India is a predominantly agricultural country and one-half of national income viz., 53.2 per cent, is from agriculture. Out of 5,64,000 villages only 5000 are served by banks. Not even 1 per cent. have bank facilities. Credit requirements for agriculture are of great importance. Agriculturists have 34 per cent. credit from Co-operatives, 5 per cent. from banks and the rest from money lenders. The requirements are said to be Rs. 2,000 crores for agriculturists. The small-scale industries are said to employ one-third of the total industrial population and 40 per cent of the industrial workers are in small scale industries. Banks will have to meet their needs. Small artisans and retail trade have all need for credit. It is said that barely 1.8 per cent. of the total bank advances goes to small-scale industries. It is said in the affidavit that the policy of the Government is to take up direct management of credit resources for massive expansion of branches, vigorous principles for mobilisation of deposits and wide range programme to fill the credit gaps of agriculture, small-scale industries, small artisans, retail trade and consumer credit. This policy can be achieved only by direct management by State and not merely by social control. Almost all the banks are in favour of large-scale industry. This direct control and expansion of bank credit is intended to make available deposit resources and expand the same to serve the country in the light of Directive Principles. These are the various reasons which are rightly said by the Attorney General to be reasonable restrictions in the interest of the general public. I wish to make it clear that in my opinion Articles 19 (1) (f) and (g) do not at all enter the domain of Article 31 (2) because a legislation for acquisition and requisition of property for public purpose is not required to be tested again on the touchstone of reasonableness of restriction. Such reasonable restriction is inherent and implicit in public purpose. That is why public purpose is dealt with separately in Article 31 (2).

The validity of the Ordinance of 1969 was challenged by contending that the satisfaction of the President under Article 123 was open to challenge in a Court of law. It was said that the satisfaction of the President was objective and not subjective. The power of the President under Article 123 of the Constitution to promulgate Ordinances is when both the Houses of Parliament are not in session and this power is co-extensive with that of the Legislature and the President exercises this power when he is satisfied that circumstances exist which render it necessary for him to take immediate action. The power of promulgating Ordinance is of historical antiquity and it has undergone change from time to time. In the East India Company Act, 1773 under section 36 the Governor-General could promulgate Ordinance. The Indian Councils Act, 1861 by section 23 thereof provided that the Governor-General in case of emergency may promulgate an Ordinance for the peace and good Government of the territories. The Government of India Act, 1915 provided in section 72 that the Governor-General could promulgate Ordinances for the peace and good Government. The Government of India Act, 1935 by sections 42, 43 and 45 conferred power on the Governor-General to promulgate Ordinances and sections 88 and 89 conferred a similar power on the Governor. Article 123 of the Constitution is really based on section 42 of the Government of India Act, 1935 and Article 213 which relates to the power of the Governor in the States is based on section 88 of the Government of India Act, 1935.

It has been held in several decisions like *Bhagat Singh's case*¹ and *Sibnath Banerjee's case*² that the Governor-General is the sole Judge as to whether an emergency exists or not. The Federal Court in *Lakshmi Narain Singh's case*³, took a similar view that the Governor-General was the sole Judge of the State of emergency for promulgating Ordinances.

The sole question is whether the power of the President in Article 123 is open to judicial scrutiny. It was said by Counsel for the petitioner that the Court would go into the question as to whether the President was satisfied that circumstances existed which rendered it necessary for the President to promulgate an Ordinance. *Liversidge's*

1. (1931) 58 I.A. 169; 61 M.L.J. 279; 1931 P.C. 11. 3. (1949) F.C.R. 693 : (1950) S.C.J. 32:
2. (1945) 72 I.A. 241; (1945) 2 M.L.J. 225. (1950) 1 M.L.J. 760.

case¹ was relied upon by Counsel for the petitioner. That case interpreted the words "reasonable cause to believe". It is obvious that when the words used are "reasonable cause to believe" it is to be found out whether the cause itself has reason to support it and the Court goes into the question of ascertaining reasons. In *Liversidge's case*¹ it was said that the words "has reasons to believe" meant an objective belief whereas the words "if it appears" or "if satisfied" would be a subjective satisfaction.

The words "if it appears" came up for consideration in two English cases of *Ayr Collieries*², and the *Carltona*³, and the decision was that it was not within the province of the Court to enquire into the reasonableness of the policy.

The interpretation of Article 123 is to be made first on the language of the Article and secondly the context in which that power is reposed in the President. When power is conferred on the President to promulgate Ordinances the satisfaction of the President is subjective for these reasons. The power in Article 123 is vested in the President who is the executive head and the circumstances contemplated in Article 123 are a guide to the President for exercise of such power. Parliament is not in session throughout the year and during the gaps between sessions the legislative power of promulgating Ordinance is reposed in the President in cases of urgency and emergency. The President is the sole Judge whether he will make the Ordinance. The President under Article 74 (1) of the Constitution acts on the advice of Ministers. Under Article 74 (2) the advice of the Ministers is not to be enquired into by any Court. The Ministers under Article 75 (3) are responsible to Parliament. Under Article 123 the Ordinances are limited in life and the Ordinance must be laid before Parliament and the life of the Ordinance may be further shortened. The President under Article 361 (1) is not answerable to any Court for acts done in the performance of his duties. The Ministers are under oath of secrecy under Article 75 (4). Under Article 75 (3) the Ministers are collectively responsible to the House of the People. Under Article 78 it shall be the duty of the Prime Minister to furnish information to the President. The power under Article 123 relates to policy and to an emergency when immediate action is considered necessary and if any objective test is applied the satisfaction of the President contemplated in Article 123 will be shorn of the power of the President himself and as the President will be acting on the advice of Ministers it may lead to disclosure of facts which under Article 75 (4) are not to be disclosed. For these reasons it must be held that the satisfaction of the President is subjective.

Counsel for the petitioner relied on the decisions of this Court in the cases of *Barium Chemicals*,⁴ and *Rohtas Industries*⁵. In both the cases the words used in the Companies Act, 1956 section 237(b) which came up for consideration before this Court are to the effect that the Central Government may, if in the opinion of the Central Government there are circumstances suggesting, that the business of the company is not properly conducted, appoint competent persons to investigate the affairs of the company. The opinion which is to be formed by the Central Government under the Companies Act in that section is in relation to various facts and circumstances about the business of a company and that is why this Court came to the conclusion that the existence of circumstances but not the opinion was open to judicial scrutiny. This was the view of this Court in the cases of *Barium Chemicals*⁴ and *Rohtas Industries Ltd*⁵.

The decisions in *Barium Chemicals*⁴, and *Rohtas Industries Ltd*⁵, turned on the interpretation of section 237 of the Companies Act and executive acts thereunder. The language used in that section is 'in the opinion of.' The Judicial Committee in the *Hubli Electricity case*⁶, interpreted the words "the Provincial Government may, if in its opinion the public interest so requires, revoke a licence in any of the following cases" to mean that the relevant matter was the opinion and not the

1. (1941) 3 All.E.R. 338 : L.R. (1942) A.C. 623 : (1966) S.C.R. (Supp.) 311.
 206. 5. (1969) 1 Comp.L.J. 350 : (1969) 2 S.C.J.
 2. (1943) 2 A.E.R. 546. 1 : A.I.R. 1969 S.C. 707.
 3. (1943) 2 A.E.R. 560. 6. (1949) L.R. 76 I.A. 57 : (1949) 2 M.L.J. 30.
 4. (1966) 2 Comp.L.J. 151 : (1966) 2 S.C.J.

ground on which the opinion was based. This Court in the *Barium Chemicals case*¹, however found that there were no materials upon which the authority could form the requisite opinion. That is the ratio of the decision in *Barium Chemicals case*¹.

In order to entitle the Central Government to take action under section 237 of the Companies Act, 1956 there is to be the requisite opinion of the Central Government and the circumstances should exist to suggest that the company's business was being conducted as laid down in sub-clause (1) or that the persons mentioned in sub-clause (2) were guilty of fraud, misfeasance or misconduct. The opinion of the Central Government was subjective but it was said that the condition precedent to the formation of such opinion was that there should be circumstances in existence and the recitals of the existence of those circumstances did not preclude the Court from going behind those recitals and determining whether in fact the circumstances existed and whether the Central Government in making the order had taken into consideration any extraneous consideration.

In the case of *Rohas Industries*², reference was made to English, Canadian and New Zealand decisions. The Canadian decision related to power of the Liquor Commission to cancel the liquor licence and it was held to be an exercise of discretion. The New Zealand decision related to the power of the Governor-General under the Education Act to make Regulations as "he thinks necessary to secure the due administration." It was held that the opinion of the Governor General, as to the necessity for such regulation was not reasonably tenable. These decisions do not deal with questions as to whether the satisfaction is subjective or objective. Of the two English decisions one related to the power of the Commissioner to make regulations providing for any matter for which provisions appear to them to be necessary for the purpose of giving effect to the provisions of the Act. The nature of legislation was taxation of subjects. It was held that the authority was not the sole judge of what its powers were, nor of the way in which that power was exercised. The words "reasonable cause to believe," "reasonable grounds to believe" occurring in the case of *Liversidge*³, were relied on to illustrate the power of the Court to find out as to whether the regulations was *intra vires* in the English case.

The decision of the House of Lords in *Padfield v. Minister of Agriculture, Fisheries and Food*⁴, on which Counsel for the petitioner relied turned on interpretation of section 19 (3) of the Agricultural Marketing Act which contemplated a committee of investigation, if the Minister so directed, to consider and report to the Minister on any report made by the consumer committee and any complaint made to the Minister as to the operation of any scheme which in the opinion of the Minister could not be considered by a consumers' committee under one of the sub-sections in that section. The House of Lords held that the Minister had full or unfettered discretion but he was bound to exercise it lawfully that is to say not to misdirect himself in law, nor to take into account irrelevant matters nor to omit relevant matters from consideration. That was an instance of a writ of *mandamus* directing exercising of discretion to act on the ground that it was a power coupled with duty.

The only way in which the exercise of power by the President can be challenged is by establishing bad faith or *mala fide* and corrupt motive. Bad faith will destroy any action. Such bad faith will be a matter to be established by a party propounding bad faith. He should affirm the state of facts. He is not only to allege the same but also to prove it. In the present case there is no allegation of *mala fide*.....

It was said on behalf of the petitioner that the fact that Parliament would be in session on 21st July, 1969 and that the Ordinance was promulgated on Saturday, 19th July, 1969 was indicative of the fact that the Ordinance was not promulgated

1. (1966) 2 Comp. L.J. 151 : (1966) 2 S.C.J. 623 : (1966) S.C.R. (Supp.) 311.

2. (1969) 1 Com L.J. 350 : (1969) 2 S.C.J. 1 : A.I.R. 1969 S.C. 707.

3. (1941) 3 All.E.R. 338 : L.R. (1942) A.C. 206.

4. (1968) 1 A.E.R. 60.

legitimately but in a hasty manner and the President should have waited. If the President has power when the House is not in session he can exercise that power when he is satisfied that there is an emergency to take immediate action. That emergency may take place even a short time before Parliament goes into session. It will depend upon the circumstances which were before the President. The fact that the Ordinance was passed shortly before the Parliament session began does not show any *mala fide*. It was said that circumstances were not set out in the affidavit and therefore the Court was deprived of examining the same. The Attorney-General rightly contended that it was not for the Union to furnish facts and information which were before President because first such information might be a State secret, secondly, it was for the party who alleged non-existence of circumstances to prove the same and thirdly the respondent was not called upon to meet any case of *mala fide*.

It was said that no reason was shown as to what mischief could have happened if the Ordinance would not have been promulgated on the date in question but no reason was required to be shown. The statement of objects and reasons shows that there was considerable speculation in the country regarding Government's intention with regard to 'nationalisation' of banks during few days immediately before the Ordinance. In the case of *Barium Chemicals*¹, it was said by this Court that if circumstances lead to tentative conclusion, that the Court would not have drawn a similar inference would be irrelevant. The reason is obvious that in matters of policy just as Parliament is the master of its province similarly the President is supreme and sole judge of his satisfaction on such policy matters on the advice of the Government.

The *locus standi* of the petitioners was challenged by the Attorney-General. The petitions were heard on merits. I have dealt with all the arguments advanced. It is, therefore, not at all necessary to deal with this objection.

For the reasons mentioned above, the petitions fail and are dismissed. There will be no order as to costs.

ORDER—In accordance with the opinion of the majority Petitions Nos. 300 and 298 are allowed, and it is declared that the Banking Companies (Acquisition and Transfer of Undertakings) Act XXII of 1969 is invalid and the action taken or deemed to be taken in exercise of the powers under the Act is declared unauthorised. Petition No. 222 is dismissed. There will be no order as to costs in these three petitions.

V.K.

Petition No. 222 dismissed ; Petitions Nos. 300 and 298 allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI AND R. S. BACHAWAT, JJ.

Surja

.. Appellant*

v.

Hardeva and others

.. Respondents.

Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953), sections 18 (1), 18 (2) and 24 and section 84 of the Tenancy Act (XVI of 1887) (Punjab)—Scope—Tenant enabled to purchase from the landowner the land held by him, but not included in the reserved area or selected area of the owner—Assistant Collector authorised to determine the value of the land, but he should decide first whether the land was included in the reserved or selected area—Financial Commissioner, if could go into the question whether the Assistant Collector had rightly assumed jurisdiction.

Under section 18 of the Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953), a tenant is only entitled to purchase land which is not included

1. (1966) 2 Comp. L.J. 151 : (1966) 2 S.C.J. 263 : (1936) S.C.R. (Supp.) 311.

* C.A. No. 778 of 1966.

17th October, 1968.

in the reserved or selected area of the landowner. Under section 18 (2) the Assistant Collector is only authorised to determine the value of the land after making such enquiries as he thinks fit. He is not expressly authorised to go into the question whether the land sought to be purchased is included in the reserved or selected area of the landowner or not. But, obviously it must be the intention that he should go into these questions before embarking on determining the price. But by wrongly deciding that question he cannot finally confer on himself jurisdiction to deal with the matter. In the exercise of the powers under section 24 of the Act, read with section 84 of the Tenancy Act, the Financial Commissioner had jurisdiction to go into the question whether the Assistant Collector or Collector had rightly assumed jurisdiction. The Financial Commissioner did not appreciate the content of his powers of revision under section 24 read with section 84 of the Tenancy Act. It was obvious from the report of the Commissioner that if the finding arrived at by the Commissioner was accepted the Assistant Collector and the Collector had no jurisdiction. Therefore, the Financial Commissioner should have gone into the question whether the Commissioner's report was acceptable or not on merits. Because the Financial Commissioner had not gone into the jurisdictional fact whether the land sought to be purchased by Surja was part of the reserved or related area, his order dismissing the revision has to be set aside.

Appeal by Special Leave from the Order dated the 25th May, 1965 of the Punjab High Court in Letters Patent Appeal No. 146 of 1965.

S. V. Gupta, Senior Advocate, (*Nannit Lal*, Advocate, with him), for Appellant.

A. K. Sen, Senior Advocate, (*S. G. Mohatta* and *A. D. Mathur*, Advocates, with him), for Respondent No. 1.

V. C. Mahajan and *R. N. Sachthey*, Advocates, for Respondents Nos. 2, 3 and 4.

The Judgment of the Court was delivered by

Sikri J.—This appeal by Special Leave is directed against the judgment and order of the High Court of Punjab in Letters Patent Appeal No. 146 of 1965 whereby the High Court dismissed *in limine* the Letters Patent Appeal filed by the appellant Surja against the judgment of the learned Single Judge allowing the writ petition filed by the respondent, Hardeva.

The relevant facts for determining the points raised before us are as follows : Hardeva, respondent before us, is a big landlord of village Panniwala Mota in Sirsa Tahsil of Hissar District. Surja, the appellant, was an old tenant of Hardeva and had been cultivating the land in dispute since about 1949. Section 18 of the Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953)—hereinafter referred to as the Act—entitles a tenant of a land-owner other than a small land-owner to purchase from the land-owner the land held by him, but not included in the reserved area of the land-owner if he satisfies the conditions laid down in that section. Section 18 (1) and (2) may be set out.

“18 (1) Notwithstanding anything to the contrary contained in any law, usage or contract, a tenant of a land-owner other than a small land-owner—

(i) who has been in continuous occupation of the land comprised in his tenancy for a minimum period of six years, or

(ii) who has been restored to his tenancy under the provisions of this Act and whose periods of continuous occupation of the land comprised in his tenancy immediately before ejection and immediately after restoration of his tenancy together amounts to six years or more, or

(iii) who was ejected from his tenancy after the 14th day of August, 1947, and before the commencement of this Act, and who was in continuous occupation of the land comprised in his tenancy for a period of six years or more immediately before his ejection,

shall be entitled to purchase from the land-owner the land so held by him but not included in the reserved area of the land-owner, in the case of a tenant falling within clause (i) or clause (ii) at any time, and in the case of a tenant falling within clause (iii) within a period of one year from the date of commencement of this Act:

Provided that no tenant referred to in this sub-section shall be entitled to exercise any such right in respect of the land or any portion thereof if he had sublet the land or the portion, as the case may be, to any other person during any period of his continuous occupation, unless during that period the tenant was suffering from a legal disability or physical infirmity, or, if a woman, was a widow or was unmarried:

Provided further that if the land intended to be purchased is held by another tenant who is entitled to pre-empt the sale under the next preceding section, and who is not accepted by the purchasing tenant, the tenant in actual occupation shall have the right to pre-empt the sale.

(2) A tenant desirous of purchasing land under sub-section (1) shall make an application in writing to an Assistant Collector of the First Grade having jurisdiction over the land concerned, and the Assistant Collector, after giving notice to the land-owner and to all other persons interested in the land and after making such inquiry as he thinks fit, shall determine the value of the land which shall be the average of the prices obtaining for similar land in the locality during 10 years immediately preceding the date on which the application is made."

Surja accordingly applied on 5th August, 1957, to the Collector, Hissar District, stating that he intended to purchase the land in dispute and that the land is outside the reserved area of the land-owner. He further alleged that he had been in possession of the land for the last eight years. Hardeva in his written statement *inter alia*, stated that Surja was in possession of the land only for three or four years. He alleged that Surja had already 150 bighas of cultivable land. He further stated that the land is reserved and for that reason Surja was not entitled to purchase it. In his evidence before the Assistant Collector given on 25th March, 1958, Hardeva deposed :

"The land is reserved. I do not know whether the land in dispute is reserved or not."

By his order dated 31st March, 1959, the Assistant Collector, Sirsa, held that Surja was entitled to purchase the land in dispute, and, accordingly, fixed the price. Regarding reservation he observed:

"It is admitted by the respondent that they are big land-owners and got this land reserved, but later on during his very cross examination, he denied any knowledge about the reservation. The respondent produced no evidence with regard to having this land got reserved though they are big land-owners."

Hardeva thereupon filed an appeal before the Collector, and one of the grounds taken was that the Assistant Collector erred in holding that the land in dispute was not reserved land. The Collector, by his order dated 20th July, 1960, dismissed the appeal. It was common ground before him that Hardeva was a big land-owner and that Surja had been in continuous possession of the land in dispute for more than six years, and the only point he determined was whether with the addition of the 28 bighas, and 12 biswas of land which Surja had been permitted to purchase his total area would exceed the permissible area or not. On this point he held in favour of Surja and accordingly dismissed the appeal.

Hardeva then filed a revision before the Commissioner. In the grounds of revision dated 27th October, 1960, various grounds were taken but there was no ground regarding reservation of land or selection of land under section 5-B of the Act. On 1st February, 1961, Hardeva filed an application in the Court of the Commissioner. In this application he stated that the entire land in dispute was included in the permissible area selected by him under section 5-B of the Act by

submitting form "E". He further stated that the Financial Commissioner had in *Karam Singh v. Angrez Singh*¹, held that selection under section 5-B (1) had the same force as reservation under section 5 of the Act, and this disentitled Surja from purchasing the land in dispute. He prayed that he may be allowed to raise the plea of selection under section 5-B (1). He stated that this plea involved a question of jurisdiction and in the interest of justice he may be permitted to raise this plea as an additional ground of revision.

The Commissioner allowed the ground to be taken but as Surja's Counsel suspected the *bona fide* of the selection, the Commissioner sent for the original file and he satisfied himself, after examining the original form "g" and the affidavit in relation to form "g", that Hardeva had duly submitted the selection document to the Collector within time on 19th June, 1958. It appears that the Financial Commissioner had held in *Dhanpat Rai v. State of Punjab*², that the period of six months allowed by section 5-B for making selection would start from 22nd March, 1958, the date when the Punjab Government Notification prescribing the form was issued. The Commissioner felt that the selected land could not be purchased under section 18 by the tenant. He accordingly submitted the case to the Financial Commissioner with the recommendation that the revision petition be accepted and that the orders of the Assistant Collector and the Collector be set aside.

The Financial Commissioner dismissed the revision. He held that as Hardeva had not put forward the plea of selection before the Assistant Collector or the Collector he could not be allowed to do so at that stage. He observed:

"In other words the consideration that reservation of area under section 5 and selection of area under section 5-B are identical in their effect has no relevance in the present cases for the reasons that it was never claimed (except in revision) that the area had been selected under section 5-B. If such a claim had been made and substantiated, the position would have been different, but since this was not done, the decision against the petitioner cannot be challenged. It is also clear that there is no question in these cases of the authorities concerned having acted without jurisdiction or having exercised it with illegality or material irregularity which alone could justify interference in revision."

Hardeva then filed a petition under Articles 226 and 227 of the Constitution. The High Court held that the Financial Commissioner should have accepted the recommendation made by the Commissioner and accordingly allowed the petition and declared that Surja was not entitled to purchase the land in dispute selected by the land-owner under the provisions of section 5-B of the Act. The learned Single Judge was of the view that the disputed question relates to jurisdiction and went to the root of the whole matter.

It appears that there was some dispute before the learned Single Judge about the date of the selection, because the learned Judge observed:

"There is a slight dispute on the question whether the intimation of selection was given on 19th or 20th of June, 1958."

He, however, preferred to accept the finding of the learned Commissioner on the point and gave the land-owner the benefit of it. He further observed that the question could not have been raised before the Assistant Collector and the Collector because "the prevailing view up till 1960 appears to have been that the selected area had not been equated with the reserved area" and it was because of this that Hardeva had not placed it before the Assistant Collector and the Collector although he had placed the point that the area was part of the reserved area.

It seems to us that the High Court was right in holding that the question whether the land sought to be purchased by Surja was part of the reserved or selected area was a jurisdictional fact. Under section 18 of the Act a tenant is only entitled to purchase land which is not included in the reserved or selected area of the land-owner. Under section 18 (2) the Assistant Collector is only authorised to deter-

1. (1960) 39 Lah.L.T. 57.

2. (1961) Lah.L.T. 3.

mine the value of the land after making such enquiries as he thinks fit. He is not authorised expressly to go into the question whether the land sought to be purchased is included in the reserved or selected area of the land-owner or not. But, obviously it must be the intention that he should go into these questions before embarking on determining the price. But by wrongly deciding that question he cannot finally confer on himself jurisdiction to deal with the matter. In exercise of the powers under section 24 of the Act, read with section 84 of the Tenancy Act, the Financial Commissioner had jurisdiction to go into the question whether the Assistant Collector or the Collector had rightly assumed jurisdiction.

It was urged before us that the orders of the Assistant Collector and the Collector were final and could not be assailed on the ground that they had wrongly assumed jurisdiction. Reliance was placed on authorities like *Rai Brij Raj Krishna v. S. K. Shaw*¹, where this Court referred to *Queen v. Commissioners for Special Purposes of Income-tax*², and *Colonial Bank of Australia v. Willen*³. That was a case of a suit whereby the order of the Commissioner under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (section 11) was sought to be declared illegal, *ultra vires* and without jurisdiction, but we are concerned with the revisional power of the Financial Commissioner which is the same as that of the High Court. As observed by Kapur, J., speaking for the Court, in *Ghaube Jagdish Prasad v. Ghaturvedi*⁴ these cases have no application to the exercise of revisional power. He observed :

"The appellant also relied on *Rai Brij Raj Krishna v. S.K. Shaw and Brothers*¹, where this Court quoted with approval the observations of Lord Esher in *Queen v. Commissioner for Special Purposes of the Income-tax*² and *Colonial Bank of Australia v. Willen*³, where Sir James Colville said :—

"Accordingly the authorities..... establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defect appears on the face of it, to be taken as conclusive of the facts stated therein and that the Court of Queen's Bench will not on *certiorari* quash such an adjudication on the ground that any such fact, however, essential, has been erroneously found."

But these observations can have no application to the judgment of the Additional Civil Judge whose jurisdiction in the present case is to be determined by the provisions of section 5 (4) of the Act. And the power of the High Court to correct questions of jurisdiction is to be found within the four corners of section 115. If there is an error which falls within this section the High Court will have the power to interfere, not otherwise.

The only question to be decided in the instant case is as to whether the High Court had correctly interfered under section 115 of the Code of Civil Procedure with the order of the Civil Judge. As we have held above, at the instance of the landlord the suit was only maintainable if it was based on the inadequacy of the reasonable annual rent and for that purpose the necessary jurisdictional fact to be found was the date of the construction of the accommodation and if the Court wrongly decided that fact and thereby conferred jurisdiction upon itself which it did not possess, it exercised jurisdiction not vested in it and the matter fell within the rule laid down by the Privy Council in *Jay Chandlal Babu v. Kamalkasha Chaudhary*⁵. The High Court had the power to interfere and once it had the power it could determine whether the question of the date of construction was rightly or wrongly decided. The High Court held that the Civil Judge had wrongly decided that the construction was of a date after 30th June, 1946, and therefore fell within section 3-A.⁶ Similarly, in *Jaganath Ramachandra Datar v. Dattaraya Belwant Hingmire*⁶, this Court observed :

"Therefore if it can be shown that the subordinate Court without any evidence whatsoever held that the transaction in question was not a sale but a mortgage and

1. (1951) S.C.J. 238 : (1951) S.C.R. 145.

2. 21 Q.B.D. 313.

3. L.R. 5 P.C. 417.

4. (1959) S.C.J. 495 : (1959) 1 An.W.R. (S.C.)

171 : (1959) 1 M.L.J. (S.C.) 171 : (1959) 1 S.C.R. (Supp.) 733, 746.

5. (1949) L.R. 76 I.A. 131 : (1949) 2 M.L.J. 6.

6. C.A.No.585 of 1964—Judgment delivered on 9th September, 1966.

that the relationship between the parties was that of a debtor and a creditor and on that footing proceeded to exercise its power under section 3 and 10-A of the Dekhan Agriculturists Relief Act the High Court would be entitled to interfere with such a decision under both the parts of section 115. It would then be possible to say that the subordinate Court had clutched at jurisdiction which it had not under the said section and it would also be possible to say that that Court had exercised its jurisdiction illegally or with material irregularity."

It seems to us that the Financial Commissioner did not appreciate the content of his powers of revision under section 24, read with section 84 of the Tenancy Act. It was obvious from the report of the Commissioner that if the finding arrived at by the Commissioner was accepted the Assistant Collector and the Collector had no jurisdiction in the matter.

In our opinion the Financial Commissioner should have gone into the question whether the Commissioner's report was acceptable or not on merits.

It is urged by the learned Counsel for Surja that the High Court did not decide the question whether the selection had been properly made within time, but it merely accepted the report of the Commissioner. He, therefore, still dispute the fact that the selection was made within time. He also says that it is not a genuine and valid selection. These points should be gone into by the Financial Commissioner. Under these circumstances we allow the appeal, set aside the orders passed by the High Court and the Financial Commissioner and remit the case to the Financial Commissioner to dispose of the revision filed before him in accordance with law.

There will be no order as to costs in this appeal.

V.M.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI AND K. S. HEGDE, JJ.

M/s. Tarapore & Co., Madras

.. *Appellant**

v.

M/s. V/O Tractoro export, Moscow and another
and

.. *Respondents.*

M/s. V/O Tractoro export, Moscow

.. *Appellant*

v.

M/s. Tarapore & Co. Madras and another

.. *Respondents.*

Constitution of India (1950), Article 136—Appeals by Special Leave against the interim injunctions granted by the trial Judge—Ordinarily Court not interfering with interim orders—Irrevocable letter of credit, a mechanism of great importance in international trade—awarding of an irrevocable letter of credit entitled to protection—Courts not to interfere with that mechanism.

The "Indian Firm" entered into a contract with the "Russian Firm" for the supply of construction machinery. In pursuance of that contract, the Indian Firm opened a confirmed, irrevocable and divisible letter of credit with the Bank of India, Limited for the entire value of the equipment. In the strength of the aforementioned contract, the Russian Firm supplied all the machinery it undertook to supply. They were duly taken possession of by the Indian Firm and put to work. The Indian Firm complained to the Russian Firm that the performance of the machinery supplied by it was not as efficient as represented at the time of entering into the contract and consequently it had incurred and continues to incur considerable loss. In pursuance of the agreement between the parties, the

* C.As. Nos. 2251 and 2252 of 1968 and
(C.As. Nos. 2305 and 2306 of 1968).

suit filed by the Indian Firm was withdrawn. In view of the "Gold Clause" the price fixed for the machinery supplied stood revised and consequently the Indian Firm had to pay to the Russian Firm an additional sum of about rupees twenty-six lacs. The Russian Firm appears to have drawn drafts on the Indian Firm for the excess amount payable under the gold clause. The settlement as contemplated by the Delhi agreement not having been reached, the Indian Firm filed the suit praying that the Bank of India as well as the Russian Firm should be restrained from taking any further steps in pursuance of the letter of credit opened by the Indian Firm in favour of the Russian Firm. Therein temporary injunctions were asked for in the very terms in which the permanent injunctions were prayed for. At a subsequent stage a further injunction restraining the Russian Firm from enforcing its right under the gold clause was also prayed for. The Russian Firm opposed those applications, but the trial Judge granted the temporary injunctions asked for.

Are the temporary injunctions issued by the trial judge sustainable?

Held, that ordinarily (this) Court does not interfere with interim orders. But herein legal principles of great importance affecting international trade are involved. An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade of this country. Except under very exceptional circumstances, the Court should not interfere with that mechanism. Not only that. The letter of credit is independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy. In the result, the temporary injunctions granted by the trial judge are set aside.

Appeals by Special Leave from the Judgment and Order dated the 9th October, 1968 of the Madras High Court in O.S.A. Nos. 26 and 27 of 1968 and Appeals by Special Leave from the Judgment and Order dated 12th April, 1968 of the Madras High Court in Applications Nos. 1760 and 2455 of 1967 in C.S. No. 118 of 1967.

M. G. Setalvad, Senior Advocate, (*V. P. Raman* and *D. N. Mishra*, Advocates, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji and Co.*, with him), for Appellant (In C. As. Nos. 2251 and 2252 of 1968) and Respondent No. 1 (In C. As. Nos. 2305 and 2306 of 1968).

S. Mohan Kumaramangalam, Senior Advocate (*M. K. Ramamurthi*, *Mrs. Shyamala Pappu* and *Vineet Kumar*, Advocates, with him), for Respondent No. 1 (In C. As. Nos. 2251 and 2252 of 1968) and the Appellant (In C. As. Nos. 2530 and 2306 of 1968).

Rameshwar Nath and *Mahinder Narain*, Advocates of *M/s. Rajinder Narain & Co.*, for Respondent No. 2 (In all the Appeals).

The Judgment of the Court was delivered by

Hegde, J.—These are connected appeals. They arise from Civil Suit No. 118 of 1967 on the original side of the High Court of Judicature at Madras. Herein the essential facts are few and simple though the question of law that arises for decision is of considerable importance.

The Suit has been brought by *M/s. Tarapore & Co.*, Madras (hereinafter referred to as the "Indian Firm"). That firm had taken up on contract the work of excavation of canal as a part of the Farakka Barrage Project. In that connection they entered into a contract with *M/s. V/O Tractores Export, Moscow* (which will hereinafter be referred to as the "Russian Firm") for the supply of construction machinery such as Scrapers and Bulldozers. In pursuance of that contract, the Indian Firm opened a confirmed, irrevocable and devisible letter of credit with the Bank of India, Limited for the entire value of the equipment, i.e., Rs. 66,09,372 in favour of the Russian Firm negotiable through the Bank for Foreign Trade of the U.S.S.R., Moscow. Under the said letter of credit the Bank of India was required to pay to the Russian Firm on production of the documents particularised in the letter of credit alongwith the drafts. One of the conditions of the letter of credit was that

25 per cent. of the amount should be paid on the presentation of the specified documents and the balance of 75 per cent. to be paid one year from the date of the first payment. The agreement entered into between the Bank of India and the Russian Firm under the letter of credit was "subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222". Article 3 of the brochure says that :

"An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and *bona fide* holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.

An irrevocable credit may be advised to a beneficiary through another bank without engagement on the part of that other bank (the advising bank), but when an issuing bank authorises another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will be duly fulfilled or, in the case of a credit available by negotiation of drafts, that the confirming bank will negotiate drafts without recourse to drawer.

Such undertakings can neither be modified nor cancelled without the agreement of all concerned."

Article 8 of the brochure says :

"In documentary credit operations all parties concerned deal in documents and not in goods.

Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorised to do so, binds the party giving the authorisation to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation....."

The only other Article in that brochure which is relevant for our present purpose is Article 9 which reads :

"Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon ; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and or omissions, solvency, performance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever."

On the strength of the aforementioned contract, the Russian Firm supplied all the machinery it undertook to supply by about the end of December, 1960, which were duly taken possession of by the Indian Firm and put to work at Farakka Barrage Project. They are still in the possession of the Indian Firm. After the machinery was used for sometime, the Indian Firm complained to the Russian Firm that the performance of the machinery supplied by it was not as efficient as represented at the time of entering into the contract and consequently it had incurred and continues to incur considerable loss. In that connection there was some correspondence between the Indian Firm and the Russian Firm. Thereafter the Indian Firm instituted a suit on the original side of the High Court of Madras seeking an injunction restraining the Russian Firm from realizing the amount payable under the letter of credit. During the pendency of that suit the parties arrived at an agreement on 14th August, 1966 at Delhi (which shall be hereinafter referred to as the Delhi agreement). The portion of that agreement which is relevant for our present purpose reads as follows :

"Tarapore and Co., Madras, agree to withdraw immediately the Court case filed by them against "Tractoro export" Moscow, in the Madras High Court.

2. Immediately on Tarapore withdrawing the case, V/O "Tractoro export agree to instruct the Bank for Foreign Trade of the USSR in Moscow, not to demand any further payment against L.C. established by Tarapore and Co., Madras for a period of six months from the due dates in the first instances. During this period both the parties shall do their best to reach an amicable settlement.

3. In case the settlement between the two parties is not completed within this period of six months V/O Tractoro export shall further extend the period of payment by further period of six months for the settlement to be completed.

4. Tarapore and Co., shall authorise their Bank to keep the unpaid portions L.C. valid for the extended period as stated above."

At this stage it may be mentioned that the Russian Firm had received from the Bank of India 25 per cent of the money payable under the letter of credit very soon after it supplied to the Indian Firm the machinery mentioned earlier. In pursuance of the aforementioned agreement the Indian Firm withdrew the suit. Thereafter there were attempts to settle the dispute. In the meantime the Indian Rupee was devalued. The contract between the Indian Firm and the Russian Firm contains the following terms :

"Payment for the delivered goods shall be made by the Buyers in India Rupee in accordance with the Trade Agreement between the USSR and India dated 10th June, 1963. All the prices, are stated in Indian rupee. One Indian Rupee is equal to 0.186621 grammes of pure gold. If the above gold content of Indian Rupee is changed the prices and the amount of this Contract in Indian Rupee shall be revalued accordingly on the date of changing the gold parity of the Indian Rupee."

This clause will be hereinafter referred to as the 'Gold Clause'. In view of that clause, the price fixed for machinery supplied stood revised. Consequently under the contract the Indian Firm had to pay to the Russian Firm an additional sum of about rupees twenty-six lacs. Accordingly the bankers of the Russian Firm called upon the Indian Firm to open an additional letter of credit for payment of the extra price payable under the contract. They also intimated the Indian Firm that the extension of time for the payment of the price of the machinery supplied, agreed to at Delhi will be given effect to only after the Indian Firm arrange for the additional letter of credit asked for. The Indian Firm objected to this demand as per its letter of 20th September, 1966. The relevant portion of that letter reads :

"We are rather surprised to see this, because, by our arrangement dated the 14th August, 1966, at New Delhi you had agreed to give further time for the payments on the withdrawal of the Madras High Court case. That was the only condition that was talked about and incorporated in our written agreement. If you will be good enough to refer to the agreement dated the 14th August, 1966, you will find that we were obliged to withdraw the Madras suit pending talks of settlement and immediately on our withdrawing this suit, you agreed to instruct your Bankers not to demand any further payment under the letter of credit. There is absolutely no reference in that agreement to our having to open any additional letter of credit in view of the devaluation of the Indian rupee..... We would therefore request you to immediately instruct your Bankers in Moscow to advise our Bankers regarding the extension of time for payment under the letter of credit without any reference to any additional letters of credit in view of devaluation..... Moreover, when the entire question is open for amicable settlement between us, it is not possible to determine what exactly will be amount payable and unless that amount is known, it is not possible to open additional letters of credit to give effect to the gold clause....."

On 1st November, 1966, the Russian Firm sent to the Indian Firm addendum No. 1 modifying the original contract in accordance with the gold clause. The last clause of that addendum recited that "all other terms and conditions are as stated in the above mentioned contract" (original contract). The Indian Firm objected to that addendum as well as to the demand for opening an additional letter of credit. In that connection the Russian Firm wrote a letter to the Indian Firm on 29th November, 1966. As considerable arguments were advanced on the basis of that letter we shall quote the relevant portion of that letter :

".....We confirm that you have signed with us the addendum No. 1 to our Contract No. 61/Tarapore—220/65 dated the 2nd February, 1965, at our request for the sole and specific purpose of satisfying our bankers. We confirm further that this addendum will not in any manner prejudice the arrangement we have come to in Delhi on the 14th August, 1966, and is without prejudice to your claims and points of controversy regarding which we shall have further discussions with a view to reach an amicable settlement.

Under this addendum, the company will extend the letter of credit for one year and accept the drafts for the difference in value of 57.5 per cent due to devaluation. The final amount payable will be in accordance with the settlement."

Thereafter the Russian Firm appears to have drawn drafts on the Indian firm for the excess amount payable under the gold clause. For one reason or the other, no settlement as contemplated by the Delhi agreement was reached. The Indian firm complained that the Russian Firm never made any serious attempt to resolve the dispute whereas the Russian Firm alleged that it found no substance in the complaint made by the Indian Firm as regards the machinery supplied. In the suit as brought, as well as in these appeals that controversy is not open for examination. Suffice it to say that the parties did not amicably settle the dispute in question. When the extended time granted under the Delhi agreement was about to come to a close, the Indian Firm instituted the suit from which these appeals have arisen. In that suit the only substantive relief asked for is that the Bank of India as well as the Russian Firm should be restrained from taking any further steps in pursuance of the letter of credit opened by the Indian Firm in favour of the Russian Firm. Therein temporary injunctions were asked for in the very terms in which the permanent injunctions were prayed for. At a subsequent stage a further injunction restraining the Russian Firm from enforcing its right under the gold clause was also prayed for. The Russian Firm opposed those applications but the trial Judge granted the temporary injunctions asked for. The Russian Firm took up the matter in appeal to the Appellate Bench of that High Court which reversed the order of the trial Judge by its Order dated 9th October, 1968, but it certified that they are fit cases for a appeal to this Court. When the applications in the appeals seeking interim orders came up for consideration by this Court the Russian Firm entered its *caveat*. It not only opposed the interim reliefs prayed for, it further challenged the validity of the certificate granted by the High Court on the ground that the orders appealed against are not 'final orders' within the meaning of Article 133 of the Constitution. Evidently as a matter of abundant caution, the Indian Firm had filed two separate applications seeking Special Leave to appeal against the orders of the Appellate Bench of the Madras High Court. After hearing the parties this Court revoked the certificates granted holding that the orders appealed against are not 'final orders' but at the same time granted Special Leave to the Indian Firm to appeal against the orders of the Madras High Court. Civil Appeals Nos. 2051 and 2052 of 1968 are appeals filed by the Indian Firm.

Before the Appellate Bench of the High Court of Madras, the Indian Firm had objected to the maintainability of the appeals filed by the Russian Firm on the ground that orders appealed against are not judgments within the meaning of clause 15 of the Letters Patent of the Madras High Court but that objection had been overruled by the Appellate Bench following the earlier decisions of that High Court. That contention was again raised in the appeals filed by the Indian Firm in this

Court. To obviate any difficulty the Russian Firm applied to this Court for Special Leave to appeal against the interim orders passed by the trial judge. We allowed those applications and consequently Civil Appeals Nos. 2305 and 2306 of 1968 came to be filed.

In view of the appeals filed by the Russian Firm in this Court against the interim orders made by the trial judge it is not necessary to decide whether the appeals filed by the Russian Firm before the Appellate Bench of the Madras High Court were maintainable? On that question, judicial opinion is sharply divided as could be seen from the decision of this Court in *Asrumati Debi v. Kumar Rupendra Deb, Rajkot and others*¹. Hence we shall confine our attention to the question whether the temporary injunctions issued by the trial judge are sustainable?

The scope of an irrevocable letter of credit is explained thus in Halsbury's Laws of England (Volume 34) paragraph 319 at page 185) :

"It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to accept drafts drawn upon it for the price of the goods, against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued; and as between the seller and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract thus created between the seller and the bank is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the bank's undertaking to the seller, which is absolute. Thus the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefore; and, conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of credit if the goods are defective."

Chalmers on "Bills of Exchange" explains the legal position in these words :

"The modern commercial credit serves to interpose between a buyer and seller a third person of un questioned solvency, almost invariably a banker of international repute; the banker on the instructions of the buyer issues the letter of credit and thereby undertakes to act as paymaster upon the seller performing the conditions set out in it. A letter of credit may be in any one of a number of specialised forms and contains the undertaking of the banker to honour all bills of exchange drawn thereunder. It can hardly be over-emphasised that the banker is not bound or entitled to honour such bills of exchange unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutinised with meticulous care, the maxim *de minimis non curat lex* cannot be invoked where payment is made by the letter of credit. If the seller has complied with the terms of the letter of credit, however, there is an absolute obligation upon the banker to pay irrespective of any disputes there may be between the buyer and the seller as to whether the goods are up to contract or not."

Similar are the views expressed in 'Practice and Law of Banking' by H.B. Sheldon "the Law of Banker's Commercial Credits" by H.C. Gutteridge "the law Relating to Commercial Letters of Credit" by A.G. Davis "the Law Relating to Bankers' Letters of Credit" by B.C. Mitra and in several other text books read to us by Mr. Mohan Kumaramangalam, learned Counsel for the Russian Firm. The legal position as set out above was not controverted by Mr. M.C. Setalvad, learned Counsel

1. (1953) S.C.J. 300 : (1953) 1 M.L.J. 710 : (1953) S.C.R. 1159.

for the Indian Firm. So far as the Bank of India is concerned it admitted its liability to honour the letter of credit and expressed its willingness to abide by its terms. It took the same position before the High Court.

The main grievance of the Indian Firm is that if the Russian Firm is allowed to take away the money secured to it by the letter of credit, it cannot effectively enforce its claim arising from the breach of the contract it complains of. It was urged on its behalf that the Russian Firm has no assets in this country and therefore and decree that it may be able to obtain cannot be executed. Therefore, it was contended that the trial Court was justified in issuing the impugned orders. The allegation that Russian Firm has no assets in this country was not made in the pleadings. That apart in the circumstances of this case that allegation has no relevance. An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade of this country. Except under very exceptional circumstances, the Courts should not interfere with that mechanism.

For our present purpose we shall assume without deciding that the allegations made by the Indian Firm are true. We shall further assume that the suit as brought is maintainable though Mr. Kumaramangalam seriously challenged its maintainability. But yet, in our judgment, the learned trial judge was not justified in law in granting the temporary injunctions appealed against. Ordinarily this Court does not interfere with interim orders. But herein legal principles of great importance affecting international trade are involved. If the orders impugned are allowed to stand they are bound to have their repercussion on our international trade.

We have earlier referred to several well known treaties on the subject. Now we shall proceed to consider the decided cases bearing on the question under consideration.

A case somewhat similar to the one before us came up for consideration before the Queens Bench Division in England in *Hamzeh Walas and Sons v. British Imex Industries Ltd.*¹. Therein the plaintiffs, a Jordanian firm contracted to purchase from the defendants, a British firm a large quantity of reinforced steel rods, to be delivered in two instalments. Payment was to be effected by opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each instalment. The letters of credit were duly opened and the first was realized by the defendants on the delivery of the first instalment. The plaintiffs complained that that instalment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Donovan, J., the trial judge refused the application. In appeal Jenkins, Sellers and Pearce L.JJ., confirmed the decision of the trial judge. In the course of his judgment Jenkins L.J., who spoke for the Court observed thus :

“We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vender of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this Court in the present case to interfere with that established practice.

There is this to be remembered, too. A vender of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, further more, to be observed that vendors are often reselling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice is—and I think it was followed by the defendants in this case—to

finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have the effect of "freezing," if I may use that expression, the sum in respect of which the letter of credit was opened."

In *Urquhart Lindsay and Co. Ltd. v. Eastern Bank Ltd.*¹, the King's Bench held that the refusal of the defendants bank to take and pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole and that the plaintiffs were entitled to damages arising from such a breach. It may be noted that in that case the price quoted in the invoices was objected to by the buyer and he had notified his objection to the bank. But under the terms of the letter of credit the bank was required to make payments on the basis of the invoices tendered by the seller. The Court held that if the buyers had an enforceable claim that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer.

Similar opinions have been expressed by the American Courts. The leading American case on the subject is *Dulien Steel Products Inc., of Washington v. Bankers Trust Co.*². The facts of that case were as follows :

The plaintiffs, Dulien Steel Products Inc., of Washington, contracted to sell steel scrap to the European Iron and Steel Community. The transaction was put through M/s. Marco Polo Group Project, Ltd., who were entitled to commission for arranging the transaction. For the payment of the commission to Marco Polo, plaintiffs procured an irrevocable letter of credit from Seattle First National Bank. As desired by Marco Polo this letter of credit was opened in favour of one Sica. The defendant-bankers confirmed that letter of credit. The credit stipulated for payment against (1) a receipt of Sica for the amount of the credit and (2) a notification of Seattle Bank to the defendants that the plaintiffs had negotiated documents evidencing the shipment of the goods. Sica tendered the stipulated receipt and a Seattle Bank informed the defendants that the Dulien had negotiated documentary drafts. Meanwhile after further negotiations between the plaintiffs and the vendees the price of the goods sold was reduced and consequently the commission payable to Marco Polo stood reduced but the defendant were not informed of this fact. Only after notifying the defendants about the negotiation of the drafts drawn under the contract of sale, the Seattle Bank informed the defendants about the changes underlying the transaction and asked them not to pay Sica the full amount of the credit. The defendants were also informed that Sica was merely a nominee of Marco Polo and has no rights of his own to the sum credit. Sica, however, claimed payment of the full amount of the credit. The defendants asked further instructions from Seattle Bank but despite Seattle Banks instructions decided to comply with Sica's request. After informing Seattle Bank of their intention, they paid Sica the full amount of the credit. Plaintiffs thereupon brought an action in the District Court of New York for the recovery of the moneys paid to Sica. The action was dismissed by the trial Court and that decision was affirmed by the Court of Appeals. That decision establishes the well known principle that the letter of credit is independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy.

A half hearted attempt was made on behalf of the India Firm to persuade us not to apply the principles noticed above as in these appeals we are dealing with a complaint of fraud. The facts pleaded in the plaint do not amount to a plea of fraud despite the assertions of the Indian Firm that the Russian Firm was guilty of fraud.

Evidently with a view to steer clear of the well established legal position Mr. Setalvad, learned Counsel for the Indian Firm urged that the letter of credit

1. (1922) 1 K.B. 318.

2. Federal Reporter 2nd Series, 298 p. 836.

was no more enforceable as the original contract stood modified as a result of the Delhi agreement and the subsequent correspondence between the parties. It was urged that according to the modified contract the Indian Firm is only liable to pay the price that may be settled between the buyer and the seller. This contention has not been taken either in the plaint or in the arguments before the trial judge or before the Appellate Bench. It is taken for the first time in this Court. This is not purely a legal contention. The contention in question bears on the intention of the parties who entered into the agreement. No one could have known the intention better than plaintiff who was a party to the contract. If there was such an intention, the plaintiff would have certainly pleaded the same. That apart, we are unable to accept the contention that either the Delhi agreement or the subsequent correspondence between the parties modified the original contract. The Delhi agreement merely provided that the parties will try and settle the dispute out of Court, if possible. Much was made of the letter written by the Russian Firm to the Indian Firm on 29th November, 1966, wherein as seen earlier it was stated :

“that the final amount payable will be in accordance with the settlement.”. This letter has to be read along with the other letters that passed between the parties. If so read, it is clear that the statement that the final payment will be made in accordance with the settlement is subject to the condition that the parties are able to arrive at a settlement. Otherwise the parties continue to be bound by the original contract subject to the extension of the time granted under the Delhi agreement for the payment of the price. As regards the additional payment demanded by the Russian Firm, there is no occasion for issuing any temporary injunction. If the Indian Firm does not comply with that demand the law will take its course. It is for that Firm to choose its course of action.

In the result we allow Civil Appeals Nos. 2305 and 2306 of 1968 with the costs of the appellant therein and set aside the temporary injunctions granted by the trial judge. The other appeals are dismissed with no order as to costs. The costs to be paid by the the Indian company.

V. M. K.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S.M. SIKRI, R.S. BACHAWAT AND K.S. HEGDE, JJ.

Bhagwan Das

.. Appellant*

v.

Paras Nath

.. Respondent.

Interpretation of Statutes—Act, a temporary measure remaining in the statute book for over 20 years—No guidelines to regulate the exercise of the powers of the District Magistrate—Commissioner to exercise his discretion in preference to the discretion exercised by the District Magistrate—State Government to exercise its powers in any way it pleases—Construction of the provisions according to the rules of construction of statutes resulting in anomalies—Court, if can fall back on the grammatical construction—U.P. (Temporary) Control of Rent and Eviction Act, 1947.

U.P. (Temporary) Control of Rent and Eviction Act, (III of 1947), sections 3 and 7 (f)—Interpretation—Landlord and tenant—Landlord desiring to evict his tenant on grounds other than (a) to (g) of section 3 (1) to obtain permission of the District Magistrate for instituting the suit—Order of the Commissioner on revision given finally subject to the order by the State Government—Landlord filing the suit after obtaining permission from the Commissioner, but State Government revoking the permission—Suit validly instituted, if ceases to be maintainable.

Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act, 1947, inter alia provided that subject to any order passed under sub-section (3), no suit

shall without the permission of the District Magistrate be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of the grounds (a) to (g).

Though it was intended to be a temporary measure when it was originally enacted, it has now remained in the statute book for over 20 years and there is no knowing how long the same will continue to be in force. Therefore it is but appropriate that the provisions of this Act should be clear and unambiguous. From sub-section (1) of section 3 it is not possible to find out the contents of the powers of the District Magistrate. No guidelines are laid down therein to regulate the exercise of the powers of the District Magistrate. It is not possible to find out from that provision under what circumstances the District Magistrate can grant the permission asked for and under what circumstances he can refuse the same. It is likely that different District Magistrates are exercising that power in different ways. One consideration may appeal to one District Magistrate and a totally different consideration may influence another District Magistrate. It would have been appropriate if the Legislature had defined the scope of the powers of the District Magistrate or at least laid down certain guide-lines for regulating his discretion. Sub-section (3) of section 3 says that if the Commissioner is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate, he may alter or reverse the order of the District Magistrate or make such other order as may be just and proper. It is not possible to find out on what basis the Commissioner can determine the correctness, legality or propriety of the order made by the District Magistrate. As no restrictions are placed on the powers of the District Magistrate in granting or refusing to grant the permission asked for under section 3 (1). Therefore the only thing the Commissioner can do is to exercise his discretion in preference to the discretion exercised by the District Magistrate. Now coming to the power conferred on the State Government under section 7 (f), it would be seen that it is a power of wide amplitude. It can be exercised by it in any way it pleases. No restriction either as to the time within which it can be exercised is placed on the State Government. Under these circumstances anomalies are inevitable. Therefore, in construing this Act, no useful purpose will be served by taking into consideration the hardship to the parties. In whatever way we may construe sections 3 and 7 (f) hardship to one party or the other is inevitable. Therefore we have to fall back on the grammatical construction of sub-section (1) of section 3 and leave out of consideration all other rules of construction for finding out the intention of the legislature.

Section 3 (1) does not restrict the landlord's right to evict his tenant on any of the grounds mentioned in clauses (a) to (g) of that sub-section. But if he wants to sue his tenant for eviction on any ground other than those mentioned in those clauses then he has to obtain the permission of the District Magistrate whose discretion is subject to any order passed under sub-section (3) of section 3 by the Commissioner. These are the only restrictions placed on the power of a landlord to institute a suit for eviction of his tenant. If a landlord files a suit for the eviction of his tenant without obtaining the permission of the District Magistrate that suit is not maintainable but if he files a suit after obtaining the permission of the District Magistrate and if the Commissioner revokes the permission granted by the District Magistrate in a properly instituted application under section 3 (2) then the suit instituted by him will be considered as having been filed without the permission of the District Magistrate because section 3 (1) in specific terms says that the permission given by the District Magistrate is subject to any order passed under sub-section (3). In other words the permission given by the District Magistrate does not acquire any finality until either the period fixed for filing an application under sub-section (2) of section 3 expires and no application under that section was filed within that time or if an application had been filed within that time, the same had been disposed of by the Commissioner. The permission to file a suit for eviction assumes finality under section 3 (1) once the Commissioner decides the revision petition pending before him. In fact sub-section (4) of sec-

tion 3 says that the order of the Commissioner is final. It is true that that order despite the fact that it is final is subject to any order passed by the State Government under section 7 (f). There is no provision in the Act providing that a suit validly instituted after getting the required permission under section 3 (1) ceases to be maintainable because of any order made by the State Government under section 7 (f). Similarly there is no provision in the Act invalidating a decree passed after the Act came into force in a validly instituted suit. A decree of a Court in a suit validly instituted is binding on the parties to the same. It is true that the finality or the force of a decree can be taken away by a statute, but the Court will not readily infer that a decree passed by a competent Court has become unenforceable unless it is shown that a provision of law has specifically or by necessary implication made that decree unenforceable. On an examination of the relevant provisions of the Act the conclusion is that when the Commissioner sets aside the order passed by the District Magistrate granting permission to file a suit for ejecting a tenant, the order of the Commissioner prevails. If the Commissioner cancels the permission granted by the District Magistrate there is no effective permission left and the suit instituted by the plaintiff without awaiting his decision must be treated as one filed without any valid permission by the District Magistrate. But a suit validly instituted after obtaining a permission as required by section 3 (1) does not cease to be maintainable even if the State Government revokes after the institution of the suit, the permission granted. If the State Government revokes the permission granted before the institution of the suit then there would be no valid permission to sue. In other words the State Government's power to revoke the permission granted under section 3 (1) gets exhausted once the suit is validly instituted.

Appeal by Special Leave from the Judgment and decree dated the 19th March, 1968 of the Allahabad High Court in Second Appeal No. 2296 of 1961.

J.P. Goyal and A.C. Ratnaparkhi, for Appellant.

G.B. Agarwala, Senior Advocate (*R. Mahalingier*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Hegde, J.—The question of law that arises for decision in this appeal by Special Leave is not free from difficulty. That question is, whether a decree for eviction obtained in a suit instituted after obtaining the permission of the Commissioner under sub-section (3) of section 3 of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 (to be hereinafter referred to as the Act) becomes unenforceable if the State Government acting under section 7 (f) of that Act revokes the permission granted by the Commissioner after the decree is passed?

The appellant was a tenant of the respondent in respect of a shop in Baluganji in Agra. On 2nd January, 1959, the respondent applied to the District Magistrate under section 3 (1) of the Act for permission to institute a suit against the appellant for evicting him from the shop in question. That application was rejected by the District Magistrate as per his order of 9th July, 1959. The respondent took up the matter in revision to the Commissioner under sub-section (2) of section 3. The Commissioner reversed the order of the District Magistrate and granted the permission asked for on 16th October, 1959. As against that order the appellant moved the State Government under section 7 (F) on 17th November, 1959. On 1st January, 1960, the respondent served on the appellant a notice under section 106 of the Transfer of Property Act. The appellant replied to that notice on 6th January, 1960. In that reply he informed the respondent that he had already moved the State Government to revoke the permission granted by the Commissioner. On 13th February, 1960 the respondent instituted suit No. 115 of 1960 in the Court of Munsiff, Agra seeking for the eviction of the appellant from the suit premises. The appellant filed his written statement in that case on 7th May, 1960. Therein again he took the plea that the permission granted by the Commissioner is not final as he had moved the Government to revoke the same. The suit was decreed by the learned munsif on 2nd November, 1960. The appellant went up in appeal as against that order to the civil Judge, Agra. On 27th January, 1961, the State

Government revoked the permission granted by the Commissioner during the pendency of the appeal. Relying on this order the Civil Judge of Agra allowed the appeal of the appellant on 9th February, 1961. As against that decision the respondent went up in second appeal to the High Court. The High Court allowed the second appeal on 19th March, 1968 following the Full Bench decision of that Court in *Bashi Ram v. Mantri Lal*.¹ This appeal is directed against that decision.

The Act was intended as a temporary measure as could be gathered from its title as well as the preamble. It is deemed to have come into force on the 1st day of October, 1946 though it was passed in 1947. Under the Act as originally stood, the decision of the District Magistrate under section 3 was neither appealable nor revisable. As per the amendments effected in 1952 a limited power of revision was conferred on the Commissioner. By the Amending Act XVII of 1954, the power conferred on the Commissioner was enlarged and section 7 (F) was incorporated in the Act which says that :

“ the State Government may call for the records of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in section 3.....and make such order as appears to it necessary for the ends of justice.”

The only sections in the Act Material for the purpose of this appeal are sections 3 and 7 (F). Section 3 reads thus :

“ *Restrictions on evictions.*—Subject to any order passed under sub-section (3), no suit shall without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of the following grounds :

(a) that the tenant is in arrears of rent for more than three months and has failed to pay the same to the landlord within one month of the service upon him of a notice of demand ;

(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the accommodation ;

(c) that the tenant has, without the permission in writing of the landlord made or permitted to be made any such construction as, in the opinion of the Court, has materially altered the accommodation or is likely substantially to diminish its value ;

(d) that the tenant has created a nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation, or which is likely to affect adversely and substantially the landlord's interest therein ;

(e) that the tenant has on or after the 1st day of October, 1946, sub-let the whole or any portion of the accommodation without the permission of the landlord ;

(f) that the tenant has renounced his character as such or denied the title of the landlord and the latter has not waived his right or condoned the conduct of the tenant ;

(g) that the tenant was allowed to occupy the accommodation as a part of his contract of employment under the landlord and his employment has been determined.

Explanation.—For the purposes of sub-section (e) lodging a person in a hotel or a lodging-house shall not be deemed to be sub-letting.

(2) Where any application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses the permission, the party aggrieved by his order may within 30 days from the date on which the order is communicated to him, apply to the Commissioner to revise the order.

(3) The Commissioner shall hear the application made under sub-section (2), as far as may be, within six weeks from the date of making it, and he may, if he is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him, alter or revise his order, or make such other order as may be just and proper.

(4) The order of the Commissioner under sub-section (3) shall, subject to any order passed by the State Government under section 7 (F) be final.

We have earlier quoted the relevant portion of section 7 (F).

Conflicting opinions were expressed by different Benches of the Allahabad High Court as to the scope of section 3, till the decision of the Full Bench in *Bashi Ram's case*¹. The Full Bench held that a decree obtained in a suit for eviction instituted after obtaining the requisite permission will not become unenforceable even if the State Government revoked, after the decree is passed, the permission granted, in exercise of its powers under section 7(F). Majority of the Judges in that case further held that once a suit is instituted after obtaining the permission of the District Magistrate, any further order made either by the Commissioner or the State Government cannot effect the course of that suit or the decree passed therein. Dwivedi, J., the other Judge did not express any opinion on that question but even according to him in the appeal filed against the decree, the appellate Court cannot receive in evidence the order made by the State Government which means that the decree cannot be reversed on the ground that the State Government had revoked the permission granted. The correctness of the Full Bench decision is challenged by the appellant in this appeal. In support of his interpretation of sections 3 and 7(F) he placed reliance on the decision of a Division Bench of the High Court of Allahabad in *Dr. S. L. Khoparji v. State Government*². He also sought support from the decision of a Single Judge of that Court in *Basant Lal Sah v. Bhagwan Prasad Sah*³. It is not necessary to refer to that various decisions of the Allahabad High Court on this question. Suffice it to say the in that Court there was serious cleavage of opinion on the question that we are considering in this appeal till the decision of the Full Bench in *Bashi Ram's case*¹. We were given to understand that Dhavan, J., had doubted the correctness of the decision of the Full Bench and had requested the Chief Justice to constitute a larger Bench to consider the correctness of the decision in *Bashi Ram's case*¹ but in view of the pendency of this appeal, the constitution of a larger bench was not considered necessary.

The contention of Mr. Goyal, the learned Counsel for the appellant was that the Act generally speaking, has restricted the right of the landlord to evict his tenant, to one or other of the grounds mentioned in clauses (a) to (g) of section 3 (1); but in order to meet any exceptional case, it is provided in section 3 (1) that a suit for eviction may be instituted on any ground other than those mentioned in clauses (a) to (g) if the permission of the District Magistrate is obtained; the order made by the District Magistrate is revisable both by the Commissioner as well as the State Government; the only order that is final is that made by the State Government. If a landlord chooses to institute a suit on the basis of the permission granted by the District Magistrate or the Commissioner without waiting for the decision of the State Government he takes the risk; if the State Government revokes the permission granted by the District Magistrate or the Commissioner then the suit must be deemed to have been instituted without permission and consequently not maintainable. Mr. Goyal urged that if the decision in *Bashi Ram's case*¹, is accepted as correct then so far as the tenant is concerned, generally speaking, he cannot invoke the powers of the State Government under section 7 (F) because immediately after the decision of the Commissioner, if the same is in his favour, the landlord is likely to institute a suit for eviction and thus nullify the power of the State Government under section 7 (F). He urged that as section 7 (F) empowers the State Government to revise the order made by the subordinate authorities whether the same is in favour of the landlord or the tenant we should not place an interpretation

1. I.L.R. (1965) 1 All. 545.
2. (1958) A.L.J. 724.

3. A.I.R. 1964 All. 210.

on section 3 which would affect the power of the State Government to do justice to the tenants for whose benefit the Act has been enacted.

On the other hand it was urged by Mr. C.B. Aggarwal, learned Counsel for the respondent that the landlord has a right to sue for the eviction of his tenant under the provisions of the Transfer of Property Act subject to the restrictions stipulated therein. That is a statutory right. The provisions contained in the Act to the extent the encroach upon the rights of the landlord either specifically or by necessary implication for the control the rights of the landlord. In other respects the landlord's rights under the Transfer of Property Act remain unaffected. According to him the only restriction placed on the landlord in the matter of instituting a suit for evictions on grounds other than those mentioned in clauses (a) to (g) in section 3 (1) is to obtain the prior permission of the District Magistrate subject to the order made under sub-section (3) of section 3 by the Commissioner; once a suit is validly instituted in accordance with those provisions, no order of the State Government can either interfere with the course of that suit or invalidate the decree obtained therein. He urged that if the position is as contended by the learned Counsel for the appellant, curious results are likely to follow. Section 7 (F) does not fix any period within which the State Government must act. It can exercise its power under that provision at any time it pleases—may be after 10 years or 20 years; the power conferred on the State Government is extremely wide as observed by this Court in *Shri Bhagwan and another v. Ram Chand and another*¹. Therefore it can revoke the permission granted after the decree for eviction is confirmed by the High Court or even the Supreme Court and thus make a mockery of the judicial process; this could not have been the intention of the Legislature. According to Mr. Aggarwal from the very scheme of the Act and from the very nature of the power conferred on the State Government, it cannot be exercised after a suit is instituted after complying with the requirements of sub-section (1) of section 3. His further contention was that on a proper construction of sub-section (1) of section 3, it would be seen that the suit instituted after obtaining the required permission being a validly instituted suit, its progress cannot be interrupted; the permission required under section 3 (1) is the permission of the District Magistrate subject to any order under section 3 (3) by the Commissioner; in other words the permission given by the District Magistrate is not final till affirmed by the Commissioner; till then it remains tentative; once the Commissioner affirms the same or grants the permission asked for it becomes final and thus amounts to a valid permission to sue; hence a suit filed on the basis of that permission is a validly instituted suit unless the permission granted was revoked by the State Government before the institution of the suit. Proceeding further he stated that it is true that the order of the Commissioner though final yet it is subject to any order that may be passed by the State Government; but section 3 (1), the provision dealing with the permission to file a suit for eviction does not refer to the order under section 7 (F); it only speaks of the permission granted by the District Magistrate subject to the order of the Commissioner and not further subject to any orders made by the State Government. In this connection he invited our attention to the fact that as against the order passed by the District Magistrate under sub-section (1) of section 3 a revision petition can be filed before the Commissioner within 30 days of that order and not thereafter. The Commissioner has not even the power to condone the delay in filing the revision petition. Further under sub-section (3) of section 3, the Commissioner is required to hear the application made under sub-section (2) of section 3, as far as may be, within six weeks from the date of making it. All these provisions indicate that the legislature was of the opinion that the proceedings under section 3 should be carried on expeditiously and the decision of the Commissioner should be considered as final. According to Mr. Aggarwal, the question of granting or refusing to grant the permission under section 3 are primarily to be dealt with only by the District Magistrate and the Commissioner. They are the only tribunals in the hierarchy of the tribunals constituted for that purpose. The power given to the Government under section 7 (F) is merely a supervisory power. That is why no

1. (1963) 3 S.C.R. 218 : (1966) 2 S.C.J. 295.

limitation is imposed on the exercise of that power either in the matter of time within which it should be exercised or the circumstances under which it can be exercised. Such a power according to him is a reserve power and therefore has to be exercised before the Court's jurisdiction is invoked. He particularly laid emphasis on the fact that sub-section (1) of section 3, the compliance of which is necessary before validly instituting the suit does not at all refer to an order under section 7 (F).

After examining the provisions of this Act, we are constrained to observe that the drafting of this Act leaves considerable room for improvement despite the fact that it was amended twice over. Though it was intended to be a temporary measure when it was originally enacted, it has now remained in the statute book for over 20 years and there is no knowing how long the same will continue to be in force. Therefore it is but appropriate that the provisions of this Act should be clear and unambiguous. From sub-section (1) of section 3 it is not possible to find out the contents of the powers of the District Magistrate. No guidelines are laid down therein to regulate the exercise of the powers of the District Magistrate. It is not possible to find out from that provision under what circumstances the District Magistrate can grant the permission asked for and under what circumstances he can refuse the same. It is likely that different District Magistrates are exercising that power in different ways. One consideration may appeal to one District Magistrate and a totally different consideration may influence another District Magistrate. It would have been appropriate if the legislature had defined the scope of the powers of the District Magistrate or at least laid down certain guide-lines for regulating his discretion. Sub-section (3) of section 3 says that if the Commissioner is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate, he may alter or reverse the order of the District Magistrate or make such other order as may be just and proper. It is not possible to find out on what basis the Commissioner can determine the correctness, legality or propriety of the order made by the District Magistrate. As seen earlier, no restrictions are placed on the powers of the District Magistrate in granting or refusing to grant the permission asked for under section 3 (1). Therefore the only thing the Commissioner can do is to exercise his discretion in preference to the discretion exercised by the District Magistrate. Now coming to the power conferred on the State Government under section 7 (F), it would be seen that it is a power of wide amplitude. It can be exercised by it in any way it pleases. No restriction either as to the time within which it can be exercised or as to the circumstances under which it can be exercised is placed on the State Government. Under these circumstances the anomalies pointed out by Mr. Goyal as well as by Mr. Aggarwal are inevitable. Therefore in construing this Act, no useful purpose will be served by taking into consideration the hardship to the parties. In whatever way we may construe sections 3 and 7 (F), hardship to one party or the other is inevitable. Neither Counsel suggested to us any interpretation which could steer clear of the anomalies pointed out at the Bar. Therefore we have to fall back on the grammatical construction of sub-section (1) of section 3 and leave out of consideration all other rules of construction for finding out the intention of the legislature. Section 3 (1) does not restrict the landlord's right to evict his tenant on any of the grounds mentioned in clauses (a) to (g) of that sub-section. But if he wants to sue his tenant for eviction on any ground other than those mentioned in those clauses then he has to obtain the permission of the District Magistrate whose discretion is subject to any order passed under sub-section (3) of section 3 by the Commissioner. These are the only restrictions placed on the power of a landlord to institute a suit for eviction of his tenant. If a landlord files a suit for the eviction of his tenant without obtaining the permission of the District Magistrate that suit is not maintainable but if he files a suit after obtaining the permission of the District Magistrate and if the Commissioner revokes the permission granted by the District Magistrate in a properly instituted application under section 3 (2) then the suit instituted by him will be considered as having been filed without the permission of the District Magistrate because section 3 (1) in specific terms says that the permission given by the District Magistrate is subject to any order passed under sub-section (3). In other words the permission given by the District Magistrate does not acquire

any finality until either the period fixed for filing an application under sub-section (2) of section 3 expires and no application under that section was filed within that time or if an application had been filed within that time, the same had been disposed of by the Commissioner. The permission to file a suit for eviction assumes finality under section 3 (1) once the Commissioner decides the revision petition pending before him. In fact sub-section (4) of section 3 says that the order of the Commissioner is final. It is true that that order despite the fact that it is final is subject to any order passed by the State Government under section 7 (F). There is no provision in the Act providing that a suit validly instituted after getting the required permission under section 3 (1) ceases to be maintainable because of any order made by the State Government under section 7 (F). Similarly there is no provision in the Act invalidating a decree passed after the Act came into force in a validly instituted suit. Section 14 provides :—

“no decree for the eviction of a tenant from any accommodation passed before the date of commencement of this Act shall, in so far as it relates to the eviction of such tenant, be executed against him as long as this Act remains in force except on any of the grounds mentioned in section 3 :

Provided that the tenant agrees to pay to the landlord “reasonable annual rent” or the rent payable by him before the passing of the decree whichever is higher.”

This provision applies only to decrees passed before the date of the commencement of the Act. A decree of a Court in a suit validly instituted is binding on the parties to the same. It is true that the finality or the force of a decree can be taken away by a statute, but the Court will not readily infer that a decree passed by a competent Court has become unenforceable unless it is shown that a provision of law has specifically or by necessary implication made that decree unenforceable. No such provision was brought to our notice. On an examination of the relevant provisions of the Act our conclusion is that when the Commissioner sets aside the order passed by the District Magistrate granting permission to file a suit for ejecting a tenant, the order of the Commissioner prevails. If he cancels the permission granted by the District Magistrate there is no effective permission left and the suit instituted by the plaintiff without awaiting his decision must be treated as one filed without any valid permission by the District Magistrate. To this extent we are in agreement with the decision of Upadhaya, J., in *Munsi Lal and another v. Shambhu Nath Ram Kishan*¹. From this it follows that the Full Bench decision in *Bashi Ram's case*², to the extent it held that a suit filed by the land'ord after obtaining the permission of the District Magistrate cannot become infructuous even if the Commissioner revokes the permission, is incorrect. But we agree with the Full Bench that a suit validly instituted after obtaining a permission as required by section 3 (1) does not cease to be maintainable even if the State Government revokes after the institution of the suit, the permission granted. If the State Government revokes the permission granted before the institution of the Suit then there would be no valid permission to sue. In other words the State Government's power to revoke the permission granted under section 3 (1) gets exhausted once the suit is validly instituted.

For the reasons mentioned above, this appeal fails and the same is dismissed. But in the circumstances of the case, we make no order as to costs.

V.M.K.

Appeal dismissed.

1. (1958) A.L.J. 584.

S C J—84

2. I.L.R. (1965) 1 All 545.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S.M. SIKRI, R.S. BAGHAWAT AND K.S. HEGDE, JJ.

The Union of India and others

.. Appellants*

v.

M/s. Rai Bahadur Shreeram Durgaprasad (P.) Ltd. and others. .. Respondents.

The Orissa Minerals Development Co. Ltd. & others .. Interveners.

Foreign Exchange Regulation Act, (VII of 1947), sections 12 (1), 12 (2), 22, 23 and 23 (A) and Central Government Notification dated 4th August, 1947—Interpretation—Export of goods, no one to export any goods from India without furnishing the declaration under section 12 (1)—Restrictions imposed by 12 (1) deemed to have been imposed under section 19 of the Sea Customs Act, 1878—Section 19 similar to section 12 (1) of the Foreign Exchange Regulations Act, 1947—Informations called for in prescribed form, if amount to restrictions under section 12 (1)—Under invoicing of consignments, a contravention of section 12 (2) and Rule (5) and not a contravention of section 12 (1).

Foreign Exchange Regulation Act, (VII of 1947), sections 12 (1), 12 (5) and 12 (6)—Interpretation—Export of goods, value thereof, primarily with by the Reserve Bank and not by the Customs authorities—Customs authorities only concerned to see that no goods are exported without furnishing the declaration under section 12 (1).

The respondents are exporters of Manganese Ore. It is said that they had exported large quantities of Manganese Ore after ostensibly complying with the formalities of law but in reality they had under-invoiced the various consignments sent by them and further that they had failed to repatriate foreign exchange of the value of about three crores of rupees obtained by them as the price of the Manganese Ore exported. It is said that by so doing they had contravened section 12 (1) of the Foreign Exchange Regulation Act, 1947 read with section 23 (A) of that Act and sections 19 and 167 (8) of the Sea Customs Act.

The only question for decision is whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of these proceedings, the respondents can be held to have contravened section 12 (1).

Held by majority with Sikri, J. dissenting: Section 22 of the Act provides that no person when making an application or declaration to any authority or person for any purpose under the Act shall give any information or make any statement which he knows or has reasonable cause to believe to be false or not true, in any material particular. Section 23 prescribes that if any person contravenes the provisions of section 12 or of any rule, direction or order made thereunder he shall (a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner provided in the Act or (b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both. In view of these provisions it is clear that if the information given by the respondents in the aforementioned declarations was false to the knowledge of those who made those declarations. The contravention of the above provisions is punishable under section 23. Section 23 (A) as it stood at the relevant time provided that : without prejudice to the provisions of section 23 or any other provision contained in this Act, the restrictions imposed by sub-section (1) of section 12 shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878 and all provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted. If the allegations mentioned in the show cause notices come within the scope of a section 23 (A) then it necessarily follows that the will be governed by the provisions in section 19 and section 167 (8) of the Sea Customs Act, 1878. Section 19 of the Sea Customs Act provides that the Central Govern-

ment may from time to time by notification in the Official Gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontiers as defined by the Central Government. This section is similar to section 12 (1) of the Act. Section 167 (8) provides for punishments for offences under that Act.

Before a case can be held to fall within the scope of section 23-A it must be shown that there has been a contravention of the restrictions imposed by section 12 (1). Therefore we have to find out what those restrictions are? The only restriction placed by section 12 (1) read with the Central Government Notification dated 4th August, 1947, is that no one should export any goods from this country without furnishing the declaration mentioned in section 12 (1). Admittedly the stipulated declarations in the prescribed forms have been furnished. The evidence specified have also been given. The declarations given do satisfy the requirements of section 12 (1) though they do not correctly furnish all the informations asked for in the form. Such declarations cannot be considered as *non est*. The informations called for in the prescribed form cannot be considered as restrictions imposed by section 12 (1). They are merely informations called for for the proper exercise of the powers under the Act. Many of them do not relate to the restrictions imposed by section 12 (1). Neither section 12 (1) nor any other provision in the Act empower the rule-making authority to add to the restrictions imposed by section 12 (1). For finding out the restrictions imposed by section 12 (1) we have only to look to that section. The requirement of that section is satisfied if the stipulated declaration supported by the evidence prescribed or specified is furnished. The contravention complained of in this case is really the contravention of section 12 (2) and rule 5. The former is punishable under section 23 and the latter under section 23 read with section 22. The main purpose of section 12 (1) is to get a declaration from the exporter that he has either brought or will bring back the amount representing the full export value of the goods exported. There are other provisions in the Act to deal with other situations.

There are two facets in every export, one relating to the goods exported and the other relating to the foreign exchange earned as a result of the export. Broadly speaking the former aspect is dealt with by the Customs authorities and the latter either by the Reserve Bank or by the Director of Enforcement. The price of goods exported has to be mentioned in the invoice. But the Reserve Bank has power to examine whether the price mentioned in the invoices correct. Section 12 (5) provides that where in relation to any goods exported the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods. Sub-section (6) of section 12 says that for the purpose of ensuring compliance with the provisions of that section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods have been or will within the prescribed period by paid in the prescribed manner. These provisions go to indicate that so far as the value of the goods exported is concerned the matter is left primarily in the hands of the Reserve Bank, and the Customs Authorities are not burdened with that work. This aspect becomes relevant in ascertaining the true scope of section 12 (1). If we bear in mind the scheme of the Act, it is clear that so far as the Customs authorities are concerned all that they have to see is that no goods are exported without furnishing the declaration prescribed under section 12 (1). Once that stage is passed the rest of the matter is left in the hands of the Reserve Bank and the Director of Enforcement.

Per *Sikri, J.*—Section 12 (1) and the notification dated 4th August, 1947 made under it, impose a conditional prohibition. The section confers a power on an exporter to lift the bar by a unilateral declaration. When such a power is conferred on an exporter by a statute, good faith on his part must at least be implied and be a condition pre-requisite. This construction is necessary in order to prevent abuse of the power given by the Act. If the exporter makes a deliberately false declaration he controvenes section 12 (1) because he has not made the statutory declaration in good faith. It is not necessary to say that the declaration becomes a nullity because the breach of good faith, a condition pre-requisite, is itself a contravention of the conditional prohibition or restriction, within section 167 (8) of the Sea Customs Act read with section 23-A and section 12 (1) of the Exchange Act. Clerical mistakes and mistakes made *bona fide* even in respect of material particulars are not within the mischief of section 12 (1), but a deliberate falsehood and a deliberate evasion of the provisions of section 12 (1) come within section 12 (1). Otherwise the ambit of section 12 (1), read with section 23-A, would be narrowed to the point of extinction. An exporter and persons concerned in the export could with impunity give a deliberately false declaration but in apparent compliance with section 12 (1), and deprive this country of foreign exchange. An interpretation which will make a mockery of the section cannot be given. But what about persons concerned in the illegal export? It is the persons concerned in the export which in most cases enable the exporter to successfully evade the provisions of the Exchange Act. These persons are taken care of only under the Customs Act. If they are covered by section 167 (8), there is no reason to exclude the exporter himself. It is not unusual to make persons liable both to penalties under the Sea Customs Act and the Exchange Act. It is indeed conceded that if no declaration is given under section 12 (1) and the goods are exported, the exporter and the persons concerned in the export would be liable to be proceeded both under section 167 (8) of the Sea Customs Act and Exchange Control Act. There can be no distinction between such exporter and an exporter who gives a deliberately false declaration for the purpose of the applicability of section 167 (8) of the Sea Customs Act. Section 23-A read with section 12 (1) calls in the aid of Customs authorities to achieve the same object, but ropes in alongwith the exporter the persons concerned in the prohibited export.

Appeals from the Judgment and Order dated the 20th September, 1967 of the Madras High Court in Writ Appeals Nos. 247 to 251 of 1966.†

G.K. Daphlary, Attorney-General for India, *Niren De*, Solicitor-General of India, and *N. S. Bindra* and *Mohan Kumaramangalam*, Senior Advocates (*R.H. Dhebar, A.S. Nambiar* and *S.P. Nayar*, Advocates with them) for Appellants (In C.As. Nos. 45 and 47 to 49 of 1968).

Niren De, Solicitor-General of India, and *Mohan Kumaramangalam* and *N.S. Bindra*, Senior Advocates, (*R.H. Dhebar, A.S. Nambiar* and *S.P. Nayar*, Advocates, with them) for Appellants (In C.A. No. 46 of 1968).

A.K. Sen, Senior Advocate, (*Soli Sorabji, S.R. Vakil, B.D. Barucha, G. L. Sanghi* and *S.K. Dholakia*, Advocates and *M/s. J.B. Dadachanji & Co.*, Advocates with him) for Respondents (In C.A. No. 45 of 1968).

N.A. Palkhivala, Senior Advocate, (*Soli Sorabji, D.N. Misra, S.R. Vakil* and *B.D. Barucha*, Advocates and *M/s. J. B. Dadachanji & Co.*, Advocates, with him) for Respondent (In C.As. Nos. 46 and 49 of 1968).

G.L. Sanghi, S.R. Vakil and *B.D. Barucha*, Advocates, and *M/s. J. B. Dadachanji & Co.*, Advocates for Respondents (In C.A. No. 47 of 1968) and Respondent (In C.A. No. 48 of 1968).

N.A. Palkhivala, Senior Advocate (*P.P. Ginzewala, D. N. Mukherjee* and *Ajit Ghoshdury*, Advocates with him for Interveners Nos. 1 to 4.

A.K. Sen, Senior Advocate (*S.D. Khetri, Avadh Behari and R.N. Bajoria*, Advocates with him), for Intervener No. 5.

N.A. Palkhivala, Senior Advocate (*D.N. Gupta*, Advocate, with him), for Intervener No. 6.

N.A. Palkhivala, Senior Advocate (*A.K. Basu S.C. Mitter and I.N. Shrooff*, Advocates, with him) for Intervener No. 7.

M.G. Chagla, Senior Advocate (*D.N. Gupta*, Advocate, with him), for Intervener No. 8.

M.G. Setalvad, Senior Advocate, *M.K. Banerjee*, Advocate and *M/s. J.B. Dadachanji & Co.*, Advocates, with him), for Intervener No. 9.

The Court delivered the following judgments

Sikri, J.—These five appeals by certificate are directed against the judgment of the High Court of Madras whereby the High Court accepted the Writ Appeals against the judgment of Kailasam, J., in Writ Petitions Nos. 1592, 1593, 1594 and 1601 of 1966 and 3948 of 1965, and directed the issue of writs of prohibition to the Union of India, the Collector of Customs, Madras, and the Deputy Collector of Customs, Visakhapatnam, appellants before us, prohibiting them from taking any action in pursuance of certain show-cause notice issued by the Deputy Collector Customs, Visakhapatnam. Common questions of law are involved in these appeals and it would suffice if I give facts in Writ Petition No. 1592 of 1966 out of which Civil Appeal No. 45 of 1968 arises.

The relevant facts in that writ petition, for appreciating the points raised before us, are as follows : On 17th February, 1965, the Deputy Collector of Customs, Visakhapatnam, issued memorandum No. S/21/14/65 to M/s. Rai Bhadur Seth Shreeram Durgaprasad (Private) Ltd., Tumsar, and five others, hereinafter referred to as the Shippers. In this memorandum, in brief, it was stated that the Shippers had entered into a formal contract on 13th October, 1965, with M/s. Inter Continental Ores Supply Corporation, New York, for the Shipment of 20,000 tons of Indian Manganese Ore of the grade of 43 per cent Mn., from the port of Visakhapatnam at a price of \$0.67 per unit of Manganese per dry long ton, f.o.b. Visakhapatnam Bombay. The Shippers exported from the port of Visakhapatnam 3,300 tons of Indian Manganese per S.S. 'ALPHEM' under the cover of Shipping Bill No. 187 dated 20th March, 1957, declaring therein that the export was being made in pursuance of the aforesaid contract. A G.R.I. form was attached. It was stated that a certain note-book which had been seized earlier in August, 1963 disclosed that a sum of \$25298.24 was received on 21st April, 1957, from INOSCO, i.e., Intercontinental Ores Supply Corporation, New York, the consignee of the subject goods, the amount having been credited to an account in the name of Gangadhar Narsinghdas Agrawal with the Trust Co., of North America, 115, Broadway, New York. It was further alleged in the memorandum that the Shippers had derived financial benefits in respect of the subject export over and above those revealed to the Customs Authorities and/or other concerned authorities and the information about them was deliberately suppressed. It was further alleged that this constituted a contravention of section 12 (1) of the Foreign Exchange Regulation Act, 1947, read with Notification No. 12 (17)-F. 1/47 dated 4th August, 1947, as amended issued thereunder and the Foreign Exchange Regulation Rules, 1952.

I may mention that by this notification the Central Government had prohibited

“the export otherwise than by post of any goods either directly or indirectly to any place outside India other than any of the countries or territories in the Schedule annexed to this order unless a declaration supported by such evidence as may be prescribed is furnished by the export to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner.”

According to the Deputy Collector Customs, the goods have been thus exported in contravention of the restrictions and prohibitions imposed under section 19 of the Sea Customs Act, 1878, read with section 12 (1) and the Notification No. 12 (17)-F. 1/47 dated 4th August, 1947, issued thereunder, and section 23-A of the Foreign Exchange Regulation Act, 1947, which exportation constituted an offence liable to be punished under section 167 (8) of this Sea Customs Act, 1878. Accordingly, the parties concerned were called upon to explain the matter and show cause in writing to the Collector of Customs, Madras, why a penalty should not be imposed on them him under section 167 (8) of the Sea Customs Act, 1878.

It appears that a number of such memoranda were issued in respect of diverse shipments. Thereupon five petitions were filed in the High Court at Madras. In Writ Petition No. 1592 of 1966 it was alleged that 125 show cause notices had been issued to the petitioners on various dates and it was prayed that a writ of prohibition or other appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the respondents from taking any action in pursuance of the said showcause memos. may be issued.

Various allegations were made but I need only mention the following allegations. It was submitted that the petitioners had complied with the statutory provisions inasmuch as a declaration in statutory form had been furnished to the prescribed authority, to wit the Collector of Customs, and the Collector of Customs, having passed the consignments for shipment, had no further right or jurisdiction to take proceedings relating to the consignments in question. It was contended that if a declaration is found to be false, it did not mean that there was a breach of the provisions of section 12 (1).

In reply it was contended that what was required under section 12 (1) of the Foreign Exchange Regulation Act and the Rules was not any value but the actual amount representing the full export value, and a mere declaration of any value would not be sufficient compliance with the provisions of section 12 (1) of the Foreign Exchange Act.

The learned Single Judge, Kailasam, J., dismissed the petitions. Various points were urged but on the point addressed to us he held that the declaration to be given by the exporters meant not only that the value of the goods will be paid in the prescribed manner but also that the full export value of the goods given is the correct value.

I may mention that before the Division Bench the case of the Revenue was classified in an affidavit and we may set out para 5 thereof :

"Since the Court has now directed the respondents to file a supplemental affidavit clarifying the stand taken by the department I state respectfully that the stand taken by the department both in the show cause memo. and here is that the essence of the offence committed by the appellants is that in the declaration required under section 12 (1) of the Foreign Exchange Regulation Act, they have deliberately given also particulars supported by false evidence. By giving this fraudulent declaration, they have secured the export of their goods. This fraud vitiates the declaration itself, thereby making the export one in violation of the prohibition contained in section 12 (1) of the Foreign Exchange Regulation Act."

It is not necessary to set out the *modus operandi* adopted by the petitioners but I may mention that it was contended that a scheme was entered into prior to the actual export and the goods were under-valued deliberately and the Department was induced to accept their declarations by means of false evidence and fraudulent suppression of facts. It is suggested that by this method a sum of Rs. 3,20,00,000 had been suppressed and there has been a failure to repatriate a corresponding amount of foreign exchange which had been earned surreptitiously. It was further stated that this scheme was adopted for all the shipments covered by the show cause notices, and also for many other shipment in respect of which show cause notices yet remain to be issued.

The Division Bench on appeal came to the conclusion that as the declarations were made under section 12 (1) and as they were scrutinised by the authorities it is not possible to contend that these goods were either exported or attempted to be exported in violation of the prohibitions or restrictions imposed by law and are, therefore, liable to be confiscated under section 167 (8) of the Sea Customs Act. The Division Bench further held that the alleged fraud on the part of the petitioners did not make any difference. According to the Division Bench 'if the petitioners had misled the authorities by false representations or failed thereby to repatriate foreign exchange, by virtue of his obligation under section 12 (2), these are different offences for which separate and specific penalties can be imposed.'

The relevant statutory provisions at the time of exportation were as follows:

" *The Foreign Exchange Regulation Act, 1947.*

section 12. (1)—The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place or specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods have been, or will within the prescribed period be paid in the prescribed manner.

(2) Where any export of goods have been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that,

(a) the sale of goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid :

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

(3) Where in relation to any such goods the said period has expired and the goods have not been sold and payment therefor has not been made as aforesaid, the Reserve Bank may give to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be expedient for the purpose of securing the sale of the goods and payment therefor as aforesaid and without prejudice to the generality of the foregoing provisions, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.

(4) Where any goods are assigned in accordance with sub-section (3), the Central Government shall pay to the person assigning them such sum in consideration of the net sum recovered by or on behalf of the Central Government in respect of the goods as may be determined by the Central Government.

(5) Where in relation to any such goods the value as stated in the invoice is less than the amount which is the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods.

(6) For the purpose of ensuring compliance with the provisions of this section and any order or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods has been, or will within the prescribed period be, paid in the prescribed manner.

Section 22.—No person shall, when complying with any order or direction under section 19 or with any requirement under section 19-B or when making any application or declaration to any authority or person for any purpose under this Act, give any information or make any statement which he knows or has reasonable cause to believe to be false, or not true, in any material particulars.

Section 23.—(1) If any person contravenes the provisions of section 4, section 5 section 9 or sub-section (2) of section 12 or of any rule, direction or order made thereunder, he shall—

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1-A) Whoever contravenes—

(a) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and section 19, shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(b) any direction or order made under section 19 shall, upon conviction by a Court, be punishable with fine which may extend to two thousand rupees.

(1-B) Any Court trying a contravention under sub-section (1) or sub-section (1-A) and the authority adjudging any contravention under clause (a) of sub-section (1) may, if it thinks fit, and in addition to any sentence or penalty which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or any other money or property, in respect of which the contravention has taken place, shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation.—For the purpose of this sub-section, property in respect of which contravention has taken place shall include deposits in a bank, where the said property is converted into such deposits.

(2) Notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898, it shall be lawful for any Magistrate of the first class, specially empowered in this behalf by the State Government, and for any Presidency Magistrate to pass a sentence of fine exceeding two thousand rupees on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance—

(a) of any offence punishable under sub-section (1) except upon complaint in writing made by the Director of Enforcement, or

(b) of any offence punishable under sub-section (1-A) of this section or under section 54 of the Indian Income-tax Act, 1922, as applied by section 19 of this Act, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint, shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

(4) Nothing in the first proviso to section 188 of the Code of Criminal Procedure, 1898, shall apply to any offence punishable under this section.

Section 23-A—Without prejudice to any provisions of section 23 or to any other provision contained in this Act, the restrictions imposed by sub-sections (1) and (2) of section 8, sub-section (1) of section 12 and clause (a) of sub-section (1) of section 13 shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1879, and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted."

" *The Sea Customs Act, 1878*

167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :—

Offences	Sections of this Act to which offence has reference	Penalties
1	2	3
<p>8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction; or</p> <p>if any attempt be made so to import or export any such goods; or</p> <p>if any such goods be found in any package produced to any officer of Customs as containing no such goods; or</p> <p>if any such goods, or any dutiable goods, be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India; or</p> <p>if any goods, the exportation of which is prohibited or restricted as aforesaid, be</p>	18 & 19	<p>such goods shall be liable to confiscation; and</p> <p>any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.</p>

brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.

"Foreign Exchange Regulation Rules, 1952.

3. *Form of declaration.*—(1) A declaration under section 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may by notification in the Gazette of India specify as appropriate to the requirements of a case.

(2) Declarations shall be executed in sets of such number as indicated on the forms.

4. *Authority to whom declaration to be furnished.*—(1) The original of the declaration shall be furnished to the Collector of Customs; provided that when export is by post, the original of the declaration shall be furnished to the postal authorities.

(2) Copies of the declaration shall be submitted to the authority and in the manner specified on forms.

(3) The documents pertaining to every export passed by the Customs shall within 21 days from the date of the export, be submitted to the authorised dealer mentioned on the relevant declaration form, unless the Reserve Bank, in its discretion, authorises otherwise.

5. *Evidence in support of declaration.*—(1) The Reserve Bank or subject to such directions, if any, as may be given by the Reserve Bank, the Collector of Customs or the postal authorities, may, to satisfy themselves of due compliance with section 12 of the Act, require such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India, or has a place of business in India.

(2) The Reserve Bank, or subject to such directions, if any, as may be given by the Reserve Bank, the Collector of Customs, or the Postal authorities may requires any exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them.

(i)

(ii) that the invoice value stated in the declaration is the full value of the goods; and (iii) that the amount representing the full export value of the goods has been or will be paid to the exporter. Explanation....."

The points which have emerged from the discussion at the Bar and which require determination may be formulated thus:

(1) What is the meaning of the expression "restrictions imposed by sub-section (1) of section 12" occurring in section 23-A of the Exchange Act? Can other sections of the Exchange Act be looked at for determining the ambit of the restrictions imposed by section 12 (1)? Do restrictions imposed under the Rules made under the Exchange Act and relating to section 12 (1) come within the meaning of this expression?

(2) What is the true meaning of the words

"a declaration supported by such evidence as may be prescribed or so specified is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner"?

Is it necessary that the declaration shall be made honestly or in good faith? Should it disclose the true export value? Is it a breach of the sub-

section if a declaration is made honestly but happens to show incorrect export value to a small but not material extent? Does not a deliberately false declaration contravene the provisions of section 12 (1)?

(3) If an action is a contravention of section 12 (1) and other provisions of the Exchange Act, e.g., sections 22, 23, 12 (2), 12 (3) and 12 (5), was it the intention that it should be treated as a contravention of section 12 (1)?

Before dealing with point (1) mentioned above, a few preliminary observations may be made. I have to construe an Act which was enacted in the interest of the national economy. A deliberate large-scale contravention of its provisions would affect the interests of every man, woman and child in the country. Such an Act, I apprehend, should be construed so as to make it workable, it should, however, receive a fair construction, doing no violence to the language employed by the Legislature. It was said that if two constructions are possible the one that is in favour of the subject should be accepted. It is not necessary to pronounce on this proposition for I have come to the conclusion that there is one true construction of section 12 (1). But I should not be taken to be assenting to this proposition in so far as it is applicable to an enactment like the Exchange Act, for no subject has a right to sabotage the national economy.

Coming to the first point, I find that the following words of Lord Blackburn express my views as to how the construction of section 23-A should be approached. He was dealing with a case where a single section of an Act of Parliament has been introduced into another Act. He said in *The Mayor of Portsmouth v. Charles Smith*¹ :

"When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by the way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to."

It seems to me that this is the correct way of looking at section 23-A of the Exchange Act for another reason. The restrictions imposed by section 12 (1) cannot be different for the purpose of the Exchange Act from that for the purposes of section 167 (8) of the Sea Customs Act, for a breach of section 12 (1) may also be punishable under the Exchange Act. In other words, the same contravention may attract penalties under the Sea Customs Act as well as the Exchange Act, and it would be incongruous to hold that the restrictions imposed by a section are different for different Acts.

Then am I entitled to take into account the restrictions imposed by the Rules made under section 27 of the Exchange Act? It seems to me that rules not referable to section 12 (1) cannot be taken into account, but any restrictions imposed by rules referable to section 12 (1) must be treated as restrictions imposed by section 12 (1). Section 12 (1) itself contemplates rules being made on three points, i.e., (1) the evidence which is to support the declaration, (2) the authority to which the declaration is to be furnished; and (3) manner of payment. It was said that the words "by section 12 (1)" exclude the restrictions made under the Rules. But though in some contexts and scheme of an Act this proposition may be true, the general rule is as stated by Lord Alverstone, C.J., in *Wellingdale v. Norris*,² as follows :

"If it be said that a regulation is not a provision of an Act, I am of opinion that *Rex v. Walker*³, is an authority against that proposition. I should certainly

1. L.R. (1895) 10 A.C. 364, 371.
2. (1909) 1 K.B. 57, 64.

3. (1875) L.R. 10 Q.B. 355.

have been prepared to hold apart from authority that, where a statute enable an authority to make regulations, a regulation made under the Act, becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done."

These observations were approved by the House of Lords in *Wicks v. Director of Public Prosecution*¹, thus:

"There is, of course, no doubt that, when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act, i.e., which is *intra vires* of the regulation making authority, should be regarded as though it were itself an enactment. As the Court of Criminal Appeal has pointed out in its judgment, that was decided by the Divisional Court in *Willingdale v. Norris*², and it appears to me that that decision is perfectly correct. Consequently, the charge against the appellant here was, in effect, that he had committed crimes defined or contained in the Act of Parliament."

The Court of Criminal Appeals has stated in *R. v. Wicks*³, as follows:

"The first observation which the Court would make is that they are in complete agreement with the decision of the Divisional Court in *Willingdale v. Norris*,² that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done. It is, therefore, clear that the regulations must be read as though they were contained in the Act itself. They derive their efficacy solely from the Act and accordingly expire with the Act, but it may be that the Legislature has provided that some restrictions or consequences shall remain effective notwithstanding the expiration of the Act."

In a recent case, *Rathbone v. Eundock*⁴, the Divisional Court following these cases held that regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955, was for the purpose of obedience or disobedience a provision of the Road Traffic Act, 1930.

In *Dr. Indramani Pyarelal Gupta v. W. R. Nathu and others*⁵, this Court was concerned, *inter alia*, with the interpretation of section 3 (1) of the Forward Contract (Regulation) Act, 1952, which used the words "such duties as may be assigned by or under this Act." Ayyangar, J., speaking for the majority, observed:

"Learned Counsel is undoubtedly right in his submission that a power conferred by a by-law is not one conferred "by the Act" for in the context the expression "conferred by the Act" would mean "conferred expressly or by necessary implication by the Act itself. . . . The words "under the Act" would, in that context, signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, by laws made by a subordinate law-making authority which is empowered to do so by the parent Act. This distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act. (vide *Hubli Electricity, Bombay Ltd. v. Province of Bombay*⁶, and *Narayanaswami Naidu v. Krishna Murthi*⁷."

The observations of Subba Rao, J., as he then was, at page 775, relied upon by the appellants are these:

1. (1947) 1 All E.R. 205, 206.

2. (1909) 1 K.B. 57, 64.

3. (1946) 2 All E.R. 529, 531.

4. (1962) 2 All E.R. 257.

5. (1953) 1 S.C.R. 721, 737; (1963) 2 S.C.J.

59.

6. L. R. (1949) 76 I.A. 57, 66 : (1949) 2

M.L.J. 39.

7. I.L.R. (1958) Mad. 513, 547 : (1958) 1

M.L.J. 367.

"I would, therefore, construe the words "by or under this Act, or as may be prescribed" as follows: "by this Act" applies to powers assigned *proprio vigore* by the provisions of the Act; "Under this Act" applies to an assignment made in exercise of an express power conferred under the provisions of the Act; and "may be prescribed" takes in an assignment made in exercise of a power conferred under a rule. This construction gives a natural meaning to the plain words used in the section and avoids stretching the language of a statutory provision to save an illegal by-law."

In my opinion that case does not assist me because the Court was construing the words "by or under the Act," and Ayyangar, J., specifically discussed the meaning of "by the Act" in the context.

Regarding the case of *United States v. George R. Eaton*¹, relied on appellants' behalf, I find that the Supreme Court of the United States explained and distinguished that case in *Singer v. United States*² as follows;

"*United States v. Eaton*¹, turned on its special facts, as *United States v. Grimaud*³, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute. The *Eaton* case¹ involved a statute which levied a tax on cleomargarine and regulated in detail cleomargarine manufacturers. Section 5 of the statute provided for the keeping of such books and records as the Secretary of the Treasury might require. But it provided no penalty for non-compliance. Other sections, however, laid down other requirements for manufacturers, and prescribed penalties for violations. Section 20 gave the Secretary the power to make "all needful regulations" for enforcing the Act. A regulation was promulgated under section 20 requiring wholesalers to keep a prescribed record. The prosecution was for non-compliance with that regulation. Section 18 imposed criminal penalties for failure to do any of the things "required by law." The Court held that the violation of the regulation promulgated under section 20 was not an offence. It reasoned that since Congress had prescribed penalties for certain acts but not for the failure to keep books the omission could not be supplied by regulation. And Congress had not added criminal sanctions to the rules promulgated under section 20 of the Act."

I would in this connection prefer to apply the English decisions referred to above as section 12 (1) itself does not impose any restrictions and contemplates certain things to be prescribed.

Coming now to the construction of section 12 (1), it seems to me that what it requires is a declaration of some actual figure which according to the declarant represents 'the full export value.' Otherwise there is no point in requiring support of such evidence as may be prescribed. Further it is clear that some actual figure has to be mentioned when the exporter declares that he has received the amount representing the full export value. I apprehend that the same applies in the case where the amount has not yet been received. The rules make this clear. Rule 5 (2) (ii) which require the invoice value stated in the declaration to be the full export value of goods, is referable to section 12 (1) of the Exchange Act and may be taken to indicate that an actual figure has to be mentioned. It may be an estimate if the goods have not been sold before the export, but a figure must be indicated.

Coming to the crux of the problem, does section 12 (1) by itself require absolutely correct particulars? It is said that section 12 (1) does not require it for section 22 requires the exporter only to make a declaration "which he knows or has reasonable cause to be false or not true in any material particulars." How could it be that if section 12 (1) itself requires absolutely correct particulars, section 22 limits the requirement? It seems to me that there is force in this contention but only to a limited extent. Section 12 (1) and the notification dated 4th August, 1947,

1. 36 L. ed. 591.

2. 89 L. ed. 285, 290.

3. 220 U.S. 506, 518, 519; 55 L. ed. 563, 568
31 S. Ct. 480.

made under it, impose a conditional prohibition. The section confers a power on an exporter to lift the bar by a unilateral declaration. When such a power is conferred on an exporter by a statute, good faith on his part must at least be implied and be a condition pre-requisite. This construction is necessary in order to prevent abuse of the power given by the Act. (See Maxwell on Interpretation of Statutes, 11th Edition, page 116). If the exporter makes a deliberately false declaration he contravenes section 12 (1) because he has not made the statutory declaration in good faith. It is not necessary to say that the declaration becomes a nullity because the breach of good faith, a condition pre-requisite, is itself a contravention of the conditional prohibition or restriction, within section 167 (8) of the Sea Customs Act read with section 23-A and section 12 (1) of the Exchange Act. Clerical mistakes and mistakes made *bona fide* even in respect of material particulars are not within the mischief of section 12 (1), but a deliberate falsehood and a deliberate evasion of the provisions of section 12 (1) come within section 12 (1). Otherwise the ambit of section 12 (1), read with section 23-A, would be narrowed to the point of extinction. An exporter and persons concerned in the export could with impunity give a deliberately false declaration but in apparent compliance with section 12 (1), and deprive this country of foreign exchange. I can not give an interpretation which will make a mockery of the section. But it is said that other sections of the Exchange Act will take care of such an exporter. He can be prosecuted under section 23 (1-A) read with section 22. He can be sentenced to imprisonment which may extend to two years. He can also be fined to an unlimited extent. The Foreign Exchange lost can be retrieved by a Court acting under section 23 (1-B). This may be true that the exporter is liable as stated above. But what about persons concerned in the illegal export? It is the persons concerned in the export which in most cases enable the exporter to successfully evade the provisions of the Exchange Act. These persons are taken care of only under the Customs Act. If they are covered by section 167 (8), there is no reason to exclude the exporter himself. It is not unusual to make persons liable both to penalties under the Sea Customs Act and the Exchange Act. It is indeed conceded that if no declaration is given under section 12 (1) and the goods are exported, the exporter and the persons concerned in the export would be liable to be proceeded both under section 167 (8) of the Sea Customs Act and the Exchange Control Act. I can draw no distinction between such an exporter and an exporter who gives a deliberately false declaration for the purpose of the applicability of section 167 (8) of the Sea Customs Act.

I am not impressed by the argument that the Foreign Exchange Act deals with the basic policy regarding foreign exchange and it was not the intention to punish offenders who violate foreign exchange restrictions under the Sea Customs Act. It is section 23-A of the Exchange Act which itself deems the restrictions imposed under section 12 (1) to have been imposed under section 19 of the Sea Customs Act. Not only that. The opening sentence of section 23-A makes it clear that this is without prejudice to section 23 and to any other provisions in the Exchange Act. In other words, the provisions of section 23 and other relevant sections are not affected or limited. They will have their full operation.

The fact that the exporter may be proceeded under section 12 (2) (I may assume that this is so for the purpose of this case) for non-payment of the full amount payable by the foreign buyer, or that the Reserve Bank can in the eventualities mentioned in section 12 (5) require the holding up of shipping documents or that the Reserve Bank by exercising powers under section 12 (6) secure contracts and other evidence to discover the full amount payable do not throw any light on the Construction of section 23-A and section 12 (1) except that the Legislature is anxious that the "full export value" shall be received in this country. Section 23-A read with section 12 (1) calls in the aid of Customs authorities to achieve the same object, but ropes in alongwith the exporter the persons concerned in the prohibited export.

I am not able to appreciate how the existence of section 167 (37), section 167 (72) and section 167 (81) is of any assistance for the purpose of interpreting section

23-A and section 12 (1) of the Exchange Act. It may be—I do not decide it—that an exporter, like the respondents, will also be liable to be proceeded against under these items of section 167.

Taking the facts as alleged by the Customs authorities to be true, as they must be taken to be true for the purpose of this application under Article 226, it seems to me that no case for the issue of a writ of prohibition has been made out. In the result the judgment of the Appeal Court is reversed and that of the learned Single Judge restored. The appellants will have costs incurred in this Court. One hearing fee.

Hegde, J. for Bachawat, J., and himself—We had the advantage of studying the judgment just now delivered by our brother Sikri, J, but we regret that we are unable to agree with the conclusions reached by him. After carefully analysing the arguments advanced before us we have come to the conclusion that no grounds were made out to interfere with the order of the Appellate Bench of the Madras High Court. We shall now proceed to give our reasons in support of our conclusion.

The respondents in these appeals are exporters of manganese ore. It is sad that they had exported large quantities of manganese ore after ostensibly complying with the formalities of law but in reality they had under-invoiced the various consignments sent by them and further that they had failed to repatriate foreign exchange of the value of about three crores of rupees obtained by them as the price of the manganese ore exported. It is said that by so doing they had contravened section 12 (1) of the Foreign Exchange Regulation Act 1947 (to be hereinafter referred to as the Act) read with section 23 (A) of that Act and sections 19 and 167 (8) of the Sea Customs Act. The case for the appellants is that during the search of the house of some of the respondents on suspicion that they had hoarded gold certain documents from the house of some of the respondents were seized and those documents disclosed the facts set out above. On the basis of the said information the Deputy Collector of Customs Visakhapatnam issued several notices to the respondents requiring them to show cause why action should not be taken against them under the aforementioned provisions. On receipt of those notices the respondents moved the High Court of Madras under Article 226 of the Constitution praying that that Court may be pleased quash the show cause notices in question and prohibit the appellants from taking any further action on the basis of those notices. Those petitions were dismissed by Kailasam, J., on 1st September, 1966 but his orders were reversed by the Appellate Bench of that Court by its judgment dated 12th September, 1967. The Appellate Bench granted the reliefs prayed for by the respondents. It is as against that decision these appeals have been brought after obtaining the necessary certificates from the High Court.

The only question that arises for decision in these appeals is whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of these proceedings, the respondents can be held to have contravened section 12 (1) which reads:

“The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereinafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner.”

On 4th August, 1947, the Central Government issued a notification prohibiting the export of all goods to any place outside India unless a declaration supported by such evidence as may be prescribed is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be, paid in the prescribed manner. Rule 3 of the Foreign Exchange Regulation Rules 1952 framed under section 27 of the

Act provides that a declaration under section 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may by notification in the Official Gazette specify as appropriate to the requirements of a case. The form that is relevant for our present purpose is G. R. 1. Rule 5 empowers the Reserve Bank, the Collector of Customs or the postal authorities, to require the exporter to furnish such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India or has a place of business in India. These authorities may also require the exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them (i) that the destination stated on the declaration is the final place of destination of the goods exported; (ii) that the invoice value stated in the declaration is the full export value of the goods, and (iii) that the amount representing the full export value of the goods has been or will be paid to the exporter. Form G. R. 1 stipulates that the exporter should furnish the information called for therein. Therein the exporter is also required to make the following declaration:

"I hereby declare that I am the seller/consignor of the goods in respect of which this declaration is made and that the particulars given above are true and (a) that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer; (b) that this is a fair valuation of the goods which are unsold.

I/My principals undertake that I/they will deliver to the bank mentioned below the foreign exchange/rupee proceeds resulting from the export of these goods or before....."

It is not denied that the respondents before exporting the goods in question had furnished declarations in the prescribed forms. Therein they had declared that the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner. It is also not denied that they had furnished to the appropriate authorities the prescribed evidence. The case against them as mentioned earlier, is that they had under-invoiced the goods and failed to repatriate a portion of the foreign exchange earned by them. It is also alleged that they gave incorrect information in their declarations. If these allegations are correct which we have to assume to be correct for the purpose of this case, then it is obvious that the declarations given by the respondents do not comply with the requirements of rule 5.

Section 22 of the Act provides that no person when making an application or declaration to any authority or person for any purpose under the Act shall give any information or make any statement which he knows or has reasonable cause to believe to be false or not true, in any material particular. Section 23 prescribes that if any person contravenes the provisions of section 12 or of any rule, direction or order made thereunder he shall (a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner provided in the Act or (b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both. In view of these provisions it was not disputed before us that if the information given by the respondents in the aforementioned declarations was false to the knowledge of those who made those declarations or if they had reasonable cause to believe that it was false or not true in any material particular then they are liable to be dealt with under section 23.

Sub-section (2) of section 12 provides that:

"Where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of the sale goods shall, except with the permission of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing that :....."

(b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid."

The contravention of the above provisions is punishable under section 23. Hence the respondents' failure to repatriate any part of the foreign exchange earned by them by the sale of the manganese ore exported can be penalised by imposing on them a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention had taken place or Rs. 5,000 which ever is more as may be adjudged by the Director of Enforcement in the manner provided in the Act. Hence it is open to the Director of Enforcement to levy on such of the respondents as have contravened section 12 (2) penalty not exceeding three times the value of the foreign exchange not repatriated which in the present case can be about nine crores of rupees. They may also be punished under section 23 (1) (b). This position is conceded by the Counsel appearing for the appellants. But it is urged on behalf of the appellants that for the offences committed by the respondents they are not only liable to be punished under section 23 but also under section 23 (A). The Appellate Bench of the Madras High Court negatived that contention. Section 23 (A) as it stood at the relevant time provided that:

"Without prejudice to the provisions of section 23 or any other provision contained in this Act, the restrictions imposed by.....sub-section (1) of section 12.....shall be deemed to have been imposed under section 19 of the Sea Customs Act 1878 and all provisions of that Act shall have effect accordingly, except that section 183, thereof shall have effect as if for the word "shall" therein the word 'may' were substituted."

If the allegations mentioned in the show cause notices come within the scope of section 23 (A) then it necessarily follows that they will be governed by the provisions in section 19 and section 167 (8) of the Sea Customs Act, 1878. Section 19 of the Sea Customs Act provides:

"that the Central Government may from time to time by notification in the official gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontiers as defined by the Central Government."

This section is similar to section 12 (1) of the Act. Section 167 (8) provides for punishments for offences under that Act. That section to the extent material for our present purpose reads:

"The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

Offences	Sections of this Act to which offence has reference.	Penalties.
1	2	3
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction; or	18 & 19	such goods shall be liable to confiscation; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

if any attempt be made so to import or export any such goods; or

if any such goods be found in any package produced to any officer of Customs as containing no such goods; or

if any such goods, or any dutiable goods, be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India; or

if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.

If an offence falls under section 23-A the fact that the said offence is also punishable under section 23 is immaterial. The provisions of section 23 (A) are without prejudice to the provisions of section 23. The mere fact that the offences alleged against the respondents are punishable under section 23 would not exclude the application of section 23 (A). Therefore all that we have to see is whether those offences fall within the ambit of section 23 (A). If they do then the impugned show cause notices must be held to be valid. If they do not, then no proceeding can be taken on the basis of those notices.

Before a case can be held to fall within the scope of section 23 (A) it must be shown that there has been a contravention of the restrictions imposed by section 12 (1). Therefore we have to find out what those restrictions are? The only restriction placed by section 12 (1) read with the Central Government Notification dated 4th August, 1947, is that no one should export any goods from this country without furnishing the declaration mentioned in section 12 (1). Admittedly the stipulated declarations in the prescribed forms have been furnished. The evidence specified have also been given. Therefore *prima facie* there was no contravention of section 12 (1). What is said against the respondents is that the invoice price mentioned by them in the declarations did not represent the full export value; hence the declarations given by them are invalid declarations which means that the concerned goods were exported without furnishing the declaration required by section 12 (1). It is not possible to accept this argument. The declarations given do satisfy the requirements of section 12 (1) though they do not correctly furnish all the informations asked for in the form. Such declarations cannot be considered as non-est. The informations called for in the prescribed form cannot be considered as restrictions imposed by section 12 (1). They are merely informations called for the proper exercise of the powers under the Act. Many of them do not relate to the restrictions imposed by section 12 (1). Neither section 12 (1) nor any other provision in the Act empower the rule making authority to add to the restrictions imposed by section 12 (1). For finding out the restrictions imposed by section 12 (1) we have only to look to that section. The requirement of that section is satisfied if the stipulated declaration supported by the evidence prescribed or specified is furnished. The contravention complained of in this case is really the contravention of section

12 (2) and rule 5. The former is punishable under section 23 and the latter under section 23 read with section 22.

The declaration required by section 12 (1) is only to the effect that the amount representing the full export value of the goods has been or will within the prescribed period be, paid in the prescribed manner. This is as it should be because this section governs both the goods sold to the foreign buyers as well as those sent on consignment basis. So far as the goods sold to the foreign buyer are concerned it is generally possible for the exporter to know the exact value but that would not be the position when the goods are sent on consignment basis. In the case of goods sent on consignment basis, the exporter can give only an estimated value. The main purpose of section 12 (1) is to get a declaration from the exporter that he has either brought or will bring back the amount representing the full export value of the goods exported. There are other provisions in the Act to deal with other situations. We shall presently refer to them.

If we are to hold that every declaration which does not state accurately the full export value of the goods exported is a contravention of the restrictions imposed by section 12 (1) then all exports on consignment basis must be held to contravene the restrictions imposed by section 12 (1). Admittedly section 12 (1) governs every type of export. Again it is hard to believe that the Legislature intended that any minor mistake in giving the full export value should be penalised in the manner provided in section 23 (A). The wording of section 12 (1) does not support such a conclusion. Such a conclusion does not accord with the purpose of section 12 (1).

It is true that the regulations contained in the Act are enacted in the economic and financial interest of this country. The contravention of those regulations, which we were told are widespread are affecting vital economic interest of this country. Therefore the rigour and sanctity of those regulations should be maintained but at the same time it should not be forgotten that section 12 (1) is a penal section. The true rule of construction of a section like section 12 (1) is, if we may say so with respect, as mentioned by Plowman, J. in *Re H. P. C. Productions Ltd.*¹. Therein the learned Judge observed:

"I approach the question of the construction of the Exchange Control Act in the light of principles stated by Upjohn J. in *London and Country Commercial Properties Investments v. Attorney-General*² to which Mr. Bagnall referred. In that case the Court was concerned with the construction of the Borrowing (Control and Guarantees) Act 1946 and the Control of Borrowing Order 1947. Upjohn J. said: "the first question I have to consider is what are the principles of construction which I must adopt in construing this Act and this order. . . . I have to bear in mind that this is a penal statute. It indeed, I suppose, represents the high water mark of the Parliamentary invasion of the traditional rights of the subjects of this realm." Then he went on to explain why that was so and continued; "In those circumstances what are the canons of construction to be adopted? I do not propose to refer to the authorities at length. I think that the proper approach to the construction of such a statute as this is that I must construe it as I would any other instrument, that is to say, I must look at all the surrounding circumstances, I must look at the mischief intended to be remedied, I must above all give effect to the words that have been used in the section. That is plain from the decision in *Dyke v. Elliot*,³ see in particular, the judgment of James L.J. but if on construing the relevant sections of the Act and the order there appears any reasonable doubt or ambiguity then being a penal statute I must apply the principles laid down succinctly by Lord Esher in *Tuck and sons v. Priestar*.⁴"

In *London and North Eastern Ry. Co. v. Berriman*⁵, Lord Macmillan observed :

1. (1962) 1 All E.R. 31 : (1962) C.H.D.N.

466 at 473.

2. (1953) 1 All E.R. 436.

3. (1872) L.R. 4 P.C. 184, 191.

4. (1887) 19 Q.B.D. 629.

5. (1946) A.C.P. 286 at 295.

"Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language."

This Court in *Tolaram Relumal and another v. State of Bombay*¹, speaking through Mahajan, C.J. observed:

"It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature."

Hereinbefore we have examined the language of section 12 (1) and its purpose. We have also referred to the provisions which provide for the punishment of the contraventions complained of in these cases. Those provisions are adequate to meet the situation. In our opinion the language of section 12 (1) does not permit the acceptance of the interpretation placed on it by the appellants nor are we able to come to the conclusion that the Legislature intended that the offences complained of in these proceedings should be made punishable under section 23 (A). If the interpretation sought to be placed by the appellants on section 12 (1) is accepted it may result in unnecessary hardship in numerous cases.

There are two facets in every export, one relating to the goods exported and the other relating to the foreign exchange earned as a result of the export. Broadly speaking the former aspect is dealt with by the Customs authorities and the latter either by the Reserve Bank or by the Director of Enforcement. The price of goods exported has to be mentioned in the invoice. But the Reserve Bank has power to examine whether the price mentioned in the invoice is correct. Section 12 (5) provides that where in relation to any goods exported the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods. Sub-section (6) of section 12 says that for the purpose of ensuring compliance with the provisions of that section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods have been or will within the prescribed period be paid in the prescribed manner. These provisions go to indicate that so far as the value of the goods exported is concerned the matter is left primarily in the hands of the Reserve Bank and the Customs authorities are not burdened with that work. This aspect becomes relevant in ascertaining the true scope of section 12 (1). If we bear in mind the scheme of the Act, it is clear that so far as the Customs authorities are concerned all that they have to see is that no goods are exported without furnishing the declaration prescribed under section 12 (1). Once that stage is passed the rest of the matter is left in the hands of the Reserve Bank and the Director of Enforcement.

In view of our above conclusion it is unnecessary for us to examine the other contentions advanced on behalf of the parties. In the result these appeals fail and they are dismissed with costs. One hearing fee.

ORDER

In accordance with the opinion of the majority, these appeals are dismissed with costs. One hearing fee.

V.M.K.

Appeals dismissed.

1. (1955) 1 S.C.R. 158 at p. 164 : (1954) S.C.J. 547.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—J. C. SHAH, G. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

The State of Maharashtra

.. Appellant*

v.

Himmatbhai Narbheram Rao and others

.. Respondents.

AND

The Municipal Corporation of Greater Bombay and another (In both the Appeals)

.. Appellants†

v.

Noor Mahomed Mahobatkhan

.. Respondents.

Bombay Municipal Corporation Act (III of 1888) as amended by Act (XIV of 1961), sections 365, 366, 367, 368 and 372—Scope—Carcass deleterious to public health—Removal of carcass through the Municipal agency at the expense of its owner, if infringes the guarantee of freedom under Article 19 (1) (f) of the Constitution—Restriction on the owner's rights to dispose of property (i.e. carcass) commensurate with the need of protection of the interest of the public against the exercise of the right.

Constitution of India (1950), Articles 19 (1) (f), 19 (5), 31 and 31 (5) (b) (ii)—Scope—Law imposing reasonable restriction upon the right of a citizen to dispose of property, not free from the challenge of violation under Article 31—Extinction of the right of the owner of the moveable property (carcass) to destroy it for abating nuisance and preventing danger to public health covered by exemption contained in Article 31 (5) (b) (ii).

Article 19 (1) (f) of the Constitution confers upon all citizens the right to acquire, hold and dispose of property. Carcass of an animal belonging to a person is his property and he has the right of disposal of the carcass. But that fundamental right, like all other rights in Article 19 (1), is not absolute: it is subject to reasonable restrictions.

A carcass being in its very nature a noxious thing, if allowed to remain on the premises of the owner or occupier, is likely to cause serious harm to the health and well-being of the residents and other persons in the neighbourhood. The law which imposes on the owner or the occupier of the place in which the carcass is found, duty to remove the carcass or to get it removed through the Municipal agency with the least practicable delay is conceived in the interests of the general public. A law designed to abate a grave nuisance and for protection of public health is *prima facie* one enacted for the protection of the interests of the general public. But that alone is not sufficient: the restriction imposed by the law must be reasonable, i.e., the restriction must not be arbitrary or excessive, and must not place upon the right of the citizen a limitation which is not calculated to ensure protection of the interests of the general public.

Reasonableness of restriction imposed by a law has to be adjudged in the light of the nature of the right, danger or injury which may be inherent in the unbridled exercise of the right and the necessity of protection against danger which may result to the public by the exercise of the right. In each the test is whether the restriction is commensurate with the need of protection of the interest of the public against the exercise of the right. But the fact that the owner is unable to sell for a price the carcass and is required to pay a fee for removal of the carcass does not, render a provision which is essentially conceived in the interests of the general public, unreasonable. The Corporation has to arrange for effectively disposing of the carcass, and it would be necessary for effectuating that purpose to provide that the title of the owner in the carcass should be extinguished. Unless the title

* C.A. No. 1654 of 1966 and

† C.As. Nos. 1019 and 1020 of 1967.

of the owner in the carcass is extinguished, various complications may arise in the way of disposal of the carcass. If the carcass is likely to be deleterious to public health and its removal from the place where it is lying being in the interests of the public health, imposition of an obligation upon the owner to remove the carcass at his own expense or to pay for its removal, cannot, be regarded as unreasonable, even if the charge which falls upon the owner is in addition to the loss which he suffers by reason of the extinction of his title in the carcass. If the owner's right to dispose of his property is by the enactment of the impugned section subjected to reasonable restrictions, it must follow that the right of the skinner, assuming that he has a right in the carcass, is also subjected to reasonable restrictions, imposed in the interests of the general public.

The impugned provisions do not infringe the guarantee of freedom under Article 19 (1) (f) of the Constitution. But even if it be established that the law which imposes a reasonable restriction upon the right of a citizen to acquire, hold and dispose of property, is not on that account free from the challenge that it infringes the guaranteed freedom under Article 31. It is sufficient for the purpose of this case to hold that a law declaring extinction of the right of the owner in moveable property not with a view to use it for a public purpose but to destroy it for abating nuisance and preventing danger to public health and vesting it in the Corporation entrusted with power to take steps to maintain public health is not a law for acquisition of property for a public purpose. In any event the law is not, because of the exemption contained clause (5) (b) (ii) of Article 31 of the Constitution, invalid even if it does not provide for payment of compensation for deprivation of the right to property. The owner of the carcass is, therefore, unable to sustain his plea that Article 19 (1) (f) and Article 31 (2) were infringed by the impugned provisions.

The first respondent is carrying on business as a skinner of carcass and claims protection of its fundamental right under Article 19 (1) (g) of the Constitution. The first respondent cannot claim the protection of Article 31 (2) of the Constitution, because until it purchases the carcasses from the owner it has no right in the property, and it cannot set up a grievance for loss of property which it does not own.

Appeal from the Judgment and Order dated the 8th March, 1963 of the Bombay High Court in Appeal No. 7 of 1963 and Appeals from the Judgment and Order dated the 20th August, 1964 of the Bombay High Court in Appeals Nos. 53 and 55 of 1963.

C. K. Daphtary, Attorney-General for India, and *N. S. Bindra*, Senior Advocate, (*R. Gopalakrishnan* and *S. P. Nayar*, Advocates, with them), for Appellant (In C.A. No. 1654 of 1966).

Niren De, Solicitor-General of India, (*G. L. Sanghi*, Advocate, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellants (In C.A. Nos. 1019 and 1020 of 1967) and Respondents Nos. 3 and 4 (In C.A. No. 1654 of 1966).

B. Sen, Senior Advocate; (*I. N. Shrivastava*, Advocate, with him), for Respondents Nos. 1 and 2 (In C.A. No. 1654 of 1966).

K. K. Singhvi, Senior Advocate (*S. G. Agarwala*, *R. K. Garg* and *D. P. Singh* Advocates of *M/s. Ramamurthi & Co.*, and *A. K. Gupta*, Advocate, with him), for Respondents (In C.A. No. 1020 of 1967).

The Judgment of the Court was delivered by

Shah, J.—The High Court of Bombay has declared section 372 (g) and a part of section 385 of the Bombay Municipal Corporation Act III of 1888 as amended by Act XIV of 1961 *ultra vires* because in their view these provisions infringe the guarantee of Articles 19 (1) (f) and (g) of the Constitution. The State of Maharashtra and the Municipal Corporation of Greater Bombay have appealed to this Court.

The first respondent in Appeal No. 1654 of 1966 is a society registered under the Societies Registration Act, 1860, and carries on, within the limits of Greater Bombay, the business of skinning carcasses of dead animals and utilising the products for industrial uses. The second respondent is an owner of a stable of milch-cattle at Andheri within the limits of Greater Bombay. By Act XIV of 1961 the Legislature of the State of Maharashtra amended, amongst others, sections 367, 372 and 385 of Act III of 1888 enacting that an owner of the carcass of a dead animal shall deposit it at the place appointed in that behalf by the Corporation, and entrusted the Corporation with power to arrange for disposal of the carcasses. On October, 1961 the Assistant Head Supervisor of the Municipal Corporation called upon the first respondent to stop removing carcasses from the "K" Ward of the Corporation. On 27th November, 1961, the Corporation published a notification inviting the attention of the public concerned to the provisions of section 385 and other provisions of the Act and warned the persons concerned that violation of the provisions was liable to be punished. On 10th January, 1962, the Corporation resolved to grant a contract authorising removal and disposal of carcasses under section 385 of the Act in respect of Wards, H. K. L. M. E. P. B. & T. to the Harijan Workmen's Co-operative Labour Society Ltd., and declared that no other person or agency was authorised to remove and dispose of carcasses under the provisions of section 385 of the Act.

Respondents Nos. 1 and 2 to this appeal moved a petition in the High Court of Bombay for an order cancelling or setting aside the notice dated 14th October, 1961, and the notification dated 27th November, 1961; for an order restraining the Corporation from demanding fee for removal of such carcasses, from taking any steps or proceedings against the respondents for enforcement of the provisions of sections 366, 367 (c), 372 (g) and 385 of the Act and from claiming ownership in the carcasses of the dead animals of private owners. The State of Maharashtra was later impleaded as a party-respondent to the petition.

Kantawalla, J., dismissed the petition. He held that sections 366, 367 (c) and 385 of the Act were "enacted for the promotion of public health and for the prevention of danger to life of the community and in the larger interest of the public," and that the restrictions upon the rights of the owners of cattle and persons carrying on business in carcasses were, because of the special protection granted by Article 31 (5) (b) (ii) not inconsistent with or repugnant to the fundamental rights guaranteed under Article 31 (2) of the Constitution, and since the impugned provisions were protected, the second respondent could not claim that his fundamental right guaranteed by Article 19 (1) (f) of the Constitution was infringed. The learned Judge also held that the restrictions imposed by the impugned provisions were reasonable and in the interest of the general public and were on that account not within the protection of Article 19 (1) (g) of the Constitution.

In appeal under the Letters Patent the High Court modified the order passed by Kantawalla, J., and declared section 372 (g) and a part of section 385 of the Act invalid. The High Court did not pass any order consequential on the declaration. Against that order the State of Maharashtra has preferred this appeal with certificate granted by the High Court.

Section 3 (c) defines 'nuisance': it includes any act, omission, place, or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smelling or hearing, or which is or may be dangerous to life or injurious to health or property. Section 61 sets out the obligatory and discretionary duties of the corporation. It is thereby incumbent upon the Corporation to make adequate provision, *inter alia*, for scavenging, removal and disposal of excrementitious and other filthy matters, and of all ashes, refuse and rubbish, reclamation of unhealthy localities, removal of noxious vegetation and generally the abatement of all nuisances. By sections 365, 366, 367, 368, 372 and 385 it was provided that—

Section 365—"For the purposes of securing the efficient scavenging and cleansing of all streets and premises, the Commissioner shall take measures for securing—

(a) * * * * *

(b) the removal of the contents of all receptacles and depots and of the accumulations at all places provided or appointed by him under section 367 or 368 for the temporary deposit of any of the matters specified in the said sections."

Section 366—"All matters collected by municipal servants or contractors in pursuance of the last preceding section and of section 369 and carcasses of dead animals deposited in any public receptacle, depot or place under section 367 shall be the property of the Corporation."

Section 367—"The Commissioner shall provide or appoint in proper and convenient situations public receptacles, depots and places for the temporary deposit or final disposal of—

- (a) dust, ashes, refuse and rubbish ;
- (b) trade refuse;
- (c) carcasses of dead animals and excrementitious and polluted matter;

Provided that—

(i) the said matters shall not be finally disposed of in any place or manner in which the same have not heretofore been so disposed of, without the sanction of the corporation or in any place or manner which the State Government think fit to disallow;

(ii) any power conferred by this section shall be exercised in such manner as to create the least practicable nuisance."

Section 368—" (1) It shall be incumbent on the owners and occupiers of all premises to cause all dust, ashes, refuse, rubbish and trade refuse to be collected from their respective premises and to be deposited at such times as the Commissioner, by public notice, from time to time prescribes in the public receptacle, depot or place provided or appointed under the last preceding section or the temporary deposit or final disposal thereof.

* * * * *

Section 372—"No person—

(a) who is bound, under section 368 or section 370, to cause the removal of dust, ashes, refuse, rubbish and trade refuse or of excrementitious or polluted matter, shall allow the same to accumulate on his premises for more than twenty-four hours, or neglect to cause the same to be removed to the depot, receptacle or place provided or appointed for that purpose;

* * * * *

(g) shall deposit the skin or otherwise dispose of the carcass of any dead animal at a place not provided or appointed for this purpose under section 367."

Section 385—" (1) It shall be the duty of the Commissioner to provide for the removal of the carcasses of all animals dying within Greater Bombay;

(2) The occupier of any premises in or upon which the animals shall die or in or upon which the carcass of any animal shall be found, and the person having the charge of any animal which dies in the street or in any open place, shall within three hours after the death of such animal, or if the death occurs at night, within three hours after sunrise, report the death of such animal at the municipal health department office of the division of the Greater Bombay in which the death occurred or in which the carcass is found and shall not unless authorised by the Commissioner in this behalf, remove or permit to be removed the carcass of any animal dying in or upon any place within Greater Bombay;

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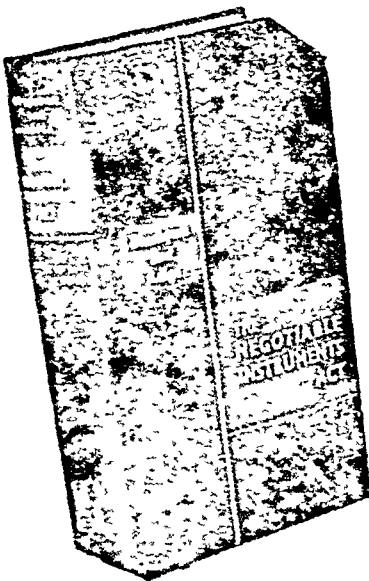
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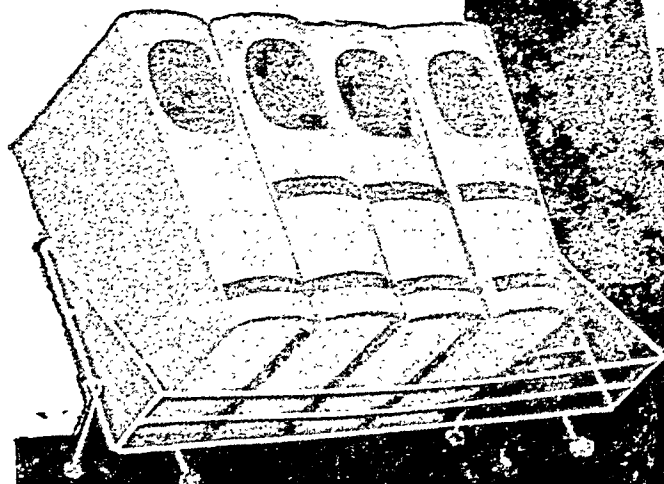
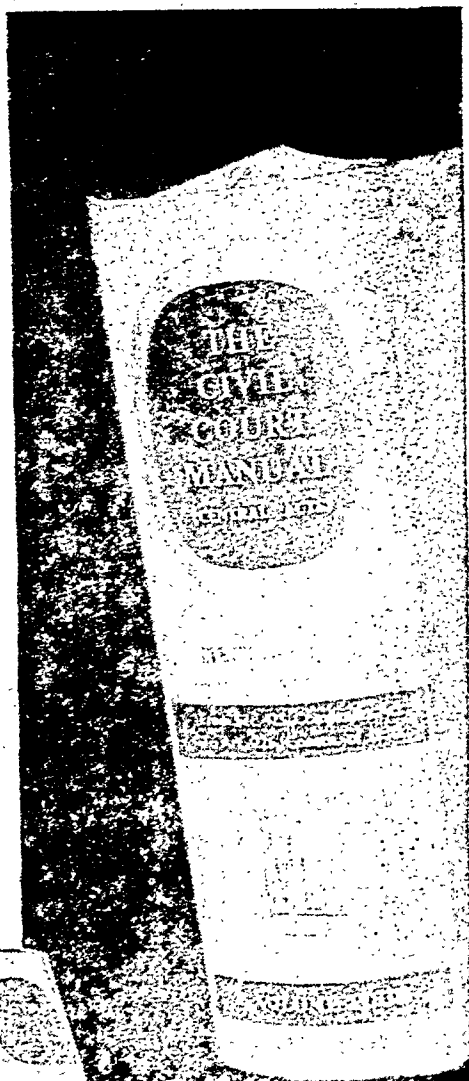
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[S.C. N.C. 76.]
A. N. Ray and
I. D. Dua, JJ.
 6-3-1970.

Sheo Mahadeo Singh v.
The State of Bihar.
 CrI. A. No. 88 of 1967.

Penal Code (XLV of 1860), section 149—Essence of the section.

The essence of section 149 is that an accused person whose case falls within the terms of the section cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly. It is an offence committed by a member of an unlawful assembly and it is an offence such as the members of that assembly have to be likely to be committed in prosecution of that object.

Section 149 creates a specific offence and deals with the punishment of that offence. The emphasis is on common object. There is no question of common intention. The act must be one which upon the evidence appears to have been done with a view to accomplishing the common object attributed to the members of the unlawful assembly. Thus every person who is engaged in prosecuting the same object, although he had no intention to commit the offence, will be guilty of an offence which fulfills or tends to fulfil the object which he is himself engaged in prosecuting in the circumstances mentioned in the section. It is in this sense that common object is to be understood.

V.K.

Appeal dismissed.

[S.C. N.C. 77.]

A. N. Ray and
I. D. Dua, JJ.
 6-3-1970.

Siddanna Apparao Patil v.
The State of Maharashtra.
 CrI. App. No. 180 of 1967.

Criminal Procedure Code (V of 1898), section 410—Scope—Appeal under—Arguable and substantial questions raised—Summary dismissal improper.

The right to prefer an appeal from sentence of Court of session is conferred by section 410 of the Criminal P. C. The right to appeal is one both on a matter of fact and a matter of law.

The following principles emerge from the decisions : First, the appellate Court under section 410, Criminal Procedure Code, undoubtedly has power to summary dismissal. Secondly, if the appeal raises arguable and substantial points the High Court should give reasons for rejection of appeal. Thirdly, rejection of an appeal by using only one word of dismissal causes difficulties and embarrassment in finding out the reasons which weighed with the High Court in dismissal of the appeal *in limine*. Fourthly, the High Court should not summarily reject criminal appeals if they raise arguable and substantial points.

V.K.

Appeal allowed and case remanded.

[S.C. N.C. 78.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
 6-3-1970.

Kanpur Sugar Works Ltd. v.
State of Bihar.
 C.A. No. 169 of 1967.

Bihar Land Reforms Act (XXX of 1956), section 7 (1) and 5—Scope and applicability of section 7 (1)—‘ Building or structure used as factory ’—Import of.

Section 7 (1) only applies to such buildings or structures together with the lands on which they stand which are used as *golas*, factories or mills for the purpose of trade, manufacture or commerce or used for storing grains or keeping cattle or implements for the purpose of agriculture. The expression employed by the Legislature is “ used as *golas*, factories or mills ”, and not “ used for *golas*, factories or

mills." The expression "lands on which they stand" may include the land which is necessary for the efficient user of the building for the purpose for which it is intended to be used. It cannot however be held that because a factory has, for the benefit of the workmen and managing staff working in the factory, constructed buildings used as bungalows, quarters for employees, clubs, kitchens, garage, dispensary, rest-house, out-house, etc., but which are not directly used as factory or mill buildings, the buildings would be deemed to fall within section 7 (1) as buildings in the possession of an intermediary and used as *golas*, factories or mills. These lands are homestead and are claimable by an intermediary under section 5 (1) : if they are used for the purpose of letting out, they would be liable to pay fair and equitable ground-rent under the proviso to section 5 (1).

The definition of "factory" in the Factories Act, cannot be a guide, much less a useful guide, in determining the meaning of the expression "factory" as used in the Bihar Land Reforms Act, 1950.

V.K.

Appeal allowed.

[S.C. N.C. 75.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
9-3-1970.

The Bank of Baroda Ltd. v.
Jiwan Lal Mehrotra.
C.A. No. 176 of 1957.

Specific Relief Act (XLVII of 1963), section 34—Master and servant—Illegal dismissal from service—Suit for declaration by servant that he is still in service—Maintainability.

Although in case of illegal termination or dismissal of a servant, the servant concerned could claim damages he cannot ask for or be granted a declaration that he should be treated as if he was still in service. The law as settled by the Supreme Court is that no declaration to enforce a contract of personal service will be normally granted. The well recognised exceptions to this rule are (1) where a public servant has been dismissed from service in contravention of Article 311 of the Constitution ; (2) where reinstatement is sought of a dismissed worker under the industrial law by labour or industrial tribunals ; (3) where a statutory body has acted in breach of a mandatory obligation imposed by statute.

V.K.

Appeal allowed.

[S.C. N.C. 80.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
10-3-1970.

Orient Paper Mills Ltd. v.
Union of India.
C.A. Nos. 976-996 of 1965.

Central Excise and Salt Act (I of 1944)—Assessment by assessing authority under—A quasi-judicial function—Judgment of assessing authority cannot be controlled by directions from appellate authority.

An assessment under the Central Excise and Salt Act by a subordinate officer in accordance with the instructions issued by the Collector of Central Excise and Customs to whom an appeal lies against the order of that subordinate officer cannot be called a valid assessment in the eye of law. No authority, however high, can control the decision of a judicial or a quasi-judicial authority, that being the essence of our judicial system.

In the present case, when the assessment is to be made by the Deputy Superintendent or the Assistant Collector, Central Excise, the Collector to whom an appeal lies against the order of assessment cannot control or fetter his judgment in the matter of assessment.

The assessing authorities exercise quasi-judicial functions and they have duty cast on them to act in a judicial and independent manner. If their judgment is

controlled by the directions given by the Collector it cannot be said to be their independent judgment in any sense of the word. An appeal then to the Collector becomes an empty formality.

V.K.

Appeals allowed.

[S.C. N.C. 81.]

S. M. Sikri,
V. Bhargava and
C. A. Vaidialingam, JJ.
10-3-1970.

S. N. Sharma v.
Bipen Kumar Tiwari.
Crl. A. No. 256 of 1969.

Criminal Procedure Code (V of 1898), section 159—Power of Magistrate under—Ambit of—Magistrate if can stop investigation by police and proceed to hold the enquiry himself.

Under section 159 of the Code of Criminal Procedure the only power, which the Magistrate can exercise on receiving a report from the officer in charge of a police station, is to make an order in those cases which are covered by the proviso to sub-section (1) of section 157, viz., cases in which the officer in charge of the police station does not proceed to investigate the case. Section 159 does not empower a Magistrate to stop investigation by the police and proceed to hold the enquiry himself.

On the face of it, the first alternative of directing an investigation in section 159 cannot arise in a case where the report itself shows that investigation by the police is going on in accordance with section 156. It is to be noticed that the second alternative does not give the Magistrate an unqualified power to proceed himself or depute any Magistrate to hold the preliminary enquiry. That power is preceded by the condition that he may do so, "if he thinks fit." The use of this expression makes it clear that section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to section 157 (1) and it is in those cases that, "if he thinks fit", he can choose the second alternative. Thus, the power conferred by the second clause in section 159 is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable.

The scheme of sections 156 to 159 of the Criminal Procedure Code clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or in the alternative himself proceed or depute a Magistrate subordinate to him to proceed to enquiry into the case.

V.K.

Appeal dismissed.

[S.C. N.C. 82.]

S. M. Sikri,
V. Bhargava and
C. A. Vaidialingam, JJ.
10-3-1970.

Fateh Bibi v.
Charan Dass.
C.A. No. 364 of 1967.

Hindu Law of Inheritance (Amendment) Act (II of 1929)—Applicability.

On a true construction of the Hindu Law of inheritance (Amendment) Act (II of 1929), it applies not only to a case of a Hindu male dying intestate on or after 21st February, 1929 (when the Act came into force) but also to a case of a Hindu male dying intestate before the Act came into operation and succeeded by a female heir with a life estate who died after that date.

Thus, the point of time for the applicability of the Act is when the succession opens, viz., when the life estate terminates. In consequence, it must be further held that the question as to who is the nearest heir will fall to be settled at the date of expiry of the ownership for life or lives. The death of a Hindu female life-estate

holder opens the inheritance to the reversioners and the one most nearly related at the time to the last full owner becomes entitled to the estate.

Case-law discussed.

V.K.

[S.C. N.C. 83.]

J. C. Shah and
K. S. Hegde, JJ.
11-3-1970.

Appeal dismissed.

Ferozi Lal Jain v.
Man Mal.
C.A. No. 302 of 1967.

Delhi and Ajmer Rent Control Act (XXXVIII of 1952), section 13 (1)—Scope—Decree for ejectment on the basis of compromise—Legality.

From the language used in section 13 (1) of the Delhi and Ajmer Rent Control Act (1952), it is clear that after the Act came into force, a decree for recovery of possession can be passed by any Court only if that Court is satisfied that one or more of the grounds mentioned in section 13 (1) are established. Without such a satisfaction, the Court is incompetent to pass a decree for possession. In other words, the jurisdiction of the Court to pass a decree for recovery of possession of any premises depends upon its satisfaction that one or more of the grounds mentioned in section 13 (1) have been proved.

In the present case at no stage, the Court was called upon to apply its mind to the question whether the alleged sub-letting is true or not. It is clear from the record that the Court proceeded to pass a decree for ejectment solely on the basis of the compromise arrived at between the parties. That being so there can be hardly any doubt that the Court was not competent to pass the impugned decree. Hence it must be held to be a nullity and no execution can be levied on the basis of such a decree.

V.K.

[S.C. N.C. 84.]

A. N. Ray and
I. D. Dua, JJ.
13-3-1970.

Appeal dismissed.

Hethubha alias Jithuba Madhuba v.
The State of Gujarat.
Crl. A. No. 100 of 1967.

Criminal Procedure Code (V of 1898), section 429—Reference under to the third judge—Powers of third judge.

Penal Code (XLV of 1860), sections 34 and 320—"Common intention"—Common intention to kill Y—X killed by mistake—Common liability if attracted.

Section 429 of the Criminal Procedure Code states "that when the judges comprising the Court of appeal are equally divided in opinion, the case with their opinion thereon, shall be laid before another judge of the same Court and such judge, after such hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion." Two things are noticeable; first that the case shall be laid before another judge, and secondly, the judgment and order will follow the opinion of the third judge. It is therefore manifest that the third judge can or will deal with the whole case. Hence the contention that the third judge under section 429 could only deal with the differences between the two judges and not with the whole case is untenable.

The dominant feature of section 34 is the element of participation in actions. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in section 34 of the Penal Code. The existence of common intention is to be basis of liability.

A mistake by one of some of the accused as to killing X in place of Y would not displace the common intention if the evidence showed the concerted action in furtherance of a pre-arranged plan.

V.K.

Appeal dismissed.

4. for service over 15 years .. one month's wages for every year of service."

The reference related to workmen only and did not apply to the clerical staff of *mistries*.

There are two workmens' Unions in the Delhi region—the Kapra Mazdoor Ekta Union—hereinafter called 'Ekta Union', and the other, the Textile Mazdoor Union. The Ekta Union made a claim principally for fixation of gratuity in addition to the benefit of provident fund admissible to the workmen under the Employees Provident Fund Act, to be computed on the consolidated wages inclusive of dearness allowance. The Ekta Union submitted by its statement of claim that a gratuity scheme based on the region-*cum*-industry principle, i.e., a uniform scheme applicable to all the four units be framed. The Textile Mazdoor Union also supported the claim for the framing of a gratuity scheme on the basis of the consolidated wages of workmen but claimed that the scheme should be unit-wise. At the trial, it appears that both the Unions pressed for a unit-wise scheme of gratuity.

The Tribunal entered upon the reference in respect of the fixation of gratuity scheme in February, 1964 and made an award on 30th June, 1966, operative from 1st January, 1964. The award was published on 4th August, 1966. By the award two schemes were framed—one relating to the D. C. M. and S. B. M., and another relating to the B. C. M. and A. T. M. Under the second scheme the digit by which the number of completed year of service was to be multiplied in determining the total gratuity was smaller than the digit applicable in the case of the D. C. M. and the S. B. M. The distinction was made between the two sets of units, because the D. C. M. and S. B. M. were, in the view of the Tribunal, more prosperous units than the B. C. M. and A. T. M. The A. T. M., it was found, was a new-comer in the field of textile manufacture, and had for many years been in financial difficulties.

The D. C. M. employs more than 8000 workmen in its textile unit; the S. B. M. has on its roll 5000 workmen; the B. C. M. has 6271 workmen and the A. T. M. has 1500 workmen. The D. C. M. and S. B. M. have a common retirement benefit scheme in operation since the year 1940. Under the scheme gratuity payable to workmen is determined by the length of service before retirement. The scheme of gratuity in operation in the D. C. M. and S. B. M. is that:

"In case of retirement from service of the Mills as a result of physical disability, due to overage or on account of death after a minimum of seven years' service in the concern.

7 years	..	Rs. 350
8 years	..	Rs. 425
9 years	..	Rs. 500
10 years	..	Rs. 575
11 years	..	Rs. 650
12 years	..	Rs. 725
13 years	..	Rs. 800
14 years	..	Rs. 875
15 years	..	Rs. 950
16 years	..	Rs. 1050
17 years	..	Rs. 1150
18 years	..	Rs. 1250

19 years	.. Rs. 1350
20 years	.. Rs. 1500."

The scale of gratuity, it is clear, is independent of the individual wage scale of the workman. In the B. C. M. and A. T. M. units there are no such schemes.

Till the year 1958, there were no standardised wages in the textile industry. According to the Report of the Central Wage Board for the Cotton Textile Industry which was published on 22nd November, 1959, there were in India 39 regions in which the textile industry was located. The basic monthly wages of the workmen in the year 1958 varied between Rs. 18 in Patna and Rs. 30 in various centres like Bombay, Indore, Madras, Coimbatore, Madurai, Bhiwani, Hissar, Ludhiana, Cannanore and certain regions in Rajasthan and Delhi. The wage Board recommended in Paragraph 106 of its Report :

"The Board has come to the conclusion that an increase at the average rate of Rs. 8 per month per worker shall be given to all workers in mills of category I from 1st January, 1960, and a further flat increase of Rs. 2 per month per worker shall be given to them from 1st January, 1962. Likewise an increase at the average rate of Rs. 6 per month per worker shall be given to all the workers in mills of category II from 1st January, 1960, and a further flat increase of Rs. 2 per month per worker shall be given to them from 1st January, 1962. These increases are subject to the condition that the said sums of Rs. 8 and Rs. 6 shall ensure not less than Rs. 7 and Rs. 5 respectively to the lowest paid, and that the increase of Rs. 2 from 1st January, 1962 shall be flat for all."

Category I included the Delhi region. Since 1st January, 1962, the basic minimum wage in the Delhi region is, therefore, Rs. 40 according to the recommendations of the Wage Board. In Bombay City and Island (including Kurla), the basic wage, according to the Report of the Wage Board, was also Rs. 30 and by the addition of Rs. 10 the basic wage of a workman came to Rs. 40. The workmen in other important textile centres also get the same rates.

The Tribunal was of the view that the average basic wage of the workmen is Rs. 60 since the implementation of the Wage Board in the Delhi region. No argument was advanced before this Court challenging the correctness of that assumption, by the employers or the workmen. It was also common ground that practically uniform basic wage levels prevail in all the large textile centres like Bombay, Ahmedabad, Coimbatore and Indore.

Besides the basic wage the workmen receive dearness allowance under diverse awards made by the Industrial Tribunals which "seek for neutralize the cost of living index." There is also a provident fund scheme under the Employees Provident Fund Act, 1962, whereunder 8% of the basic wage and the dearness allowance and the retaining allowance for the time being in force is contributed by the employees. Besides, there is a right to retrenchment compensation under the Industrial Disputes Act, 1947 (section 25 FFF) and the Employees Insurance Scheme. In view of the observations of this Court in *Burhanpur Tapti Mill's Ltd. v. Burhanpur Tapti Mills Mazdoor Sangh*¹, that :

"It is no longer open to doubt that a scheme of gratuity can be introduced in concerns where there already exist other schemes such as provident fund or retrenchment compensation. This has been ruled in a number of cases of this Court and recently again in *Wenger & Co. and others v. Their Workmen*² and *Indian Hume Pipe Company Ltd. v. Their Workmen*³. It is held in these

1. (1965) 1 L.L.J. 453 : (1965) 2 S.C.J. 737.
2. (1963) 2 L.L.J. 403.

3. (1960) S.C.J. 550 : (1959) 2 L.L.J. 830.

cases that although provident fund and gratuity are benefits available at retirement they are not the same and one can exist with the other",

No serious argument was advanced that the existence of these additional benefits disentitled the workmen to obtain benefits under a gratuity schemes if the employer is able to meet the additional burden.

But on behalf of all the employers it was urged that—(1) in determining the quantum of gratuity, basic wage alone could be taken into account and not the consolidated wage; and (2) it was necessary for the Tribunal to fix when introducing a gratuity scheme the age of superannuation. On behalf of the D.C.M., S.B.M. and B.C.M. it was urged in addition that a uniform scheme applicable to the entire industry on the *region-cum-industry* basis should have been adopted and not a scheme or schemes applicable to individual units. On behalf of the A. T. M. it was urged that its financial condition is not and has never been stable and the burden of payment of gratuity to workmen dying or disabled or on voluntary retirement from service or when their employment is terminated is excessive and the Unit was unable, to bear that burden. It was also urged on behalf of the A.T.M. that in view of a settlement which was reached between the management and workmen it was not open to the Tribunal to ignore that settlement and to impose a scheme for payment of gratuity in favour of the workmen in this reference.

While broadly supporting the award of the Tribunal the workmen claim certain modifications. They claim that a shorter period of qualifying service for workmen voluntarily retiring should be provided, and gratuity should be worked out by the application of a larger multiple of days for each completed year of service; that the ceiling of gratuity should be related to a larger number of months' wages; that gratuity should be awarded for dismissal even for misconduct; that provision should be made for payment of gratuity to *Badli* workmen irrespective of the numbered days for which they work in a year; that the expression "average of the basic wage" should be appropriately clarified to avoid disputes in the implementation of the gratuity scheme, and that the award should be made operative not from 1st January, 1964, but from the date of the reference to the Tribunal.

The two schemes which have been framed may be set out :

ANNEXURE 'A'

"Gratuity scheme applicable to the Delhi Cloth Mills and the Swatantra Bharat Mills.

Gratuity will be payable to the employees concerned, in this reference, on the scale and subject to the conditions laid down below :

1. On the death of employee while in the service of the mill company or on his becoming physically or mentally incapacitated for further service :

(a) After 5 years continuous 12 days' wages for each completed year service and less than 10 of service, years' service.

(b) After continuous service of 10 15 days' wages for each completed years, year of service."

The gratuity will be paid in each case under clauses 1 (a) and 1 (b) to the employees, his heirs or executors or nominee as the case may be :

Provided that in no case will an employee, who is in service on the date on which this scheme is brought into operation, be paid an amount less than

what he would have been entitled to under the pre-existing scheme of the Employees' Benefit Fund Trust:

(ii) Provided further that the maximum payment to be made shall not exceed the equivalent of 15 months wages:

(iii) Provided further that gratuity under this scheme will not be payable to any employee who has already received gratuity under the pre-existing scheme of the Employees' Benefit Fund Trust.

2. On voluntary retirement or 15 days' wages for each completed resignation after 15 years' year of service.
service.

Provided that the maximum payment to be made shall not exceed the equivalent of 15 months' wages.

3. On termination of service on, As in clauses 1 (a) and 1 (b) above.
any ground whatsoever
except on the ground of
misconduct.

Provided that the maximum payment to be made shall not exceed the equivalent of 15 months' wages.

4. *Definitions:*

(a) "Wages"

The term "wages" in the scheme will mean the average of the basic wage plus the dearness allowance drawn during 12 months next preceding death, incapacitation, voluntary retirement, resignation or termination of service and will not include overtime wages.

(b) "Basic wages"

The term "basic wage" will have the meaning as defined in paragraph 110 of the Report of the First Central Wage Board for Cotton Textile Industry.

(c) "Continuous service"

"Continuous service" means un-interrupted service and includes service which may be interrupted on account of sickness, authorised leave, strike which is not illegal, lockout or cessation of work which is not due to any fault on the part of the employee:

Provided that interruption in service upto six months' duration at any one time and 18 months' duration in the aggregate of the nature other than those specified above shall not cause the employee to lose the credit for previous service in the mills for the purpose of calculation of gratuity, but at the same time shall not entitle him to claim benefit of gratuity for period of such interruption. Service for the purposes of gratuity will include service under the previous management whether in the particular mill or other sister mill under the same management.

(d) "Resignation"

The word "resignation" will include abandonment of service by an employee provided he submits his resignation within a period of three months from the first day of absence without leave.

(e) "Length of service"

For counting "length of service," fraction of a year exceeding six months shall count as one full year, and six months or less shall be ignored.

5. "Application for gratuity"

Any person eligible to claim payment of gratuity under this scheme shall, so far as possible, send a written application to the employer within a period of six months from the date its payment becomes due.

6. "Payment of gratuity"

The employer shall pay the amount of gratuity to employee and in the event of his death before the payment to the person or persons entitled to it under clause 1 above within a period of 90 days of the claim being presented to the employer and found valid.

7. "Claims by persons who are no longer in service"

Claims by persons who are no longer in service of the Company on the date of the publication of this award shall not be entertained unless the claims are preferred within six months from the date of publication of this award.

8. "Badli service"

Gratuity shall be paid for only those years of *Badli Service* in which the employee has worked for not less than 240 days.

9. "Proof of incapacity"

In proof of physical or mental incapacity, it will be necessary to produce a certificate from any one of the Medical Authorities out of a panel to be jointly drawn up by the parties.

10. "Nomination"

(a) Each employee shall, within six months from the date of the publication of this award, make a nomination conferring the right to receive the amount of gratuity that may be due to him in the event of his death, before payment has been made.

(b) A nomination made under sub-clause *a*) above may, at any time, be modified by the employee after giving a written notice of his intention of doing so. If the nominee pre-deceases the employee, the interest of the nominee shall revert to the employee who may make a fresh nomination in respect such interest."

ANNEXURE 'B'

Gratuity scheme applicable to the Birla Cotton Spinning and Weaving Mills and the Ajudhia Textile Mills.

Gratuity will be payable to the employees concerned in this reference, on the scale and subject to the conditions laid down below :—

1. On the death of an employee while in the service of the Mill company or on his becoming physically or mentally incapacitated for further service :

(a) After 5 years continuous service and less than 10 years service. One fourth month's wages for each completed year of service.

(b) After continuous service of 10 years. One third month's wages for each completed year of service.

"The gratuity will be paid in each case under clauses 1 (a) and 1 (b) to the employee, his heirs or executors, or nominee, as the case may be.

Provided that the maximum payment to be made shall not exceed the equivalent of 12 months' wages.

2. On voluntary retirement, or resignation after 15 years service. On the same scale as in 1 (b) above.

Provided that the maximum payment to be made shall not exceed the equivalent of 12 months' wages.

3. On termination of service by As in clauses 1 (a) and 1 (b) above.
the employer for any reason
whatsoever except on the
ground of misconduct.

Provided that the maximum payment to be made shall not exceed the equivalent of 12 months' wages."

[Clauses 4 to 10 of Annexure 'B' are the same as in Annexure 'A' and need not be repeated.]

Whether against the A.T.M., the Tribunal was incompetent to make an award framing a scheme for payment of gratuity may first be considered. Counsel for the A.T.M. urged that there was a settlement between the workmen and the management of the A.T.M. in consequence of which the Tribunal was incompetent to make an award. The facts on which reliance was placed are these. After the dispute was referred to the Industrial Tribunal, there were negotiations between the management of the A.T.M. and workmen represented by the two Unions and an agreement was reached, the terms whereof were recorded in writing. Clauses 6 and 11 (4) of the agreement relate to the claim for gratuity:

"6. The workmen agree not to claim any further increase in wages, basic or dearness, or make any other demand involving financial burdens on the Company either on their initiative or as a result of any award, till such time as the working of the mills results in profits.

11. The parties hereto agree to jointly withdraw in terms of this settlement, the following pending cases and proceedings before the Courts, Tribunals and Authorities and more especially—

* * * * *

(4) With regard to I. D. No. 70 of 1958, the workers agree not to claim any benefits that may be granted under the above reference by the Hon'ble Industrial Tribunal in case the award is given in favour of the workmen, subject to clause 7 above."

(It is common ground that reference to clause 7 is erroneous: it should be to clause 6.)

The workmen and the management of the unit submitted an application before the Tribunal on 28th December, 1959, admitting that there had been an "overall settlement" of all the pending disputes between the management of A.T.M. and its workmen represented by the two Unions, and requested that an interim award be made in terms of the agreement insofar as the dispute related to the A.T.M. No order was passed by the Tribunal on that application. On 4th June, 1962, the Manager of the A.T.M. applied to the Tribunal that an interim award be pronounced in terms of the agreement. The workmen had apparently changed their attitude by that time and filed a written statement and requested that the prayer contained in paragraph-3 of the application "be rejected as impermissible in law." The Tribunal made an order on 26th November, 1962 and observed:

".....the only interpretation that can be given to clause 11 (4) of the settlement read with clause 7 is, that the workers of the Ajudhia Textile Mills had bound themselves not to claim any benefits that might be granted by the Tribunal is the award on the present reference, if it turns out to be in favour of the workmen unless and until the working of the Mills results in profit. The fact that the passing of an award on the demands was envisaged under the

settlement goes to show that the demands were to be adjudicated upon in any case.

The main case will now proceed in respect of all the mills and the effect of the settlement and of the application dated 28th December, 1959, and of the 5th July, 1962 will be considered at the time of the final award."

But in making the final award the Tribunal did not specifically refer to the settlement. The terms of clause 6 of the settlement clearly show that if it be found that the A.T.M. had acquired financial stability, it will be liable to pay gratuity to the workmen. We are unable to agree with the contention of Counsel for the A.T.M. that it was intended by the parties that the adjudication proceedings against the A.T.M. should be dropped, and after the A.T.M. became financially stable a fresh claim should be made by the workmen on which a reference may be made by the Government for adjudication of the claim for gratuity against the A.T.M. The contention by the management of the A.T.M. that the Tribunal was incompetent to determine the gratuity payable to the workmen of the A.T.M. must therefore fail.

The other contention raised on behalf of the A.T.M. that its financial position was "unstable" need not detain us. The Tribunal has held that the A.T.M. was working at a loss since the year 1953-54 and the losses aggregated to Rs. 6.22 lakhs in the year 1958-59, but thereafter the financial position of the unit improved. The trading account for the period ending 31st March, 1966, showed profits amounting to Rs. 3.10 lakhs. In 1960-61 there was a surplus of Rs. 11.18 lakhs out of which adjusting the depreciation, development rebate reserve and reserve for bad and doubtful debts, there was a balance of Rs. 7.10 lakhs. In 1961-62, the net profits of the Unit amounted to Rs. 7.48 lakhs and the A.T.M. distributed Rs. 52,500 as dividend. In 1962-63, there was a gross profit of Rs. 4.18 lakhs and after adjusting depreciation and development rebate reserve there was a net deficit of Rs. 30,517. In 1963-64, there was a gross profit of Rs. 14.29 lakhs and after adjusting depreciation, reserve for doubtful debts, bonus to employees and development rebate reserve, there remained a net profit of Rs. 4.71 lakhs. The Tribunal observed that by 1961-62 all previous losses of the Unit were wiped out and that even during the year 1962-63 in which there was labour unrest the gross profits were substantial and taking into consideration the reserves built by the Company "the picture was not disheartening and from the great progress that had been made since 1959-60 there was every reason to think that the Mill had achieved stability and reasonable prosperity and that it had an assured future", and the Company was in a position to meet the burden of a modest gratuity scheme. We see no reason to disagree with the finding recorded by the Tribunal on this question.

On behalf of the D.C.M., S.B.M. and B.C.M., it was urged that normally gratuity schemes are framed on the region-cum-industry principle, i.e. a uniform scheme applicable to all units in a region is framed, and no ground for departure from that rule was made out. It was urged that this Court has accepted invariably the region-cum-industry principle in fixing the rates at which gratuity should be paid. In our judgment no such rule has been enunciated by this Court. In *Bhagarkhand Textile Manufacturing Co. Ltd. v. Textile Labour Association, Ahmedabad*, this Court in dealing with the question whether the Industrial Court had committed an error in dealing with the claim for gratuity on industry-wise basis negatived the contention of the employers that the unit wise basis was the only basis which could be adopted in fixing the rates of gratuity. It was observed at page 345:

"Equality of competitive conditions is in a sense necessary from the point of view of the employers themselves; that, in fact, was the claim made by the Association which suggested that the gratuity scheme should be framed on industry-wise basis spread over the whole of the country. Similarly equality of benefits such as gratuity is likely to secure contentment and satisfaction of the employees and lead to industrial peace and harmony. If similar gratuity schemes are framed for all the units of the industry migration of employees from one unit to another is inevitably checked, and industrial disputes arising from unequal treatment in that behalf are minimised. Thus, from the point of view of both employers and employees industry-wise approach is on the whole desirable."

It is clear that the Court rejected in that case the argument that rates of gratuity should be determined unit-wise; the Court did not rule that in all cases the region-cum-industry principle should be adopted in fixing the rates of gratuity. That was made explicit in a later judgment of this Court; *Burhanpur Tapti Mills Ltd. v. Burhanpur Tapti Mills Mazdoor Sangh*.¹ This Court observed at page 456 :

".....it has been laid down by this Court that there are two general methods of fixing the terms of a gratuity scheme. It may be fixed on the basis of industry-cum-region or on the basis of units. Both systems are admissible but regard must be had to the surrounding circumstances to select the right basis. Emphasis must always be laid upon the financial position of the employer and his profit-making capacity whichever method is selected."

In *Garment Cleaning Works v. Its Workmen*² this Court observed at page 515:

".....It is one thing to hold that the gratuity scheme can, in a proper case, be framed on industry-cum-region basis, and another thing to say that industry-cum-region basis is the only basis on which gratuity scheme can be framed. In fact, in a large majority of cases gratuity schemes are drafted on the basis of the units and it has never been suggested or held that such scheme are not permissible."

The Tribunal in the award under appeal observed :

"There are * * * certain peculiar features in the textile industry in this region which militate against an industry cum-region approach. Apart from the fact that one of the four units, namely, the Ajudhia Textile Mills is a much weaker unit than the rest and has passed through a chequered career during its existence, it has to be borne in mind that two of the units namely D.C.M. and S.B.M. which are sister concerns, already have some sort of a gratuity scheme providing for two important retrieval benefits, namely death and physical disablement on a scale which is independent of wage variations and is not unsubstantial at least for categories in the lower levels."

The Tribunal further observed :

"If a common scheme is framed for the entire textile industry at Delhi, i.e. for all the four units the quantum of benefits under that scheme will naturally have to be much lower in consideration of the financial condition of the Ajudhia Textile Mill, than if a unit-wise scheme is framed. Moreover in a common "scheme of gratuity the quantum of benefits to be provided will have to be lower than the benefits already available to workmen in the D.C.M. and S.B.M. units for the most important contingencies for which gratuity benefits are meant, namely, death and retirement on account of physical or mental incapacity. Such a lowering of the quantum of benefits would not in my view be desirable as it would create legitimate discontent."

1. (1965) 1 L.L.J. 453; (1965) 2 S.C.J. 737.

2. (1961) 1 L.L.J. 513; (1962) 1 S.C.R. 711.

In our judgment, no serious objection may be raised against the reasons set out by the Tribunal in support of the view that unit-wise approach should be adopted in the reference before it and not the region-cum-industry approach. No case is therefore made out for interference with the award made determining the rates of gratuity unit-wise.

We also agree with the Tribunal that on the terms of the reference it was incompetent to fix the age of superannuation for workmen. We are unable to hold that a gratuity scheme may be implemented only if the age of superannuation of the workmen is determined by the award. Support was sought to be derived by Counsel for the employers in support of his plea from the observations made by this Court in *Buhanpur Tapri Mills Ltd.'s case*¹, where in examining the nature of gratuity, it was observed :

"The voluntary retirement of an inefficient or old or worn out employee on on the assurance that he is to get a retiral benefit leads to the avoidance of of industrial disputes, promotes contentment among those who look for promotions, draws better kind of employees and improves the tone and morale of the industry. It is beneficial all round. It compensates the employee who as he grows old knows that some compensation for the gradual destruction of his wage-earning capacity is being built up. By inducing voluntary retirement of old and worn out workmen it confers on the employer a benefit akin to the replacing of old and worn out machinery."

There is, in our judgment, nothing in these observations which justifies the view that a gratuity scheme cannot be effective unless it is accompanied by the fixation of the age of superannuation for the workmen in the industry.

There is another objection to the consideration of this claim made on behalf of the employers. By the express terms of reference the Tribunal is called upon to adjudicate on the question of fixation of gratuity : there is no reference either expressly or by implication to the fixation of the age of superannuation and in the absence of any reference relating to the fixation of the age of superannuation, the Tribunal was not competent to fix the age of superannuation. A gratuity scheme may, in our judgment, be implemented even without fixing the age of superannuation. The gratuity scheme in operation in the D.C.M. and S.B.M. has been effectively in operation without any age of superannuation for the workmen in the two units. An enquiry into the question of fixing the age of superannuation did not arise out of the terms of reference. No such claim was made by workmen and even in the written statement filed by the employers no direct reference was made to the fixation of the age of superannuation, nor was there any plea that before framing a gratuity scheme the Tribunal should provide for the age of superannuation. We agree with the Tribunal that fixation of the age of superannuation was not incidental to the framing of the gratuity scheme and it was neither necessary nor desirable that it should be fixed.

Counsel for the employers urged that the Tribunal committed a serious error in relating the computation of gratuity payable to the workmen on retirement on the consolidated monthly wage and not on the basic wage. "Gratuity" in its etymological sense means a gift especially for services rendered or return for favours received. For sometime in the early stages in the adjudication of industrial disputes, gratuity was treated as a gift made by the employer at his pleasure and the workmen had no right to claim it. But since then there has been a long line of precedents in which it has been ruled that a claim for gratuity is a legitimate claim which the workmen may make and which in appropriate cases may give rise to an industrial dispute.

In *Garment Cleaning Works' case*¹ it was observed that gratuity is not paid to the employees gratuitously or merely as a matter of boon. It is paid to him for the service rendered by him to the employer. The same view was expressed in *Bharatkhand Textile Mfg. Ltd.'s case*² and *Calcutta Insurance Ltd. v. Their Workmen*³. Gratuity paid to workmen is intended to help them after retirement on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing a gratuity scheme is to provide a retiring benefit to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer. It is one of the 'efficiency-devices' and is considered necessary for an 'orderly and human elimination' from industry of superannuated or disabled employees who, but for such retiring benefits, would continue in employment even though they function inefficiently. It is not paid to an employee gratuitously or merely as a matter of boon; it is paid to him for long and meritorious service rendered by him to the employer.

On the findings recorded by the Tribunal all the textile units in the Delhi region are able to meet the additional financial burden, resulting from the imposition of a gratuity scheme. The D.C.M. and S.B.M. have their own schemes which enable the workmen to obtain substantial benefit on determination of employment. The B.C.M. though a weaker unit is still fairly prosperous and is able to bear the burden; so also the A.T.M.

But the important question is whether these four units should be made liable to pay gratuity computed on the consolidated wage i.e. basic wage plus the dearness allowance. The Tribunal was apparently of the view that in determining the question the definition of the word "wages" in the Industrial Dispute Act, 1947, would come to the aid of workmen. The expression "wages" as defined in section 2 (rr) of the Industrial Disputes Act means all remuneration, capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes, among other things, such allowances (including dearness allowance) as the workman is for the time being entitled to. But we are unable to hold that in determining the scope of an industrial reference, words used either in the claim advanced or in the order of reference made by the Government under section 10 of the Industrial Disputes Act, must of necessity have the meaning they have in the Industrial Disputes Act. Merely because the expression "wages" includes dearness allowance within the meaning of the Industrial Disputes Act, the Tribunal is not obliged to base a gratuity scheme on consolidated wages.

The Tribunal has observed that the basic average wage of a workman in the textile industry in the Delhi region may be taken at Rs. 60 per month, and the dearness allowance at Rs. 100 per month, and even if full one month's basic wage is adopted as the minimum quantum of benefits to be allowed in the case of wage group with service of five years and more the scale of benefit would be very much lower than the present scale in the two contingencies provided in the Employees Benefit Fund Trust Scheme in operation in the D.C.M. and S.B.M. And observed the Tribunal:

"In view of the limitations of the terms of the reference, the quantum cannot exceed 15 days' wages for every year of service from 5 to 10 years and 21 days' wages for every year of service from 10 to 15 years. Any scheme framed within the limitations of the terms of reference on the basis of basic wage alone will therefore mean a scale of benefits much lower than even the present scheme under the Employees Benefit Fund Trust. Such a scheme cannot, therefore,

1. (1961) 1 L.L.J. 513; (1962) 1 S.C.R. 711. 3. (1967) 2 L.L.J. 1 : (1967) 2 S.C.R. 596.
2. (1960) 3 S.C.R. 329.

be framed without causing grave injustice and acute discontent, because it will mean the deprivation of even the present scale of benefits in the case of large body of workers. In order to maintain, so far as possible, the present level of benefits I have, therefore, no alternative but to frame for these two units a scheme based on basic wage plus dearness allowance."

A scheme of gratuity based on consolidated wages was also justified in the view of the Tribunal because it "was also necessary to compensate for the ever diminishing market value of the rupee."

The Tribunal did however observe that normally gratuity is based not on the consolidated wage but on basic wage. But since 13,000 workmen out of a total of 20,000 workmen in the region would stand to lose the benefits granted to them under a voluntary scheme introduced by the D.C.M. and S.B.M. a departure from the normal pattern should be made and gratuity should be based on the consolidated monthly wage. In our judgment, the conclusion of the Tribunal cannot be supported. The primary object of industrial adjudication is, it is said, to adjust the relations between the employers and employees or between employees *inter se* with the object of promoting industrial peace, and a scheme which deprives workmen of what has been granted to them by the employer voluntarily would not secure industrial peace. But on that account the Tribunal was not justified in introducing a fundamental change in the concept of a benefit granted to the workmen in the textile industry all over the country by numerous schemes. The appropriate remedy is to introduce reservations protecting benefits already acquired and to frame a scheme consistent with the normal pattern prevailing in the industry.

We consider it right to observe that in adjudication of industrial disputes settled legal principles have little play: the awards made by industrial tribunals are often the result of *ad hoc* determination of disputed questions, and each determination forms a precedent for determination of other disputes. An attempt to search for principle from the law built up on those precedents is a futile exercise. To the Courts accustomed to apply settled principles to facts determined by the application of the judicial process, an essay into the unsurveyed expanses of the law of industrial relations with neither a compass nor a guide, but only the pillars of precedents is a disheartening experience. The Constitution has however invested this Court with power to sit in appeal over the awards of Industrial Tribunals which are, it is said, founded on the somewhat hazy background of maintenance of industrial peace, which secures the prosperity of the industry and improvement of the conditions of workmen employed in the industry, and in the absence of principles precedents may have to be adopted as guides—somewhat reluctantly to secure some reasonable degree of uniformity or harmony in the process.

But in the branch of law relating to industrial relations the temptation to be crusaders instead of adjudicators must be firmly resisted. It would not be out of place to remember the statement of the law made in a different context—but none the less appropriate here—by Douglas, J., of the Supreme Court of the United States in *United Steel Workers of America v. Enterprise Wheel and Car Corporation*¹ :

".....as arbitrator x x x does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, Courts have no choice but to refuse enforcement of the award."

We may at once state that we are not for a moment suggesting that the law of industrial relations developed in our country has proceeded on lines parallel to the direction of the law in the United States.

One of the grounds which appealed to the Tribunal in relating the rate of gratuity to the consolidated wage was the existence of a gratuity scheme in the D.C.M. & S.B.M. and the assumption that the Tribunal adjudicating a dispute is always, in exercise of its jurisdiction, limited when determining the rate of gratuity to the multiple number of days of service in the order of reference, and cannot depart therefrom. We are unable to hold that Industrial Tribunal is subject to any such restriction. Its power is to adjudicate the dispute. It cannot proceed to adjudicate disputes not referred: but when called upon to adjudicate whether a certain scheme "on the lines indicated" should be framed the basic guidance cannot be deemed to impose a limit upon its jurisdiction.

As already stated, gratuity is not in its present day concept merely a gift made by the employer in his own discretion. The workmen have in course of time acquired a right to gratuity on determination of employment, provided the employer can afford, having regard to his financial condition, to pay it. There is undoubtedly no statutory direction for payment of gratuity as it is in respect of provident fund and retrenchment compensation. The conditions for the grant of gratuity are, as observed in *Bharatkhand Textile Mfg. Co. Ltd's case*¹; (i) financial capacity of the employer; (ii) his profits making capacity; (iii) the profits earned by him in the past; (iv) the extent of his reserves; (v) the chances of his replenishing them; and (vi) the claim for capital invested by him. But these are not exhaustive and there may be other material considerations which may have to be borne in mind in determining the terms and conditions of the gratuity scheme. Existence of other retiring benefits such as provident fund and retrenchment compensation or other benefits do not destroy the claim to gratuity: its quantum may however have to be adjusted in the light of the other benefits.

We may repeat that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the Tribunal or the Courts may be determined and often precedents of cases determined *ad hoc* are utilised to build up claims or to resist them. It would in the circumstances be futile to attempt to reduce the grounds of the decisions given by the Industrial Tribunals, the Labour Appellate Tribunals and the High Courts to the dimensions of any recognized principle. We may briefly refer to a few of the precedents relating to the grant of gratuity. In *May and Baker (India) Ltd. v. Their Workmen*², the claim of the workmen to fix gratuity on the basis of gross salary was rejected by the Industrial Tribunal and the quantum was related to basic salary i.e., excluding dearness allowance. The view taken by the Tribunal was affirmed by this Court. In *British India Corporation v. Its Workmen*³ the existing gratuity scheme directed payment of gratuity in terms of consolidated wages. The Tribunal however modified the scheme while retaining the basis of consolidated wages which was held to be justified and reasonable. This Court observed that *prima facie* gratuity is awarded not by reference to consolidated wages but on basic wages and the Tribunal had made a departure from that. But in the view of the Court no interference with the scheme framed by the Tribunal was called for. In *British Paints (India) Ltd. v. Its Workmen* the Court followed the judgment in *May and Baker (India) Ltd.*² that it would be proper to follow the usual pattern of fixing the quantum of gratuity on basic wage excluding dearness allowances. But same principle was not adhered to in

1. (1960) 3 S.C.R. 829.
2. (1961) 2 L.L.J. 94 (S.C.).

3. (1965) 2 L.L.J. 556 (S.C.).
4. (1966) 1 L.L.J. 407.

all cases. For instance in *Hindusthan Antibiotics Ltd. v. Their Workmen*¹, it was observed.

"The learned Counsel for the Company then argued that there is a flagrant violation or departure from the accepted norms in fixing the wage structure and the dearness allowance and therefore, as an exceptional case, we should set aside the award of the Tribunal and direct it to re-fix the wages."

In that case the Tribunal had awarded gratuity related to consolidated wages and without any contest the order of the Tribunal was confirmed. In *Remington Rand of India v. The Workmen*² it was contended on behalf of the employer that the Tribunal was not justified in awarding gratuity on the basis of consolidated wages and should have awarded it on the basic wages alone. In dealing with that plea this Court observed that the Tribunal was *on the facts of the case* justified in proceeding in that way.

It is not easy to extract any principle from these cases, as precedents they are conflicting. If the matter rested there, we could not interfere with the conclusion of the Tribunal, but the Tribunal has failed to take into account the prevailing pattern in the textile industry all over the country. The textile industry is spread over the entire country, in pockets some large others small. There are large and concentrated pockets in certain regions and smaller pockets in other regions. Except in two or three of the smaller States, textile units are to be found all over the country. It is a country-wide industry and in that industry, except in one case to be presently noticed, gratuity has never been granted on the basis of consolidated wages. Out of 39 centres in which the textile industry is located there is no centre in which gratuity payable to workmen in the textile industry pursuant to awards or settlements is based on consolidated wages. In the two principal centres, viz. Bombay and Ahmedabad, schemes for payment of gratuity to workmen in the textile industry the rates of gratuity are related to basic wages. The B.C.M. have tendered before the Tribunal a chart setting out the names of textile units in which the gratuity is paid, to the workmen on basic wages. These are—the Textile Units, Bhavnagar. (Gujarat); Shaniur Chhatrapati Mills, Kolhapur (Maharashtra); Jivajirao Cotton Mills, Gwalior (Madhya Pradesh); Madhya Pradesh Mill-owners' Association, (Indore); Bombay, Ahmedabad (Gujarat); New Sherrock Spg. & Wvg. Co. Ltd., Nadiad (Gujarat); Raja Bahadur Motilal Mills, Poona (Maharashtra); Shree Gajanan Wvg. Mills, Sangli (Maharashtra); T.I.T. Bhiwani (Haryana); Jagatjeet Cotton Mills, Phagwada (Punjab); 36 Textile Mills in West Bengal; and Umed Mills (Rajasthan). It is true that the chart does not set out the gratuity schemes, if any, in all the 39 centres referred to in the Report of the First Wage Board, but the chart relates to a fairly representative segment of the industry. No evidence has been placed before the Court to prove that in determining gratuity payable under any other scheme in a textile unit the rate is related to consolidated wages. The two large centres in which the industry is concentrated are Bombay and Ahmedabad. In *Rashtriya Mill Mazdoor Sangh, Bombay v. Millowners' Association, Bombay*³, a scheme was framed by the Industrial Court, exercising power under the Bombay Industrial Relations Act XI of 1947, in which the quantum of gratuity was related to the basic wages alone. In paragraph 27 at p. 583 the Tribunal rejected the argument advanced by Counsel for the workmen that since benefits like provident fund, retrenchment compensation, State insurance scheme, are granted in terms of monthly wages, gratuity should also be

1. (1957) 1 L.L.J. 114 (S.C.): (1967) 1 S.C.R. 652 : (1963) 1 S.C.J. 12 : A.I.R. 1967 S.C. 948.

2. (1968) 1 L.L.J. 542.

3. (1957) Industrial Court Reporter 561.

related to consolidated wages. They observed that in a large majority of awards of the Labour Appellate Tribunal and Industrial Tribunals gratuity had been awarded in terms of basic wages, and that,

"The basic wages reflect the differentials between the workers more than the total wages, as dearness allowance to all operatives is paid at a flat rate varying with the cost of living index. The gratuity schemes for the supervisory and technical staff as well as for clerks are also in terms of basic wages."

They accordingly related gratuity with the average basic wage earned by the workman during the twelve months preceding death, disability, retirement, resignation or termination of service. The scheme in the Bombay region was adopted in the dispute between the Textile Labour Association and the Ahmedabad Mill Owners' Association. The award is reported in the *Textile Labour Association, Ahmedabad v. Ahmedabad Millowners' Association*.¹ The question whether gratuity should be fixed on the basis of consolidated wages was apparently not mooted, but it was accepted on both the sides that gratuity should be related to basic wages. An appeal against that decision in the *Ahmedabad Mill Owners' Association case*¹ was brought before this Court in *Bharatkhand Textile Manufacturing Co. Ltd.'s case*,² but no objection was raised to the award relating gratuity to basic wages. In the report of the General Wage Board for the Cotton Textile Industry, 1959, in paragraph 110 gratuity was directed to be given on the basis of wages plus the increases given under paragraph 106, but excluding the dearness allowance.

The only departure from the prevailing pattern to which our attention is invited was made by the Labour Appellate Tribunal in regard to the textile units in the Coimbatore Region: *Rajalakshmi Mills Ltd. v Their Workmen*.³ There was apparently no discussion on the question about the basis on which gratuity should be awarded. The Labour Appellate Tribunal observed:

2. "In all the appeals there is a contest by the mills on the subject of gratuity, and it is contended that the gratuity as awarded is too high. Both sides had much to say on the subject of the gratuity scheme as given by the adjudicator. During the course of the hearing we indicated to the parties the lines on which the gratuity scheme could be suitably altered to meet their respective points of view."

3. "We accordingly give the following scheme in substitution of the scheme at paragraph 85 of the award:

'All persons with more than five years and less than ten years' continuous service to their credit, on termination of their service by the company, except in cases of dismissals for misconduct involving moral turpitude, shall be paid gratuity at the rate of ten days' average rate of pay inclusive of dearness allowance for each completed year of service.'

* * * * *

But this award was modified later by the Industrial Tribunal in *Coimbatore District Mill Workers' Union and others v. Rajalakshmi Mills Co., Ltd.*⁴ The earlier award made in 1957 was sought to be reviewed before the industrial Tribunal. The Tribunal observed that it would be the duty of the Tribunal to modify a gratuity scheme based upon some agreement or settlement if the terms of that agreement are found to be onerous and oppressive. The Tribunal stated that the original scheme was not applicable to all the units and taking into considera-

1. (1958) L.L.J. 349.

2. (1960) 3 S.C.R. 329.

3. (1957) 2 L.L.J. 426

4. (1964) 1 L.L.J. 638.

tion the statutory provident fund scheme and "the fact that recently basic wages and dearness allowance have leaped up", there was no justification for including the dearness allowance in any new scheme that might be framed for the new Mills; and that it would be most undesirable to have two sets of gratuity schemes in the same region with varying rates. In the view of the Tribunal there should be a uniform scheme for all the Mills, old and new, and on that ground also the retention of the dearness allowance under the old scheme must be refused.

Counsel for the workmen relied upon an award made by the Industrial Tribunal in the Chemical Unit belonging to the D.C.M. which is published in *D.C.M. Chemical Works v. Its Workmen*. In that case gratuity was related to consolidated wages. The unit though belonging to the D.C.M. is entirely independent of the textile unit. The Company was treating the unit as separate from the textile unit and distinct for the purpose of recruitment of labour, sale, and conditions of service for the workmen employed therein. The Chemical Unit had separate muster-rolls for its employees and transfers from one unit to the other, even where such transfers were possible, considering the utterly different kinds of business carried on in the difference units, usually took place with the consent of the employee concerned. In upholding the gratuity scheme which was based on the consolidated wages, this Court observed:

"As to the burden of the scheme, we do not think that, looking at it from a practical point of view and taking into account the fact that there are about 800 workmen in all in the concern, the burden per year would be very high, considering that the number of retirements is between three to four per centum of the total strength."

The gratuity scheme was in a chemical unit, and not in a textile unit. The judgment of this Court merely affirmed the award of the Tribunal and sets out no reasons why gratuity should be related to consolidated wages. We do not regard the affirmation by this Court of the award of the Industrial Tribunal as an effective or persuasive precedent justifying a variation from the normal pattern of gratuity schemes in operation in the textile industry all over the country.

It is clear that in the gratuity schemes operative at present to which our attention has been invited, in force in the textile industry payment of gratuity is related not to consolidated wages but to basic wages. It is true that under the scheme which is in operation in the D.C.M. and S.B.M. payment which is related to the length of service may in some cases exceed the maximum awardable under a scheme of gratuity benefit related to basic wages. That cannot be a ground for making a vital departure from the prevailing pattern in the other textile units in the country. But it may be necessary to protect the interest of the members governed by the original scheme.

Determination of gratuity is not based on any definite rules. In each case it must depend upon the prosperity of the concern, needs of the workmen and the prevailing economic conditions, examined in the light of the auxiliary benefits which the workmen may get on determination of employment. If all over the country in the textile centres payment of gratuity is related to the basic wages and not on consolidated wages any innovation in the Delhi region is likely to give rise to serious industrial disputes in other centres all over the country. The award if confirmed would not ensure industrial peace if it is likely to foment serious unrest in other centres. If maintenance of industrial peace is a governing principle of industrial adjudication, it would be wise to maintain a reasonable degree of uniformity in the diverse units all over the country and not to make

a fundamental departure from the prevailing pattern. We are, therefore, of the view that the Tribunal's award granting gratuity on the basis of consolidated wage cannot be upheld. This modification will not, however, affect the existing benefits which are available under the schemes framed by the D.C.M. and S.B.M. insofar as those two units are concerned.

Mr. Ramamurthi for the workmen also contended that in the matter of relating gratuity to wages—consolidated or basic—the principle of region-wise industry should be applied and an “overall view of similar and uniform conditions in the industry in different centres” should not be adopted. It was also urged that the basic wage is very low and the class of wage to which gratuity was related played a very important part in the determination of gratuity. The basic wage is however low in all the centres and if it does not play an important part in other centres, we see no reason why it should play only in the Delhi region a decisive part so as to make vital departure from the scheme in operation in the other centres in the country. We are strongly impressed by the circumstances that acceptance of the award of the Tribunal in the present case is likely to create conditions of great instability all over the country in the textile industry. In that view, we decline to uphold the order of the Tribunal fixing gratuity on the basis of consolidated wages inclusive of dearness allowance.

We may refer to the contentions advanced by Counsel for the workmen in the two appeals filed by them. It was urged that the Tribunal was in error in denying to the workmen gratuity when employment is determined on the ground of misconduct. It was urged that it is now a rule settled by decisions of this Court that the employer is bound to pay gratuity notwithstanding termination of employment on the ground of misconduct. It may be noticed that in the *Rashtriya Mill Mazdoor Sangh's case*¹ and in the *Ahmedabad Mill Owners' Association case*² provision was expressly made denying gratuity to the workmen dismissed for misconduct. But in later cases a less rigid approach was adopted. In *Garment Cleaning Works case*³, this Court observed:

“On principle, if gratuity is earned by an employee for long and meritorious service, it is difficult to understand why the benefit thus earned by long and meritorious service should not be available to the employee even though at the end of such service he may have been found guilty of misconduct which entails his dismissal. Gratuity is not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for the service rendered by him to the employer, and when it is once earned, it is difficult to understand why it should necessarily be denied to him whatever may be the nature of misconduct of his dismissal.”

In later judgments also the Courts upheld the view that denial of the right to gratuity is not justified even if employment is determined for misconduct. In *Matipur Zamindari (P) Ltd. v. Their Workmen*⁴ this Court opined that the workmen should not be wholly deprived of the benefit earned by long and meritorious service, even though at the end of such service he may be found guilty of misconduct entailing his dismissal, and therefore the condition in a gratuity scheme that no gratuity should be payable to a workman dismissed “for misconduct involving moral turpitude” should be held unjustified. The Court therefore modified the condition and directed that while paying gratuity to a workman who was dismissed for misconduct only such amount should be deducted from the gratuity due to him in respect of which the employer may have suffered loss by the misconduct of the employee.

1. (1957) Industrial Court Reporter, 561.

2. (1958) L L J. 349.

3. (1961) 1 L L J. 513; 1962, 1 S C R. 711

4. 1965; 2 L L J. 139.

A similar view was expressed in *Remington Rand of India Ltd.'s case*.¹ In *Calcutta Insurance Company Ltd.'s case*² however protest was raised against acceptance of this rule without qualification. Mitter, J. observed at page 9 that it was difficult to concur in principle with the opinion expressed in the *Garment Cleaning Works case*³. Mitter, J. observed :

"We are inclined to think that it (gratuity) is paid to a workman to ensure good conduct throughout the period he serves the employer. 'Long and meritorious service' must mean long and unbroken period of service meritorious to the end. As the period of service must be unbroken, so must the continuity of meritorious service be a condition for entitling the workman to gratuity. If a workman commits such misconduct "as causes financial loss to his employer, the employer would, under the general law, have a right of action against the employee for the loss caused, and making a provision for withholding payment of gratuity where such loss was caused to the employer does not seem to aid to the harmonious employment of labourers or workmen. Further, the misconduct may be such as to undermine the discipline in the workers—a case in which it would be extremely difficult to assess the financial loss to the employer."

"Misconduct" spreads over a wide and hazy spectrum of industrial activity the most seriously subversive conduct rendering an employee wholly unfit for employment to mere technical default are covered thereby. The Parliament enacted the Industrial Employment (Standing Orders) Act, 1946, which by section 15 has authorised the appropriate Government to make rules to carry out the purposes of the Act and in respect of additional matters to be included in the Schedule. The Central Government has framed certain model standing rules by notification dated 18th December, 1946, called 'The Industrial Employment (Standing Orders) Central Rules, 1946'. In Schedule I—Model Standing Orders—clause 14 provides :

"(1) * * * * *

(2) A workman may be suspended for a period not exceeding four days at a time, or dismissed without notice or any compensation in lieu of notice, if he is found to be guilty of misconduct.

(3) The following acts and omissions shall be treated as misconduct—

(a) wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior,

(b) theft, fraud or dishonesty in connection with the employer's business or property,

(c) wilful damage to or loss of employer's goods or property,

(d) taking or giving bribes or any illegal gratification,

(e) habitual absence without leave or absence without leave for more than 10 days,

(f) habitual late attendance,

(g) habitual breach of any law applicable to the establishment,

(h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline.

(i) habitual negligence or neglect of work,

(j) frequent repetition of any act or omission for which a fine may be imposed to a maximum of 2 per cent. of the wages in a month.

(k) striking work or inciting others to strike work in contravention of the provisions of any law, or rule having the force of law."

1. (1968) 1 L.L.J. 542.

2. (1957) 2 L.L.J. 1 : (1967) 2 S.C.R. 596.

3. (1961) 1 L.L.J. 1 : (1962) 1 S.C.R. 711.

A bare perusal of the Schedule shows that the expression "misconduct" covers a large area of human conduct. On the one hand are the habitual late attendance, habitual negligence and neglect of works on the other hand are riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline, wilful insubordination or disobedience. Misconduct falling under several of these latter heads of misconduct may involve no direct loss or damage to the employer, but would render the functioning of the establishment impossible or extremely hazardous. For instance, assault on the Manager of an establishment may not directly involve the employer in any loss or damage which could be equated in terms of money, but it would render the working of the establishment impossible. One may also envisage several acts of misconduct not directly involving the establishment in any loss, but which are destructive of discipline and cannot be tolerated. In none of the cases cited any detailed examination of what type of misconduct would or would not involve to the employer loss capable of being compensated in terms of money was made: it was broadly stated in the cases which have come before this Court that notwithstanding dismissal for misconduct a workman will be entitled to gratuity after deducting the loss occasioned to the employer. If the cases cited do not enunciate any broad principle we think that in the application of those cases as precedents a distinction should be made between technical misconduct which leaves no trail of indiscipline, misconduct resulting in damages to the employer's property, which may be compensated by forfeiture of gratuity or part thereof, and serious misconduct which though not directly causing damage, such as acts of violence against the management or other employees or riotous or disorderly behaviour, in or near the place of employment is conducive to grave indiscipline. The first should involve no forfeiture: the second may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third may entail forfeiture of gratuity due to the workmen. The precedents of this Court e.g., *Wenger Co. v. Its Workmen*,¹ *Remington Rand of India Ltd. case*,² and *Motipur Zamindari (P.) Ltd.'s case*³ do not compel us to hold that no misconduct however grave may be visited with forfeiture of gratuity. In our judgment, the rule set out by this Court in *Wenger & Co's case*¹ and *Motipur Zamindari (P) Ltd.'s case*³ applies only to those cases where there has been by action wilful or negligent any loss occasioned to the property of the employer and the misconduct does not involve acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment. In these exceptional cases—the third class of cases—the employer may exercise the right to forfeit gratuity: to hold otherwise would be to put a premium upon conduct destructive of maintenance of discipline.

It was urged on behalf of the workmen that the minimum period of 15 years fixed for voluntary retirement is too long and it should be reduced to 10 years. In *Hume Pile Co. Ltd. v. Their Workmen*⁴ and *Hydro (Engineers) Private Ltd. v. The Workmen*⁵ the minimum period for qualifying for gratuity on voluntary retirement was fixed at 15 years. In other cases a shorter period of 10 years was adopted: *Garment Cleaning Works*⁶ *British Paints India Ltd.*⁷ *Calcutta Insurance Co. Ltd.*⁸ and *Wenger & Company*.¹

Counsel for the employers have accepted that qualifying length of service for voluntary retirement should be reduced to 10 years. Counsel for the em-

1. (1963) 2 L.L.J. 403.

2. (1968) 1 L.L.J. 542.

3. (1965) 2 L.L.J. 139.

4. (1959) 2 L.L.J. 830; (1960, S.C.J. 570

5. (1959) 1 S.C.J. 519.

6. (1962) 1 S.C.R. 711

7. (1966) 1 L.L.J. 407.

8. (1967) 2 L.L.J. 1 : 1967 2 S.C.R. 596.

ployers have also accepted that having regard to all the circumstances, notwithstanding the direction given by the Tribunal and the schemes prevailing in the other parts of the country in the textile industry, the maximum gratuity should not exceed 20 months' basic wages and not 15 months' as directed by the Tribunal. Further Counsel for the D.C.M. and S.B.M. have agreed that in case of termination of employment on voluntary retirement one full month's basic wages for each completed year of service not exceeding 20 months' wages should be granted to workmen. Counsel for the B.C.M. has agreed that gratuity at the rate of 21 days' wages for each completed year of service in case of voluntary retirement or resignation after 10 years' service may be awarded as gratuity to the workmen. Counsel for the A.T.M. has shown no disinclination to fall in line with this suggestion. Counsel for the A.T.M. has also not objected to appropriate adjustments in view of the concessions made by the management of the D.C.M., S.B.M. and B.C.M.

It was urged by Counsel for the workmen that in providing that gratuity shall be paid to *Badli* workmen for only those years in which a workman has worked for 240 days, the Tribunal has committed an error. It was urged that a *Badli* workman has to register himself with the management of the textile unit and is required every day to attend the factory premises for ascertaining whether work would be provided to him, and since a *Badli* workman has to remain available throughout the year when the factory is open, a condition requiring that the *Badli* workman has worked for not less than 240 days to qualify for gratuity is unjust. We are unable to agree with that contention. If gratuity is to be paid for service rendered, it is difficult to appreciate the grounds on which it can be said that because for maintaining his name on the record of the *Badli* workmen, a workman is required to attend the Mills he may be deemed to have rendered service and would on that account be entitled also to claim gratuity. The direction is unexceptionable and the contention must be rejected.

It was also urged by Mr. Ramamurthi that the expression "average of the basic wage" in the definition of "wages" in clause 4 of the Schemes is likely to create complications in the implementation of the schemes. He urged that if the wages earned by a workman during a month are divided by the total number of working days, the expression "wages" will have an artificial meaning and especially where the workman is old or disabled or incapacitated from rendering service, gratuity payable to him will be substantially reduced. We do not think that there is any cause for such apprehension. The expression "average of the basic wage" can only mean the wage earned by a workman during a month divided by the number of days for which he has worked and multiplied by 26 in order to arrive at the monthly wage for the computation of gratuity payable. Counsel for the employers agree to this interpretation.

It was then urged that whereas the reference to the Industrial Tribunal was made by the Delhi Administration sometime in March 1958, the award is given effect to from 1st January, 1964, and for a period of nearly six years the workmen have been deprived of gratuity, when the delay in the disposal of the proceedings was not due to any fault or delaying tactics on the part of the workmen. The reference was made in the first week of March, 1958. The Textile Mazdoor Union then applied to be impleaded on 15th September, 1958, the D.C.M. and S.B.M. moved the High Court of Punjab at Delhi and obtained an order for stay of proceedings in writ petition filed against the order of the Tribunal impleading the Textile Mazdoor Union. That writ petition was dismissed in February 1961 and the proceedings were resumed on 12th December, 1962. Thereafter preliminary issues were decided and on 3rd December, 1963, an interim award relating to other disputes was made. It must, however, be noticed that there were four

claims and the claim relating to gratuity was taken in hand by the Tribunal after disposal of the other claims. Neither party was dilatory in the prosecution of any claim before the Tribunal. It has also to be noticed that in the D.C.M. and S.B.M. there was in fact a gratuity scheme already in operation. The liability of the A.T.M. to pay gratuity arises after that unit acquired sufficient financial stability and it is not suggested that the unit had acquired financial stability before 1st January, 1964. The issue remains alive issue only in respect of the B.C.M. It is true that the gratuity scheme of the D.C.M. and S.B.M. was related only to the length of service and did not take into account the varying rates of wages received by the workmen. But the question if at all would be one of making minor adjustment in the liability of the two units to pay gratuity in the event of gratuity being payable under this award at a higher rate than the gratuity awardable under the scheme already in operation in the two units. If in respect of the A.T.M. which had no scheme of gratuity for all practical purposes becomes operative from 1st January, 1964, we do not see any reason why in respect of the B.C.M. any different rule should be provided for. Again, the Tribunal has fixed 1st January, 1964, as the date for the commencement of the schemes. Giving the schemes effect before 1st January, 1964, may rake up cases in which the workmen have left the establishments many years ago. It would not be conducive to industrial peace to allow such questions to be raised after this long delay. The question is not capable of solution on the application of any principle and must be decided on the consideration of expediency. We do not think that any ground is made out for altering the award of the Industrial Tribunal in this behalf.

It was then urged that in any event the workmen of the D.C.M. and S.B.M. should not be deprived of the right to gratuity under the scheme of the two units, if gratuity at a higher rate is payable to them under the voluntary scheme. This contention must be accepted. We direct that in respect of all workmen of the D.C.M. and S.B.M. who were employed before 1st January, 1964, and continued to remain employed till that date, gratuity at the higher of the two rates applicable to each workman when he becomes entitled to gratuity either computed under the Employees Benefit Fund Trust scheme of the D.C.M. and S.B.M., or under the terms of this award shall be paid. Workmen employed after 1st January, 1964, will be entitled to the benefit of this award alone.

Industrial disputes have given rise to considerable strife holding up development of industry and the economic welfare of the nation. Awards have been made by the Tribunals often on consideration *ad hoc* and based on no principle and Courts have upheld or modified those awards without enunciation of any definite or generally accepted principle. In the present case we have been largely guided by the consideration of securing a reasonable degree of uniformity in the fixation of gratuity in the textile industry, for, in our view, a departure made from the prevailing pattern in one region is likely to give rise to claims all over the country for modification of the gratuity schemes in operation, and have been accepted as fixing the basis of gratuity schemes. If, having regard to the deteriorating value of the rupee, it is thought necessary that more generous benefits should be available to the workmen by way of gratuity, the remedy lies not before the adjudicators or the Courts, but before the legislative branch of the State. In respect of the bonus, provident fund, retrenchment compensation, State Insurance Schemes as well as medical benefits, legislation has been introduced bringing a reasonable degree of certainty in the law governing the various benefits available to the workmen and we are of the view that even in respect of gratuity a reasonably uniform scheme may be evolved by the Legislatures which could prevent resort to the adjudicators in respect of this complicated matter of dispute between the employers and the employees. It may not be difficult to evolve a scheme which

would meet the legitimate claims of both the employers and the employees and which might, while eliminating cause for friction, simultaneously conduce to greater certainty in the administration of the law governing industrial disputes, and secure benefits to the employers as well as the employees and conduce to the prosperity of the industry as well as of the workmen.

We propose to summarise the effect of our judgment:

(1) A unit-wise approach in framing the gratuity scheme for the four units was appropriate, and on the terms of the references the plea of the employees to fix the age of superannuation was beyond the scope of reference. The financial condition of the D.C.M., S.B.M. and B.C.M. justifies imposition of gratuity schemes as from 1st January, 1964. Even the A.T.M. which is the weakest of the four units is financially stable from the date on which the award becomes operative;

(2) The settlement between the workmen and the A.T.M. did not operate to bar the jurisdiction of the Tribunal to make the scheme of gratuity payable to the workmen of the A.T.M.;

(3) That the Tribunal was in error in relating gratuity awardable to the workmen to the consolidated wage;

(4) That the minimum period for qualifying for voluntary retirement should be reduced to 10 years and one month's basic wage in the case of D.C.M. and S.B.M. and 21 days' basic wage in the case of B.C.M. and A.T.M. for each completed year of service should be paid but not exceeding 20 months' wages in the aggregate. (This direction is made with the consent of the Advocates of the employers);

(5) That workmen dismissed or discharged from service for misconduct will not be entitled to gratuity if guilty of conduct involving acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment;

(6) No modification need be made with regard to *Badli* workmen;

(7) The award needs no modification with regard to the date of operation of the award; and

(8) The workmen of the D.C.M. and S.B.M. who commenced service and continued to serve till 1st January, 1964, and thereafter will be entitled to elect at the time when gratuity becomes due to claim gratuity either on the scheme in force under Employees Benefit Fund Trust of the employers or under this award.

We have made some incidental changes to streamline the scheme.

On the view we have taken of the schemes, Annexure 'A' relating to the D.C.M. and S.B.M. of the award will be modified in the following respects:

In clause 1 (a) instead of "12 days' wages", the expression "20 days' wages" will be substituted;

In clause 1 (b) for the expression "15 days' wages", the expression "1 month's wages" will be substituted;

In proviso (i) to clause 1 for the expression "15 months' wages", the expression "20 months' wages" will be substituted;

In clause 2 for the expression "15 days' wages", the expression "1 month's wages" will be substituted; and for the expression "15 years' service", "10 years' service" will be substituted;

In the proviso to clause 2 for the expression "15 months' wages the expression "20 months' wages" will be substituted;

In clause 3 in the proviso for the expression "15 months' wages", the expression "20 months' wages" will be substituted;

Clause 3 will be followed by an *Explanation* :

"*Explanation.*—The expression "misconduct" means acts involving violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment.

Where the workman is guilty of conduct which involves the management in financial loss, the loss occasioned may be deducted from the gratuity payable."

In clause 4 the words "plus the dearness allowance" will be omitted.

The remaining clauses will stand unaffected except that for the words "within six months from the date of publication of this Award" the words "within six months from the date of this judgment" will be substituted.

Annexure 'B' relating to the B.C.M. and A.T.M. will be modified in the following respects:

In clause 1 *a* for the expression "one fourth month's wages", the expression "15 days wages" will be substituted;

In clause 1 *b* for the expression "one third month's wages" the expression '21 days' wages" will be substituted;

In the proviso for the expression "12 months' wages", the expression "20 months' wages" will be substituted;

In clause 2 for the words "15 years' service", the expression "10 years' service" will be substituted;

In clause 3 in the proviso for the expression "12 months' wages", the expression "20 months' wages" will be substituted and it will be followed by the *Explanation* of "misconduct" as in Annexure 'A'.

In clause 4 the words "plus the dearness allowance" will be omitted.

There will be no order as to costs in these appeals.

V.M.K.

Gratuity Schemes modified.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.M. SHELAT AND C.A. VAIDIALINGAM, JJ.

Executive Committee of U. P. State Warehousing Corporation,

Lucknow

.. *Appellant**

v.

Chandra Kiran Tyagi

.. *Respondent.*

Master and Servant—Agricultural Produce (Development and Warehousing) Corporations Act (XXVIII of 1956), Regulation 16 (3) and Specific relief Act (I of 1877), section 21—Dismissal of an employee in violation of Regulation 16 (3)—Effect of remedies—Contract for personal service—No declaration to enforce the same will be normally granted—Exception.

From a review of the English decisions the position emerges as follows : The law relating to master and servant is clear. A contract for personal service will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repudiation of a contract of service by his master and

say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract. The is the normal rule. But, when a statutory status is given to an employee and there has been a violation of the provisions of the statute while terminating the services of such an employee, the latter will be eligible to get the relief of declaration that the order is null and void and that he continues to be in service, as it will not then be a mere case of a master terminating the services of a servant.

The position in law in India is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well recognised exceptions to this rule and they are : To grant such a declaration in appropriate cases regarding (1) public servant, who has been dismissed from service in contravention of Article 311 ; (2) Reinstatement of a dismissed worker under Industrial law by labour or Industrial Tribunals; (3) A statutory body when it has acted in breach of a mandatory obligation, imposed by statute.

On facts, *held*, the regulations are made under the power reserved to the corporation under section 54 of the Act. No doubt they lay down the terms and conditions, of relationship between the Corporation and its employees. An order made in breach of the regulations would be contrary to such terms and conditions, but would not be in breach of any statutory obligation. In the instant case, a breach has been committed by the appellant of regulation 16 (3) when passing the said order of dismissal, in as much as the procedure indicated therein has not been followed. The Act does not guarantee any statutory status to the respondent, nor does it impose any obligation on the appellant in such matter. It is not in dispute that the authority who can pass an order of dismissal has passed the same : under those circumstances a violation of regulation 16 (3) can only result in the order of dismissal being held to be wrongful and, in consequence, making the appellant liable for damages. But the said order cannot be held to be one which has not terminated the service, albeit wrongfully, or which entitles the respondent to ignore it and ask for being treated as still in service.

(*Held further*, that there has been a violation of regulation 16 (3) in the enquiry proceedings; and that the order passed is one under Regulation 16 and not under regulation 11).

Appeal by Special Leave from the Judgment and Decree dated the 25th October, 1966 of the Allahabad High Court in Second Appeal No. 4275 of 1965.

S. T. Desai, Senior Advocate (*Naunit Lal and D. N. Misra*, Advocates, with him), for Appellant.

B.R.L. Iyengar, Senior Advocate (*S. K. Mehla and K. L. Mehla*, Advocates, of *M/s. K. L. Mehla & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Vaidialingam, J.—This appeal, by Special Leave, by the defendant-appellant, is directed against the decree and judgment, dated 25th October, 1956 of the Allahabad High Court in Second Appeal No. 4275 of 1965 holding that the order, dated 10th March, 1964 passed against the respondent dismissing him from service, is null and void and that he is entitled to be reinstated with full pay and emoluments.

The respondent-plaintiff originally entered service with the appellant as a Technical Assistant in November, 1953 and later he was promoted to the post of Warehouseman on 15th October, 1959. He was confirmed in 1962 in the said post. Certain charges were framed against the respondent and pending the enquiry into those charges he was placed under suspension on 9th September, 1963. After an enquiry the respondent was found guilty and in consequence dismissed from service of the appellant by order dated 10th March, 1964. The respondent instituted Civil Suit No. 201 of 1964 challenging the order of dismissal. According to him the various allegations made against him were vague and had not been established and there has been no proper enquiry conducted against him. The enquiry, according to him was contrary to the principles of natural justice without giving him an opportunity

to place his defence and it was also held in disregard of clause 16 of the Regulations framed by the appellant. He also claimed that he was entitled to the protection under Article 311 of the Constitution. On these allegations the plaintiff prayed for a declaration that the order, dated 10th March, 1964 dismissing him from service, was null and void and that he was entitled to be reinstated with full pay and other emoluments.

The appellant-defendant, in its written statement, pleaded that the enquiry into the charges levelled against the plaintiff was made properly and in compliance with the provisions of the Regulations and the plaintiff respondent had been given full opportunity to participate in the enquiry which he also did. The appellant pleaded that the respondent was not entitled to the protection of Article 311 of the Constitution. It also pleaded that the order of dismissal passed against the respondent was perfectly justified and that the suit (claim) was false and had to be dismissed with costs.

The trial Court held that the plaintiff was not entitled to the protection under Article 311 of the Constitution. But it held that in conducting the enquiry, the Enquiry Officer did not comply with the provisions of sub-clause (3) of clause 16 of the Regulations framed by the appellant and that there had been a violation of the rules of natural justice. In consequence the trial Court held that the order dismissing the plaintiff was illegal; but in considering the question as to whether the plaintiff was also entitled to the further relief claimed by him, viz., of reinstatement with full pay and emoluments, the trial Court was of opinion that in view of section 21 of the Specific Relief Act, 1877 the plaintiff was not entitled to that relief. Ultimately the trial Court granted a declaration, by its judgment dated 24th March, 1965 that the order of dismissal dated 10th March, 1964 was void and ineffective and decreed the suit with costs.

The appellant challenged this decision in appeal before the Civil Judge. Mainpuri, in Civil Appeal No. 69 of 1965. The respondent filed a Memorandum of Cross Objections challenging the decree of the trial Court declining his relief for reinstatement with full pay. The learned Civil judge, by his decree and judgment dated 4th September, 1951 dismissed the appeal and allowed the Memorandum of Cross-Objections filed by the respondent. The result was that the plaintiff's suit was decreed granting both the reliefs as prayed for by him.

The appellant again challenged the decrees of both the lower Courts before the Allahabad High Court in Second Appeal No. 4275 of 1965. The High Court has by its judgment dated 25th October, 1966 dismissed the appeal. It agreed with the findings recorded by the two Subordinate Courts that the enquiry proceedings are vitiated by a violation of the principles of natural justice and also not being in accordance with Regulation No. 16 (3). Regarding the declaration for reinstatement the High Court was of the view that the rules and the Regulations framed under the *Agricultural Produce (Development and Warehousing) Corporations Act, 1956* (Act XXVIII of 1956) (hereinafter called the Act) had statutory force and that as there had been a violation of Regulation No. 16 (3), the plaintiff was entitled to the declaration.

Mr. S. T. Desai, learned Counsel for the appellant Corporation raised two contentions: (1) A full and fair opportunity was given to the respondent in the enquiry held against him and there has been no violation of Regulation No. 16 (3). The finding on his point by the High Court and the Subordinate Courts is erroneous. (2) Even on the basis that the enquiry is vitiated by non-compliance with the provisions of Regulation No. 16 (3) framed by the Corporation, the relief declaring that the plaintiff is entitled to be reinstated in service with full pay should not have been granted as by doing so the Courts have departed from the normal rule that the specific performance of a contract of personal service will not be enforced. In any event, counsel urged that there are no special circumstances justifying the grant of that relief in this case.

Mr. B.R. L. Iyengar, learned Counsel for the respondent, pointed out that the findings that the enquiry held was not in accordance with Regulation No. 16 (3)

and that there has been a violation of the principles of natural justice, are concurrent findings recorded by all the Courts and those findings are fully supported by the evidence on record. Regarding the second contention, Mr. Iyengar pointed out that when an order of dismissal has been passed in violation of a statutory provision—as in this case the Regulations—a declaration granted in favour of the respondent is justified.

The first contention raised by Mr. Desai relates to the question as to whether the enquiry held against the plaintiff was in accordance with sub-clause (3) of Regulation 16 of the Regulations framed by the appellant and whether the enquiry is vitiated by a violation of the principles of natural justice. All the Courts have held that the respondent is not entitled to the protection under Article 311 of the Constitution. Therefore, the only question for consideration is whether the enquiry has been properly conducted in accordance with Regulation No. 16 (3). As pointed out by Mr. Iyengar, the findings on facts on this point have been recorded concurrently by all the Courts as against the appellant.

It is now necessary to briefly refer to some of the provisions of the Act under which the appellant has been constituted and is functioning, as also the Regulations framed by the Board. The Act is one to provide for the incorporation and regulation of corporations for the purpose of development and warehousing of agricultural produce on co-operative principles and for matters connected therewith. Section 2 defines certain expressions, including 'appropriate Government', 'Board', 'Central Warehousing Corporation', 'prescribed', 'State Warehousing Corporation' and 'Warehousing Corporation'. The expression 'Board' means the National Co-operative Development and Warehousing Board established under section 3. 'State Warehousing Corporation' (the appellant is one such) means a Warehousing Corporation for a State established under section 28. Section 3 provides for the establishment by the Central Government of a Corporation by the name of National Co-operative Development and Warehousing Board. Section 17 provides for the Central Government establishing a Corporation by the name of Central Warehousing Corporation. Section 28 provides for the State Government establishing a Warehousing Corporation for the State. As pointed out earlier, the appellant is the Warehousing Corporation for the State of Uttar Pradesh, established under this section. Section 34 lays down the functions of a State Warehousing Corporation. Section 35 provides for the composition of the Executive Committee of a State Warehousing Corporation. Section 52 gives power to the appropriate Government to make rules to carry out the purposes of the Act and sub-section (2) deals with the various matters in respect of which rules may be framed without prejudice to the generality of the power contained in sub-section (1). Sub-section (3) provides that all rules made by the appropriate Government under section 52 shall, as soon as may be after they are made, be laid before both Houses of Parliament or the Legislature of the State as the case may be. Section 53 gives power to the Board to make regulations not inconsistent with the Act and the rules made thereunder, and those regulations may provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Act. Apart from the generality of this power, sub-section (2) specifies the various matters regarding which regulations may be framed. Section 54 gives power to the Warehousing Corporations to make regulations not inconsistent with the Act and the rules made thereunder and those regulations may provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Act. Apart from this general power, sub-section (2) enumerates the various matters in respect of which regulations can be framed. Under section 54 the appellant Corporation had framed regulations. Those regulations are the Uttar Pradesh State Warehousing Corporation Regulations, 1951 (hereinafter called the Regulations). We shall now proceed to consider the provisions of the Regulations.

Clause 1 (3) of the Regulations provides that the Regulations shall apply to all employees of the Corporation and to the personnel employed on contract in respect of all matters not regulated by the contract. Clause 2 defines the various

expressions. Chapter II of the Regulations deals with the appointing authority, probation and termination of service. Regulation 11 deals with termination of service. Chapter IV deals with discipline. Sub-clause (1) of regulation 16 provides for the imposition of penalties as against an employee found guilty of the various acts mentioned therein. Sub-clause (3) of regulation 16, which is relevant for the present purpose, is as follows :—

“(3) No punishment other than that specified in sub-para (1) (a), (1) (b) or (1) (c) shall be imposed on any employee without giving him an opportunity for tendering an explanation in writing and cross-examining the witnesses against him, if any, and of producing evidence in defence :

Provided that punishment to an employee on deputation from the Central Government, a State Government or a Government Institution shall be imposed only in accordance with the procedure and rules laid down in this behalf in his parent service.”

Sub-para (1) (a), (1) (b) and (1) (c) referred to therein are the penalties of (a) fine; (b) censure ; and (c) postponement or stoppage of increments or promotion. In this case as the punishment imposed is one of dismissal of the appellant should have followed the procedure indicated in sub-clause (3) of regulation 16 extracted above. Under this sub-clause, it has to be noted that an employee on whom a punishment other than that specified therein is to be imposed, has to be given an opportunity of tendering his explanation in writing and cross-examining witnesses against him, if any, and producing evidence in defence. The grievance of the respondent regarding the conduct of the enquiry, apart from other objections, is that materials collected by the Enquiry Officer behind his back were not made known to him and that information had been taken into account for holding him guilty. His further objection is that he did not get any opportunity to adduce evidence in his defence and that the various persons from whom information had been gathered by the Enquiry Officer were not tendered for cross-examination by him. It is not necessary for us to go elaborately into the various proceedings connected with the giving of the charge-sheet, the explanation offered by the appellant and the final conclusions arrived at by the Enquiry Officer on the basis of which the respondent has been dismissed from service. As pointed out by Mr. Iyengar, all the Courts have concurrently held that the enquiry is vitiated and has been held contrary to regulation 16 (3). It is enough therefore, in the circumstances, to note that the Enquiry Officer Sri F.A. Abbasi who has given evidence has admitted that he did not take in evidence in respect of any charge and that he considered the records as sufficient for giving findings on the charges. He has also admitted that he met various persons and collected information and that information has been incorporated in his enquiry report. He has further admitted that the information so collected by him was not put to the plaintiff, and has stated that he based his findings in the report against the respondent on the basis of the enquiries made by him of the police and other persons. In the face of this admission, it is idle for Mr. Desai to urge before us that the findings of the High Court and the Subordinate Courts that there has been a violation of regulation 16 (3) in the enquiry proceedings cannot be sustained. On the other hand, we are of opinion that the finding is amply justified by the evidence on record.

Mr. Desai made a feeble attempt to sustain the order, dated 10th March, 1964 as one passed under regulation 11 and not under regulation 16. We have no hesitation in rejecting this contention. Regulation 11 as we have already pointed out is in Chapter II, and deals with termination of service simpliciter and, even in such circumstances, it provides in the case of a permanent employee that his services can be terminated only after apprising the employee of the reasons therefor and asking him to furnish explanation and after consideration of the explanation and then giving the employee a final notice to show cause against the proposed termination of service. This clause in our opinion deals with a termination, other than by way of punishment, and the procedure indicated therein is quite simple. On the other

hand, regulation 16 appears in Chapter IV dealing with discipline. An order of dismissal passed after following the procedure indicated therein attaches a stigma on the employee concerned. Having issued a charge-sheet and made a farce of an enquiry and then dismissed the employee after holding him guilty cannot certainly be considered to be termination of the employee's service under regulation 11. That action was taken by way of disciplinary proceedings is clear from the fact that an order suspending the respondent, pending the enquiry, was passed on 9th November, 1963. The same order further directed that the respondent will receive only subsistence allowance during the period of suspension. The order of suspension must be related to regulation 17 and the grant of subsistence allowance must be referred to regulation 18, both of which occur in Chapter IV relating to discipline. Therefore it follows that the first contention of Mr. S. T. Desai cannot be accepted.

Mr. Desai next urged that even on the basis that the order of dismissal had been passed in violation of regulation 16 (3), the decree granting a declaration for reinstatement of the respondent with full pay and emoluments is illegal as amounting to enforcing a contract of personal service. Alternatively Mr. Desai urged that in any event there are no special circumstances existing in this case justifying the grant of such a declaration.

Mr. Desai developed his contention as follows : The relationship between the appellant and the respondent is that of a master and servant. A breach of regulation 16 (3) will at the most result in the order of dismissal being wrongful. The remedy, if any, of the aggrieved party in such a case will only be a claim for damages for breach of contract. The Counsel further urged that Courts have jurisdiction to declare the decision of a statutory body given in violation of a mandatory statutory obligation relating to dismissal of a servant as *ultra vires* and void. Even in such circumstances, it was urged, the jurisdiction to grant a declaration which will result in continuity of service is granted only under very special circumstances which require the departure from the general rule that a contract of service will not be specifically enforced. According to the Counsel, the rules framed under section 52 of the Act by the appropriate Government may have statutory force and effect if they are of such a nature as to require mandatory compliance, but, according to him, the regulations framed by a Warehousing Corporation do not create any such statutory obligation of a mandatory nature. Hence a termination of service by an employer even in breach of conditions of service laid down by the regulations would only attract the general law of master and servant and cannot result in a declaratory decree about continuity of service being granted. In any event, the Counsel urged that a declaration should not have been granted as there are no special circumstances warranting the grant of such a relief in this case. Counsel pointed out that the respondent entered service only in November, 1958 and he has been removed from service in 1964 and it is not claimed by the respondent that he will not be able to take up service elsewhere. In short, according to Mr. Desai, the grant of the relief of declaration by way of reinstatement is erroneous.

Mr. B. R. L. Iyengar, learned Counsel for the respondent, urged that the regulations have been framed by the Warehousing Corporation under section 54. One of the matters in respect of which regulations may be framed is in regard to the conditions of service of the employees of a Warehousing Corporation. It is by virtue of that power that the regulations—called Staff regulations—have been framed. By virtue of clause (3) of regulation 1, they apply to all employees of the Corporation and to the personnel employed on contract in respect of all matters not regulated by the contract. Those regulations deal with various matters relating to the service conditions of the employees. Chapter IV deals with discipline and clause (3) of regulation 16 makes it imperative and obligatory on the Corporation to comply with those provisions before punishment other than those punishments specified therein is imposed against an employee. The regulations, according to Mr. Iyengar having been framed under the Act, have statutory effect and they impose statutory obligation of a mandatory nature on the appellant Corporation in respect of the procedure to be adopted for taking disciplinary action. On the findings recorded

by all the Courts, it is clear that there has been a violation of clause (3) of regulation 16, in which case it follows that the respondent was entitled to get a declaration that the order of dismissal is void and of no effect. Counsel also pointed out that the respondent's services have been arbitrarily and *mala fide* terminated by the appellant and therefore there are sufficient circumstances for departing from the normal rule that a contract of personal service will not be specifically enforced.

The question as to when and under what circumstances a relief by way of declaration regarding continuity of service, after holding that an order of dismissal is void or *ultra vires*, can be given, has been considered both in England and here. The leading decision of the House of Lords which is generally invoked in support of the view that such a declaration can be granted is the decision in *Vine v. National Dock Labour Board*¹. This decision has also been referred to by this Court in some of its decisions, to which we shall refer presently. The case before the House of Lords in the decision referred to above arose under the following circumstances. The plaintiff was a registered dock worker employed in the reserve pool by the National Dock Labour Board under a scheme set up under the Dock Workers (Regulation of Employment) Order, 1947. In 1948, the National Board, approved the delegation of powers to disciplinary committees set up by local boards. The plaintiff failed to obey a valid order to report for work with a company of stevedores and, in consequence, the local board instructed their disciplinary committee to hear the case. The disciplinary committee, having heard the case, gave notice in writing to the plaintiff terminating his employment. The plaintiff instituted the action claiming damages for wrongful dismissal and also prayed for a declaration that the order of dismissal was illegal, *ultra vires* and invalid. The Court of first instance granted both damages and declaration; but on appeal, by the National Board, the Court of appeal struck out the declaration granted to the plaintiff. The plaintiff appealed to the House of Lords against the striking out of the declaration and the National Board cross-appealed against the finding that the dismissal was invalid and also against the award of damages. The House of Lords held that the declaration granted by the trial judge was properly made as the order of dismissal was a nullity since the local board had no power to delegate its disciplinary functions. The cross-appeal filed by the National Board was dismissed. Viscount Kilmuir, L.C. in considering the question regarding the grant of declaration, observes at p. 943 that the discretion in granting a declaratory judgment should not be exercised save for good reason and then, summarising the reasons for granting the declaration, states at page 944:

"First, it follows from the fact that the plaintiff's dismissal was invalid that his name was never validly removed from the register, and he continued in the employ of the National Board. This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme, the Court should declare his rights."

At page 948, Lord Keith of Avonholm states:

"This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages.

Here we are concerned with a statutory scheme of employment. . . . The scheme gives the dock worker a status. Unless registered, he is deprived of the opportunity of carrying on what may have been his lifelong employment as a

dock worker, and he has a right and interest to challenge any unlawful act that interferes with this status. If the actings here complained of were a nullity, Mr. Vine (hereinafter called "the plaintiff"), in my opinion, has a clear right to have that fact declared by the Court."

It will be noted that the House of Lords, in the decision referred to above, have emphasized that orders striking off the plaintiff from the register was not considered a simple case of a master terminating the services of the servant but, on the other hand, was treated as one affecting the status of the plaintiff and whose services have been terminated by an authority which had no power to so terminate and, as such, the order was treated as void. The House of Lords have also emphasised that due to the intervention of the statute which safeguards the right of the dock worker, the order not being in accordance with the statute, must be treated as a nullity. It was under those circumstances that the House of Lords restored the decree of the Court of first instance granting a declaration regarding the continuity of service of the plaintiff therein. It must again be emphasised that the order, the validity of which was considered by the House of Lords, was treated as a nullity.

The question whether a dismissed employee can ask for a declaration that his employment had never been validly terminated, again came up for consideration in *Barber v. Manchester Hospital Board*¹. In that case a Regional Hospital Board passed an order terminating the plaintiff's employment as a medical consultant in the hospital. The plaintiff brought an action against the Board claiming declaration that his employment had never been validly determined and he also claimed damages for breach of contract or wrongful dismissal. The Court held that the plaintiff's contract with the Board was one between master and servant and the order of termination of his services could not be treated as a nullity. In this view the plaintiff's claim for a declaration that his employment had never been validly determined was not granted; but the plaintiff was awarded damages for breach of contract. It was contended on behalf of the plaintiff that when passing the order terminating his services the procedure indicated in clause 16 of the terms and conditions of service of hospital medical staff has not been violated by the original hospital Board and therefore the order of termination never became effective and the plaintiff continued to be still in service as the order was a nullity. On behalf of the plaintiff reliance was placed on the decision in *Vine's case*², Repelling this contention. Barry, J., observes, at p. 331:

".... I am unable to equate this case to the circumstances which were being considered by the Court of Appeal and the House of Lords in *Vine v. National Dock Labour Board*². There the plaintiff was working under a code which had statutory powers and clearly in those circumstances, all the Lords of appeal who dealt with the case in the House of Lords took the view that the case could not be dealt with as though it were an ordinary master and servant claim in which the rights of the parties were regulated solely by contract. Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more."

In this view the Court finally held that the plaintiff's only remedy was to recover damages as for breach of contract.

A similar question regarding the right of a dismissed employee to get a declaration of his right to continue in employment came up for consideration before the Privy Council in *Francis v. Municipal Councillors, etc.*³. The plaintiff in that case was in the service of the Municipal Councillors of Kuala Lumpur and, by section 16 (5) of the Municipal Ordinance (Extended Application) Ordinance, 1948, the president had power to dismiss him. The plaintiff was dismissed. The Privy Council held that the plaintiff had been wrongly dismissed and that his remedy lay in a claim for damages. The plaintiff sought a further declaration that he had a right

1. (1955) 1 All.E.R. 322.
2. (1969) 3 All.E.R. 939.

3. (1962) 3 All.E.R. 633.

to continue in employment notwithstanding the order of dismissal. Rejecting this claim the Privy Council observed, at page 637 :

"In their Lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration."

The Privy Council distinguished the particular circumstances that existed before the House of Lords in *Vine's case*¹ and finally held at page 638.

"In their Lordships' view the circumstances of the present case are not comparable with those in *Vine's case*¹, and are not such as to make it appropriate to give a declaratory judgment in the manner contended for on behalf of the appellant. The appellant's employment must be treated as having in fact come to an end on 1st October 1957 and the appellant's remedy lay in a claim for damages."

From a review of the English decisions, referred to above, the position emerges as follows : The law relating to master and servant is clear. A contract of personal service will not be enforced by an order for specific performance, nor will it be open for a servant to refuse to accept the repudiation of a contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract. This is the normal rule and that was applied in *Barbar's case*² and *Francis' case*³. But, when a statutory status is given to an employee and there has been a violation of the provisions of the statute while terminating the services of such an employee, the latter will be eligible to get the relief of a declaration that the order is null and void and that he continues to be in service, as it will not then be a mere case of a master terminating the services of a servant. This was the position in *Vine's case*¹.

The question has also been considered by this Court in certain decisions, to which we will immediately refer. In *Dr. S. B. Dutt v. University of Delhi*⁴, this Court had to consider the legality of an award directing that an order of dismissal was *ultra vires*, *mala fide* and of no effect and that the appellant in that case continued to be a Professor of the University. The appellant, Dr. Dutt, who was a Professor in the University of Delhi, was dismissed from service by the latter. He referred the dispute regarding his dismissal and certain other disputes to arbitration, under section 45 of the Delhi University Act. An award was made which decided that the appellant's "dismissal was *ultra vires*, *mala fide*, and has no effect on his status. He still continues to be a professor of the University". The said award was made a rule of Court by the Subordinate Judge of Delhi. The University of Delhi challenged this decision on appeal and the Punjab High Court, which ultimately heard the appeal, set aside the award on the ground that such a declaration amounted to specific enforcement of a contract of personal service forbidden by section 21 of the Specific Relief Act and therefore disclosed an error on the face of the award. On appeal, this Court, agreeing with the reasoning of the High Court observed at page 1242 :

"There is no doubt that a contract of personal service cannot be specifically enforced. Section 21, clause (b) of the Specific Relief Act, 1877, and the second illustration under this clause given in the section make it so clear that further elaboration of the point is not required. It seems to us that the present award does purport to enforce a contract of personal service when it states that the dismissal of the appellant 'has no effect on his status' and 'He still continues to be a Professor of the University'. When a decree is passed according to the award which if the award is unexceptionable, has to be done under section 17 of the Arbi-

1. (1956) 3 All E.R. 939.

2. (1958) 1 All E.R. 322.

3. (1962) 3 All E.R. 633.

4. (1959) S.C.R. 1236 : (1959) S.C.J. 78.

tration Act after it has been filed in Court, that decree will direct that the award be carried out and hence direct that the appellant be treated as still in the service of the respondent. It would then enforce a contract of personal service, for the appellant claimed to be a professor under a contract of personal service, and so offend section 21 (b)."

On behalf of the appellant, reliance was placed on the decision of the judicial Committee in *The High Commissioner for India v. I.M. Lall*¹ in support of the contention that a declaration that the appellant continued in service under the University of Delhi in spite of the order of dismissal was a declaration which the law permitted to be made and was not therefore erroneous. Dealing with this contention and referring to the decision of the judicial Committee, this Court observed at page 1244:-

"That was not a case based on a contract of personal service..... The declaration did not enforce a contract of personal service but proceeded on the basis that the dismissal could only be effected in terms of the statute and as that had not been done, it was a nullity, from which the result followed that the respondent had continued in service. All that the judicial Committee did in this case was to make a declaration of a statutory invalidity of an act, which is a thing entirely different from enforcing a contract of personal service."

Holding that "it was not the appellant's case before the arbitrator that the dismissal was *ultra vires* the statute or otherwise a nullity", this Court ultimately confirmed the judgment of the High Court setting aside the award.

The jurisdiction of the Courts to grant a declaration in a particular case that an order of dismissal is void and that the dismissed employee continues to remain in service, again came up for consideration before this Court in *S.R. Tewari v. District Board Agra*². In that case, the appellant's service as an Engineer under the District Board, Agra, was terminated by the latter, after giving salary for three months in lieu of notice. The appellant, after having unsuccessfully appealed against the order of termination to the State Government, initiated proceedings under Article 226 before the Allahabad High Court for a writ of *certiorari* for quashing the order of the District Board dismissing him from service and also sought a writ in the nature of *mandamus* commanding the District Board and the State of Uttar Pradesh to treat him as the lawfully appointed engineer, and not to give effect to the order terminating his service. The High Court dismissed the writ petition holding that the employee had been properly dismissed from service. The employee came up to this Court in appeal. On behalf of the District Board, the respondent therein, it was contended that the remedy of the appellant, if any, was only to institute a suit for damages for wrongful termination of employment and that he was not entitled to pray for a declaration that the termination of employment was unlawful and a consequential order for restoration in service. The decision in *Dr. Dutt's case*³, among other decisions, was relied on in support of this contention. This Court negatived that contention and stated the position in law as follows :

"Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well recognized exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the industrial law, jurisdiction of the labour and industrial tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognised. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to do."

1. (1948) L.R. 75 I.A. 225 : (1948) F.C.R. 44 : (1948) F.L.J. 23 : (1948) 2 M.L.J. 55.

2. (1964) 2 S.C.J. 300 : (1964) 3 S.C.R. 55.
3. (1959) S.C.R. 1236 : (1959) S.C.J. 78.

cepted by the Court was that the order terminating their services was a nullity as it had not been effected in terms of the statute. In our opinion, therefore, this decision does not support the contention of the respondent.

Mr. Iyengar referred us also to the decision of this Court in *The State of Uttar Pradesh v. Babu Ram Upadhyaya*¹, but that decision need not detain us because that deals with a member of the public service who has been given protection under the Constitution. Such cases stand apart.

Mr. Iyengar referred us to a decision of a learned Single judge of the Gujarat High Court reported as *Tata Chemicals Ltd. v. Kailash*². The question that arose for consideration was regarding the validity of an order of dismissal by an employer of an employee contrary to the standing orders. The learned Judge has expressed the view that a breach of the standing orders constitutes a breach of a statutory provision and therefore the order of dismissal is a nullity. It is not necessary for us to consider the correctness of that decision because the dispute between the parties in that case arose under Industrial Law and we have already pointed out that one of the exceptions to the Common Law is under Industrial Law where Labour and Industrial Tribunals have jurisdiction to compel an employer to employ a worker whom he does not desire to employ.

Having due regard to the principles discussed above, we are of opinion that the High Court was not justified in granting the declaration that the order dated 10th March, 1964 dismissing the respondent from service is null and void and that he is entitled to be reinstated in service with full pay and other emoluments. As pointed out by us, the regulations are made under the power reserved to the Corporation under section 54 of the Act. No doubt they lay down the terms and conditions of relationship between the Corporation and its employees. An order made in breach of the regulations would be contrary to such terms and conditions, but would not be in breach of any statutory obligation, as was the position which this Court had to deal with in the *Life Insurance Corporation case*³. In the instant case, a breach has been committed by the appellant of regulation 16 (3) when passing the said order of dismissal, inasmuch as the procedure indicated therein has not been followed. The Act does not guarantee any statutory status to the respondent, nor does it impose any obligation on the appellant in such matters. As to whether the rules framed under section 52 deal with any such matters, does not arise for consideration in this case as the respondent has not placed any reliance on the rules and he has rested his case only on regulation 16 (3). It is not in dispute that, in this case, the authority who can pass an order of dismissal has passed the same. Under those circumstances a violation of regulation 16 (3), as alleged and established in this case, can only result in the order of dismissal being held to be wrongful and, in consequence, making the appellant liable for damages. But the said order cannot be held to be one which has not terminated the service, albeit wrongfully, or which entitles the respondent to ignore it and ask for being treated as still in service. We are not concerned with the question of damages, because no such claim has been made by the respondent in these proceedings.

In this view, the judgment and the decree of the High Court, in so far as they declare that the order dated 10th March, 1964, is null and void and that the respondent continues to be in the service of the appellant, are set aside and this appeal allowed, to that extent. In the circumstances of the case, there will no order as to costs.

S. V. J.

Appeal partly allowed.

1. (1961) 2 S.C.R. 679.
2. A.I.R. 1964 Guj. 265.

3. (1964) 1 S.C.J. 272 : (1964) 1 Comp.L.J. 94.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—V. BHARGAVA AND K.S. HEGDE, JJ.

Sham Lal and others

.. Appellants*

v.

Amar Nath and others

.. Respondents.

*Hindu Law—Mithakshara School—Stridhana property of a Hindu woman—Daughters of a predeceased son whether entitled to succeed.**Hindu Women's Rights to Property Act (XVIII of 1937)—Applicability of.*

It is now well settled that stridhana of a Hindu woman governed by Mitakshara passes in the order mentioned in Mitakshara and the children of the deceased woman do not take the same as a body either jointly or as tenants-in-common, only the heir belonging to a class take the properties as tenants-in-common.

In the matter of succession to stridhana, propinquity was not considered by the law givers as the sole or even the principal test, otherwise there is no justification for a daughter's daughter or a daughter's son to succeed to the estate of a woman in preference to her son. It is true that it is not easy to find out the reason behind the rules relating to succession to stridhana. But that is equally true of many other branches of our family laws. These contradictions are inevitable in socio-religious matters particularly when our social laws were controlled by our religious beliefs and our law givers were our religious preceptors. It is for the Legislatures to step in and bring about harmony between the society and the laws governing it. That is why our parliament enacted several statutes in 1955 to amend the Hindu law in various respects.

The expression son's son does not include son's daughter as according to the rules of interpretation the masculine includes the feminine. That rule of interpretation is inapplicable in the present case as daughters' daughter succeeds to the stridhana in preference to daughter's son. The order of succession prescribed clearly rules out the application of that rule of interpretation.

Hindu Woman's Right to Property Act, 1937, applies only to the separate property left by a Hindu male. It does not apply either to the coparcenary property or to the property of a Hindu female.

Held, Daughter's of a predeceased son of a Hindu woman are not entitled to succeed to her stridhana.

Appeals from the Judgment and Decree dated the 30th May, 1963 of the Punjab High Court in Regular First Appeal No. 105 of 1957.

A.K. Sen, Senior Advocate (*R.K. Agarwal*, Advocate with him), for Appellants (In C.A. No. 1954 of 1966) and Respondents Nos. 5, 6, 8 and 9 (In C.A. No. 1955 of 1966).

Bishan Narain, Senior Advocate (*B. P. Maheshwari* and *R. K. Gupta*, Advocates with him), for Appellants (In C.A. No. 1955 of 1966) and Respondents Nos. 2 to 6 (In C.A. No. 1954 of 1966).

Sarjoo Prasad, Senior Advocate (*M. Rameshwar Prasad* and *A.D. Mathur*, Advocates with him), for Respondent No. 1 (In both the Appeals).

S.M. Jain, Advocate, for Respondents Nos. 13 (i) to 13 (iv) (In C.A. No. 1954 of 1966) and Respondents Nos. 12 (i) to 12 (iv) (In C.A. No. 1955 of 1966).

The Judgment of the Court was delivered by

Hegde, J.—The question of law that arises for decision in these appeals by certificate is whether the daughters of a predeceased son of a Hindu woman are entitled to succeed to her stridhana? The trial Court answered the question in the affirmative but the High Court in appeal came to the conclusion that they are not entitled to succeed to the estate in question.

The material facts of this case are few. For a proper understanding of the facts of the case, it will be convenient to have before us the admitted pedigree of the family. It is as follows:

Shri Bhol Chand

Tulsi Ram	Patu Ram	Behair Lal	Hira Lal
	Mst. Barji		
Amar Nath (Plaintiff)	Parhlad Rai Shri. Kishan (defendant No. 7) widow Champadevi (defendant No. 8).	Mool Chand (died issueless)	Mohan Lal (died issueless) Ram Sarup (adopted son defendant 10).
			Bindrabai (died issueless) Shamlal (defendant 9 adopted).
Jugal Kishore Mst. Bindri widow dead.		Radha Kishan Mst. Dakhan (defendant 6).	
Roshan Lal (dead)	Sheela (defendant No. 3 daughter).	Lila (defendant No. 2 daughter).	Chamteli (defendant No. 1 daughter).
			Balwanti (daughter)
		Suresh Chand (defendant 4.)	Sardha (defendant 5).
Kidar Nath	Ram Chander	Sheo Parshad	
Murari Lal (defendant No. 11 adopted).	Basant Lal Ragbhir Singh (adopted son— defendant No. 15.)	Rameshwar Dass (defendant No. 16)	Jagdish (defendant No. 17)
		Maman Chand (defendant No. 14).	Manphul Singh (defendant 12).
			Sher Singh (defendant No. 13).

The finding of the trial Court that the suit properties are the stridhana properties of Barji was not contested before the High Court. In this Court at one stage a feeble attempt was made on behalf of the appellants to contest that finding. We did not permit that finding to be challenged as the same had not been challenged before the High Court. Therefore we proceed on the basis of that finding. Barji died in September, 1950. Her husband Patu Ram had predeceased her. It appears that he died sometime in 1904. Patu Ram's father Bool Chand as well as Patu Ram's brothers Tulsi Ram, Behari Lal and Hira Lal had predeceased Barji. Patu Ram and Barji had a son by some jugal Kishore who had predeceased Patu Ram leaving behind him his widow Bindri who died in 1931. They had no children. Radha Kishan, the adopted son of Patu Ram and Barji died about 20 years before the death of Barji leaving behind him his widow, defendant No. 6. Radha Kishan had five children including defendants Nos. 1 to 3 through another wife. His son Roshanlal had died a few months before the death of Barji. His daughter Balwanti had predeceased Barji leaving behind her children defendants 4 and 5. Tulsi Ram's son Prahlad Rai had also predeceased Barji leaving behind his widow defendant No. 8, and son defendant No. 7. By the time succession to the estate of Barji opened all the children of Behari Lal and Hiralal had died but some of them had children and grand children, as seen from the pedigree. After the death of Barji, her properties came to the possession of defendant No. 6. Defendant No. 1 sued for the possession of those properties on the ground that she had her sisters as preferential heirs to the deceased Barji. To that suit she did not make Amar Nath, the plaintiff in the present suit, a party. Amar Nath's application for being impleaded as a party in that suit was opposed by the 1st defendant and the said application was ultimately rejected by the Court. The dispute in that suit was referred to arbitration. The arbitrators upheld the claim of defendants Nos. 1 to 3. Thereafter the present suit was brought. In the High Court as well as in the trial Court there was a triangular contest. The plaintiff claimed that he was exclusively entitled to the suit properties, defendants Nos. 1 to 3 claimed that they are the nearest heirs to Barji; some of the other defendants contended that they succeeded to the suit properties as co-tenants with the plaintiff. In this Court all the contesting defendants sail together. As mentioned earlier, the trial Court accepted the claim of defendants Nos. 1 to 3 but the High Court held that the plaintiff was exclusively entitled to the suit properties, he being the nearest heir to the deceased. That finding is contested both by defendants Nos. 1 to 3 as well as by the other contesting defendants. That is how the aforementioned two appeals came to be filed.

In arriving at its finding the High Court relied on the rules of succession found in paragraph 147 of Mulla's principles of Hindu Law (13th Edn.). It came to the conclusion that those rules are exhaustive. On the basis of those rules, it ruled that defendants Nos. 1 to 3 were not entitled to succeed to the estate of Barji. So far as the other defendants are concerned it rejected their claim on the ground that as between the plaintiff and themselves the former is a preferential heir as he is the nearest in degree to Barji.

It is the admitted case of the parties that the properties in question are not *shulka* and that Barji was married in one of the approved forms. Therefore while pronouncing on the competing claims made in this case, we must be guided by the order of succession prescribed in paragraph 147, if the same is correct and exhaustive. Paragraph 147 says :

"Stridhana other than *shulka* passes in the following order :

- (1) unmarried daughter ;
- (2) married daughter who is unprovided for ;
- (3) married daughter who is provided for ;
- (4) daughter's daughter ;
- (5) daughter's son ;

(6) son ;

(7) son's son ;

If there be none of these, in other words, if the woman dies without leaving any issue, her stridhana, if she was married in an approved form, goes to her husband, and after him, to the husband's heirs in order of their succession to him; on failure of the husband's heirs, it goes to her blood relations in preference to the Government. But if she was married in an unapproved form, it goes to her mother, then to her father, and then to the father's heirs and then to the husband's heirs in preference to the Government."

The legal position is stated in identical terms in Mayne's treatise on Hindu Law (Eleventh Edn.—Paragraph 623, pages 744 to 746) as well as in the other text books on Hindu Law referred to at the time of the hearing. At this stage it may be mentioned that the correctness of the order of succession mentioned in paragraph 147 till we come to item No. 7 (son's son) was not challenged. The same is well settled by decided cases. It is not necessary to refer to those cases. The only contention advanced on behalf of some of the defendants is that after son's sons come son's daughters. Alternatively it was contended that the expression "son's son" includes "son's daughter." We have to see whether these contentions are well founded.

The rules relating to succession to stridhana enunciated in the text books are based on Yajnyawalkya's text "her kinsmen take it, if she die without issue." This statement is elaborated by Vijnyaneswara in Mitakshara. The relevant portions thereof as translated by H. T. Colebrooke are found in placita 8, 9, 10 and 11 in Section II of his book "Mitakshara." They read as follows :

"8. A woman's property has been thus described. The author next propounds the distribution of it : "Her kinsmen take it, if she die without issue."

9. If a woman die "without issue" that is leaving no progeny ; in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son ; the woman's property, as above described shall be taken by her kinsmen ; namely her husband and the rest, as will be (forthwith) explained.

10. The kinsmen have been declared generally to be competent to succeed to a woman's property. The author now distinguishes different heirs according to the diversity of the marriage ceremonies. "The property of a childless woman, married in the form denominated Brahma, or in any of the four (unblamed modes of marriage), goes to her husband : but, if she leave progeny, it will go to her (daughter's) daughters : and, in other forms of marriage (as the Asura & c.), it goes to her father (and mother, on failure of her own issue).

11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha and Prajapatya, the (whole) property, as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen (sapindas) allied by funeral oblations. But, in the other forms of marriage called Asura, Gandharba, Racshasa and Paisacha ; the property of a childless woman goes to her parents, that is, to her father and mother. The succession devolves first (and the reason has been before explained) on the mother, who is virtually exhibited (first) in the elliptical pitrigami implying 'goes (gach 'hati bo both parents pitarau) ; that is to the mother and to the father.' On failure of them, their next of kin take the succession.

These passages have received interpretation at the hands of the judicial Committee as well as the High Courts in India and the law is now settled as to the mode of succession to stridhana under Mitakshara until we reach son's son. The controversy now is as to who should succeed to such an estate if none of the heirs

mentioned in items Nos. 1 to 7 in paragraph 147 of Mulla's Hindu Law are in existence at the time of the death of the woman concerned.

Mr. A.K. Sen, learned Counsel for some of the defendants contested the correctness of Colebrooke's translation in certain respects. He wanted us to examine the original text to find out whether the translation found in placita 9 is correct? The parties did not place before us either an admitted translation of the original text or even an official translation. Colebrooke is a distinguished oriental scholar. The Judicial Committee as well as the various High Courts in this country have relied on his translation of Mitakshra in dealing with the question of inheritance. Jogendra Nath Bhattacharya in his commentary on Hindu Law (2nd Edn.) deals with the order of succession under Mitakshra to stridhana in Chapter VI of that book. His translation of the relevant commentaries accords, with those made by Colebrooke. To the same effect is the opinion expressed by Justice Chandavarkar in *Bhimacharya Bin Venkappacharya v. Ramcharya Bin Bhimcharya*¹. Hence we are unable to agree with Mr. Sen that Colebrooke's translation does not bring out accurately the meaning of the relevant passages in Mitakshara. Colebrooke in his book 'Mitakshara' published in 1869 sets out the order of succession to a woman's stridhana properties at page 158 thus :

Maiden daughter	..1
Unendowed married daughter	..2
Endowed married daughter	..3
Daughter's daughter	..4
Daughter's son	..5
Son	..6
Grandson	..7
Husband	..8

If the contention of defendants is correct then son's daughter and not husband should have come after the grandson. But that is not the case.

Mr. Bishan Narain, learned Counsel for defendants Nos. 1 to 3 contended that the list given in Mitakshara is only illustrative and not exhaustive. He urged that Yajnyawalkya had stated that "a woman's property would devolve on her kinsmen if she died without issue" which means that it would devolve on her progeny which expression includes son's daughter as well. In this connection he also relied on Vijnyaneswara's commentary stating that the expression 'without issue' found in Yajnyawalkya text means "leaving no progeny." On the basis of these statements he contended that even according to Vijnyaneswara, the deceased women's progeny would take her stridhana in preference to her kinsmen including her husband. On the basis of this premise he proceeded to argue that the other words used in placita 9 viz., "having no daughter nor daughter's daughter nor daughter's son nor son nor son's son" should be understood as merely being illustrations of the word "progeny." This contention is opposed to the commentaries by Narada, Gautama and the later commentators. More than that it runs counter to the decisions rendered by the Judicial Committee and the various High Courts during the last over a century. It is now well settled that stridhana of a Hindu woman governed by Mitakshara passes in the order mentioned in Mitakshara and the children of the deceased woman do not take the same as body either jointly or as tenants in common. Only the heirs belonging to a class take the properties as tenants in common.

Mr. Bishan Narain next contended that under Mitakshra propinquity is the text of inheritance. Therefore there is no reason why the deceased woman's husband's brother's son should take the properties in preference to her son's daughter.

ters. We do not think that in the matter of succession to stridhana propinquity was considered by the law givers as the sole or even the principal test, otherwise there is no justification for a daughter's daughter or a daughter's son to succeed to the estate of a woman in preference to her son. It is true that it is not easy to find out the reason behind the rules relating to succession to stridhana. But that is equally true of many other branches of our family laws. These contradictions are inevitable in socio-religious matters particularly when our social laws were controlled by our religious beliefs and our law givers were our religious preceptors. It is for the Legislatures to step in and bring about harmony between the society and the laws governing it. That is why our Parliament enacted several statutes in 1955 to amend the Hindu Law in various respects.

We are unable to accept the contention of Mr. Bishan Narain that the expression son's son includes son's daughter as according to the rules of interpretation the masculine includes the feminine. That rule of interpretation is inapplicable in the present case as daughter's daughter succeeds to the stridhana in preference to daughter's son. The order of succession prescribed clearly rules out the application of that rule of interpretation.

Mr. Sen in support of his contention that on a true interpretation of the relevant passages in 'Mitakshra', defendants Nos. 1 to 3 are preferential heirs to deceased Barji, relied on certain passages in some of the decided cases. First he referred to the decision of the Patna High Court in *Kumar Raghava Surendra Sahi v. Babu Lachmi Kuer*¹. Therein the dispute related to the succession to the properties left by a maiden and not by a married woman. The rules relating to the succession to the stridhana of a deceased maiden are wholly different from those relating to succession to the stridhana of a married woman. Therefore the observations made in regard to those rules have no relevance for our present purpose. He next invited our attention to certain passages in the decision of the Judicial Committee in *Bai Kesserbai v. Hunsraj Morarji and another*². Therein the dispute was between Bai Kesserbai the surviving co-widow of the deceased Bachubai's husband Koreji Haridass, Hunsraj Morarji the separated nephew of Koreji, being the son of his eldest brother, who predeceased Bachubai and Bai Moghibai, the widow of a younger brother of Koreji named Ranchordass Haridass. The question for consideration by the Judicial Committee was as to the true scope of the latter part of the placita 9 in Colebrooke's Mitakshra which says, "if a woman die without issue, that is, leaving no progeny..... the woman's property..... shall be taken by her kinsmen namely her husband and the rest as will be forthwith explained." Their Lordships observed that there can be no reasonable doubt that according to Mitakshara definition of sapinda, husband and wife are sapindas to each other and the co-widow of the husband of the deceased was the nearest sapinda of the deceased woman's husband and hence entitled to succeed to the estate in question. This decision again does not bear on the point under consideration.

Lastly Mr. Sen contended that in view of the Hindu Women's Rights to Property Act (XVIII of 1937), it must be held that defendants 1 to 3 are nearer heirs to the deceased than the plaintiff. This contention was negated by the High Court on the basis of the rule laid down by this Court in *Annagouda Nathgouda Patil v. Court of Wards and another*³, wherein this Court dealing with Act II of 1929 observed:

"The question is whether the provisions of this Act can at all be invoked to determine the heirs of a Hindu female in respect of her stridhan property. The object of the Act as stated in the preamble is to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; and section 1 (2) expressly lays down that "the Act applies only to persons who but for the passing of this Act would have been subject to the Law of Mitakshara in respect of the provision herein enacted, and it applies to such persons in respect

1. I.L.R. Pat. 18.
2. L.R. (1906) 33 I.A. 176. 16 M.L.J. 446. (1952) 1 M.L.J. 414.
3. (1952) S.C.R. 208 : (1952) S.C.J. 20 :

only of the property of males not held in coparcenary and not disposed of by will." Thus the scope of the Act is limited. It governs succession only to the separate property of a Hindu male who dies intestate. It does not alter the law as regards the devolution of any other kind of property owned by a Hindu male and does not purport to regulate succession to the property of a Hindu female at all. It is to be noted that the Act does not make these four relations statutory heirs under the Mitakshra Law under all circumstances and for all purposes; it makes them heirs only when the propositus is a male and the property in respect to which it is sought to be applied in his separate property."

Similar would be the position under the Hindu Woman's Right to Property Act, 1937. Section 3 (1) of that Act which provides for the devolution of the property reads thus :

"When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property his widow or if there is more than one widow all his widows together shall, subject to the provisions of sub-section (3) be entitled in respect of property in respect of which he dies intestate to the same share as a son....."

From this provision it is clear that Hindu Woman's Right to Property Act, 1937 applies only to the separate property left by a Hindu male. It does not apply either to the coparcenary property or to the property of a Hindu female.

For the reasons mentioned above the appeals fail and they are dismissed with costs—advocates' fee one set.

S V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. S. HEGDE AND A. N. RAY, JJ.

Om Prakash

... *Appellant**

Lalchand and another

... *Respondents.*

Representation of the People Act (XLIII of 1951), S. 123 (1)—Effect—Scope of.

The gist of the offence under sub-section (1) of section 123 of the Act is that there has to be a gift by a candidate or his agent or by any other persons with the consent of a candidate or his election agent of any gratification, to any person with the object of inducing a person to stand or not to stand as a candidate at the election. The elements required to constitute an offence are first, that the gift has to be by a candidate or his agent or by any other person. Secondly, the gift is to be with the consent of the candidate or his agent and the third important element is that the gratification is to be made with the object, directly or indirectly, of inducing a person to stand or not to stand in the election. (On facts held, that the offence under sub-section (1) of section 123 has not been made out.

The four elements in sub-section (4) are, first, that there has to be a publication by the candidate or his agent or by any other person with the consent of the candidate of any statement of fact. The second element is that the statement of fact is false and a candidate or his agent or any other persons either believes it to be false or does not believe to be true. Thirdly, the publication is in relation to the personal character and conduct of any candidate. Fourthly, the statement is reasonably calculated to prejudice the prospects of

that candidates election (on facts held), that the Respondent is guilty of corrupt practice under section 123, 4, of the Act.

Appeal under section 116-A of the Representation of the People Act, 1951 from the judgment and Order, dated the 19th November, 1968 of the Punjab and Haryana High Court in Election Petition No. 14 of 1968.

H. L. Sibal, Senior Advocate, (*Ram Sarup*, *S. C. Mahanta*, *K. C. Sharma* and *J. C. Talwar*, Advocates, with him), for Appellant.

Naunit Lal, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Ray, J.—This is an appeal against the judgment and order dated 19th November, 1968 of the High Court of Punjab and Haryana at Chandigarh dismissing the election petition of the appellant.

The appellant contested the Assembly seat from Ellenabad Constituency in the District of Hissar in the mid-term election held in May, 1968. The appellant challenged the election of Lalchand, the first respondent. The other defeated candidate in the election was the second respondent Prithvi Raj. The appellant obtained 15,485 votes. The successful candidate Lalchand secured 20,816 votes and Prithvi Raj obtained 5,276 votes. The polling was on 14th May, 1968. The results were announced on 16th May, 1968.

At the hearing of the appeal Counsel on behalf of the appellant canvassed three grounds. First, that the poster being Exhibit P.W. 11] was against the personal character of the appellant and therefore constituted a corrupt practice within the meaning of sub-section (4) of section 123 of the Representation of the People Act, 1951 (hereinafter referred to as the Act). Secondly, the religious head Sat Guru Jagjit Singh of the Namdhari sect issued an appeal and a farman and thereby the provisions contained in sub-section (2) of section 123 of the Act are attracted. Thirdly, the respondent Lalchand is guilty of corrupt practice of bribery by having given Rs. 20,000 in cash to Prithvi Raj to contest the election.

I shall at the outset deal with the second and the third grounds. Counsel on behalf of the appellant pressed allegations contained in sub-paragraphs (b) and (d) of paragraph 10 of the petition which were to the effect that Sat Guru Jagjit Singh issued a farman, on or about 20th April, 1968 to the effect that it was the Guru's desire that all followers should oppose the appellant who was the son of Choudhury Devi Lal, an enemy of Namdhari Guru. Further, if any of the followers did not obey the farman they would stand ex-communicated and their 'Prasad' would not be accepted in the Gurdwaras and that they would be spiritually censured by naming them as tractors of Dharma and befallen presons in Sabha's of Namdharis. In sub-paragraph (d) of paragraph 10 of the petition it was alleged that on 21st April, 1968, the followers of Namdhari sect were called to Sant Nagar where a big Dewan of Namdharis was convened and Sat Guru Jagjit Singh made a speech there that he had taken a vow to defeat the appellant because he was the son of Choudhury Devi Lal whose family was an avowed enemy of Namdhari sect and that it should be treated as a vow by every Namdhari.

The respondent Lalchand denied that there was any meeting and further denied that there was any farman.

The appellant, it may be stated, did not adduce any documentary evidence in support of the allegations. The appellant's entire case was based on oral evidence. The appellant relied on the oral testimony of P.W. 29 and P.W. 30. P.W. 29 Ram Dayal was formerly a member of the Punjab Legislative Assembly. Ram Dayal was formerly a member of the Congress Committee.

He resigned from the Congress and contested the seat as an independent candidate against Choudhury Devi Lal and won the election in the year 1957. An election petition was filed by Choudhury Devi Lal against the witness Ram Dayal. Ram Dayal was eventually unseated as a result of the decision of this Court. The witness Ram Dayal helped the respondent Lalchand in the election of 1967 and also in the mid-term election in the month of May, 1968. The witness Ram Dayal spoke of the Sat Guru Maharaj having exhorted the Namdhari to vote for Lalchand and warned them about the consequences if they failed to do so. The witness also spoke of the meeting at Rania village on 23rd April, 1968. It is indeed strange and significant that Ram Dayal who supported respondent Lalchand and also attended meetings on his behalf came and gave evidence in favour of the appellant about the utterances of Sat Guru Jagjit Singh of the Namdhari sect. It is extremely unsafe and hazardous to rely on the uncorroborated and isolated oral testimony of such a person.

P.W. 30 Parma Nand Sharma spoke of the meeting at Sant Nagar on 21st April, 1968 and said that Guru Jagjit Singh spoke at the meeting and proclaimed that it was the duty of every Namdhari to vote for respondent Lalchand and any one who violated the said Guru's direction would be ex-communicated from the Panth. In cross-examination the witness Parma Nand Sharma said that he came to give evidence in favour of the Congress because he was summoned to appear as a witness and therefore he spoke the truth. It is obvious that when one speaks truth one does not proclaim it. It is obvious that the witness in view of his antecedents wanted to sound truthful because he came forward to give evidence in favour of the appellant.

On behalf of the appellant reliance was placed on Exhibit P.W. 24/2 to show that there was a meeting on 21st April, 1968. The appellant relied on the diary entry of Gurbhajan Singh being Exhibit P.W. 24/2 bearing the date 21st April, 1968 in support of the contention that there was intrinsic evidence in the diary entry, that there was a meeting on 21st April, 1968 where Sat Guru Jagjit Singh spoke, and the said entry is in the following terms:—

Asa Di war was recited at Sh. Jiwan Nagar. He (Sant Sahiba Singh) remained there for the whole day. He listened for some time difficulties of the Singhs who had collected there from outside, at 7 p. m. he appeared before the Sadh Sangat assembled at Muharanwali Dharamsala Santnagar and made an appeal to the audience to cast their votes in favour of Ch. Lalchand independent candidate of Ellenabad Constituency and return him as successful candidate. Then he came back to Jiwan Nagar."

The diary entry is to the effect that the Sat Guru Jagjit Singh appeared before the Sant Nagar Assembly. The diary entry does not mention about any alleged utterance by Sat Guru Jagjit Singh at the said meeting.

Exhibits P.W. 24/1 and P.W. 24/2 are two pamphlets containing articles. Counsel for the appellant relied on the pamphlets to prove that the meeting was held where Sat Guru Jagjit Singh spoke. Both the articles were published after the election had been held on 16 May, 1968. These articles suffer from the vice of coming into existence under deliberate motive. We are unable to accept the oral evidence that there was any meeting on 21 April, 1968 as alleged by the appellant and that Sat Guru Jagjit Singh spoke at the meeting, to cast votes in favour of respondent Lalchand under threat of divine displeasure and spiritual censure.

Counsel on behalf of the appellant contended that respondent Lalchand was guilty of offences under section 123 (1) of the Act by having given Rs. 20,000 in cash to respondent Prithvi Raj to contest the election. There is no documentary evidence in support of the allegation. The oral evidence is that of P.W.

11, P.W. 12 and P.W. 13. Kanshi Ram, P.W. 11 said that he was Kumhar and there was meeting of the Kumhars on 30th March, 1968. It was decided that a Kumhar should be made a member of the Legislative Assembly. He also said that the Kumhars decided at the said meeting to put up respondent Prithvi Raj as candidate. Kanshi Ram's further evidence was that Bawa Bir Singh paid Rs. 20,000 to Prithvi Raj for election expenses. Kanshi Ram said that the payment was in the presence of respondent Lalchand. Jot Ram, P.W. 12 said that he was a Kumhar and his evidence was also that Bawa Bir Singh paid Rs. 20,000 to Prithvi Raj in the presence of Lalchand. Rawat, P.W. 13 who was also a Kumhar said that Bawa Bir Singh paid Rs. 20,000 to Prithvi Raj in the presence of Lalchand. The gist of the offence under sub-section (1) of section 123 of the Act is that there has to be a gift by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person with the object of inducing a person to stand or not to stand as a candidate at the election. The elements required to constitute an offence are first, that the gift has to be by a candidate or his agent or by any other person. Secondly, the gift is to be with the consent of the candidate or his election agent and the third important element is that the gratification is to be made with the object, directly or indirectly, of inducing a person to stand or not to stand in the election. In the present case, there is no evidence to hold that any gift was made by the candidate or his agent or by any other person with the consent of the candidate, namely, the respondent Lalchand. Secondly, there is no evidence that gratification was made with the object of inducing the respondent Prithvi Raj to stand or not to stand as a candidate.

Counsel on behalf of the appellant contended that respondent Lalchand was guilty of corrupt practices as mentioned in sub-section (4) of section 123 of the Act. The four elements in sub-section (4) are, first, that there has to be a publication by the candidate or his agent or by any other person with the consent of the candidate of any statement of fact. The second element is that the statement of fact is false and a candidate or his agent or any other person either believes it to be false or does not believe to be true. Thirdly, the publication is in relation to the personal character and conduct of any candidate. Fourthly, the statement is reasonably calculated to prejudice the prospects of that candidate's election.

P.W. 35, Lachhman Das was the Manager, Kwaliti Art Printers. He spoke of a poster which was printed in his Press. He identified the Exhibit P.W. 1|1 as a copy of the poster which was printed in his Press. He said that Exhibit P.W. 34|2 was a manuscript of Exhibit P.W. 1|1. He further said that the pamphlet was printed on the asking of Lalchand who was identified by the witnesses Muni Lal Azad and Jai Gopal Verma. Lachhman Das said that Muni Lal Azad and Jai Gopal Verma signed the manuscript Exhibit P.W. 34|2 in his presence. The further evidence was that 10,000 copies of the poster were printed in the said Press. It was suggested in cross-examination that the poster was printed after 14 May, 1968. P.W. 36 Jai Gopal Verma identified Exhibit P.W. 34|2 as a manuscript of the poster and further said that the witnesses identified Lalchand. Jai Gopal Verma proved his signature on Exhibit P.W. 34|2. Jai Gopal Verma said that Lalchand accompanied him to the Kwaliti Art Printers. Jai Gopal Verma further identified the signature of Muni Lal Azad. It was also suggested to Jai Gopal Verma that the poster was printed after 14th May, 1968. Muni Lal Azad, P.W. 37 said that he accompanied Jai Gopal Verma to Kwaliti Art Printers along with respondent Lalchand. He admitted his signature on Exhibit P.W. 34|2.

Counsel on behalf of the respondent Lalchand contended that Lachhman Das was neither the Printer nor the Publisher and that Lachhman Das joined the Press in the month of April, 1968. Lachhman Das was a disinterested person. He sent a copy of the poster to the Chief Electoral Officer. The letter to the Chief Electoral Officer Exhibit P.W. 34/1 was in a sealed cover. It was opened in this Court. It was proved by Muni Lal Jain, Accountant in the office of the Chief Electoral Officer. He proved that Exhibit P.W. 34/1 was the letter received from Kwaliti Art Printers on 2nd May, 1968. The witness Muni Lal Jain further proved the receipt of said letter in the office of the Chief Electoral Officer, on 2nd May, 1968. Muni Lal Jain identified the signatures of the clerks Jagmohan Saran Verma and D. N. Arora on Exhibit P.W. 34/1. Muni Lal Jain proved Exhibit P.W. 34/2 and Exhibit P.W. 34/3 which were the enclosures received along with Exhibit P.W. 34/1.

Counsel on behalf of the respondent Lalchand contended that the rubber stamp of the Chief Electoral Office bore the date 22nd May, 1968 and there was intrinsic evidence to show that the first digit 2 was smudged with carbon ink. This argument cannot be accepted because of the dominant reason that no such suggestion was made to the witness from the Electoral Office or any other witness on behalf of the appellant. If such a case had been made, the appellant would have had an opportunity of dealing with it.

Counsel on behalf of the respondent Lalchand contended that the receipt book and the bill register book of the Press were not produced. Lachhman Das, the Accountant of Kwaliti Art Printers was not asked to produce either the receipt book or the bill book. There was some dispute as to whether the signature of Lalchand on the manuscript poster Exhibit P.W. 34/2 was genuine or not. Ratan Lal Aggarwal, P.W. 58 said that the signature of the respondent Lalchand on Exhibit P.W. 34/2 was a genuine signature. The respondent's witness No. 2, A. S. Kapoor said that the signature of Lalchand on Exhibit P.W. 34/2 was not the same as the admitted signature of Lalchand and in the opinion of the witness the signature on Exhibit P.W. 34/2 was "the work of a person who was well skilled in the art of traced forgery". It is rare for two experts to agree in cases of disputed signature. The Court has to arrive at the conclusion in the light of the entire evidence. Jai Gopal Verma said that Lalchand appended his signature in his presence. That portion of the evidence of Jai Gopal Verma was not impeached in cross-examination. Lachhman Das, the Accountant of the Kwaliti Art Printers said that the pamphlet was printed at the request of Lalchand who was identified by Muni Lal Azad and Jai Gopal Verma. This portion of the evidence of Lachhman Das was also not challenged in cross-examination.

The poster on which the appellant relied is Exhibit P.W. 1/1. Exhibit P.W. 1/1 is as follows:—

"Appeal to the Voters of the Ellenabad Vidhan Sabha Constituency."

Election	(Rising Sun)	Symbol
Brothers:		

Just after one year election is being held. I hope I will get more support from public than before. Because you have seen the 'Adlu-Badlu' policy of Ch. Partap Singh son of Ch. Devi Dayal, Devi Lal has put up the second son as a candidate because of this fear. The deeds of Om Prakash are well known to the public. Under the auspicious of his father Ch. Devi Lal, he had been indulging in smuggling and today he is asking for votes in the name of his father. I hope the people will show the face of defeat to such

an obnoxious person. My election symbol is rising sun, put stamp only on that.

Yours

Lal Chand Khod,
Ellenabad Constituency".

Ganga Dhar Sharma, P.W. 31, said that a memorandum of appeal in favour of respondent Lalchand was printed. He spoke of Exhibit P.W. 34|1. The appeal which was published and distributed is Exhibit P.W. 34|2 which is the same as Exhibit P.W. 1|1. This appeal leaves no room for doubt that there were allegations against the personal character and conduct of the appellant Om Prakash who was described as "having been indulging in smuggling". In the said appeal, it was further said that the appellant was an obnoxious person.

Various witnesses, P.Ws. 14, 16, 18, 19, 21, 23, 29, 30 and 31 gave evidence of the distribution and publication of the appeal. They identified Exhibit P.W. 24|1 which is the same as Exhibit P.W. 34|2 and the evidence of distribution and publication is over-whelming.

The evidence in the present case established beyond any measure of doubt first that Exhibit P.W. 1|1 which is the same as Exhibit P.W. 34|2 was published, secondly, that Lalchand got the same printed and published, thirdly, that the statement was in relation to the personal character and conduct of the appellant, fourthly, the statement is false and fifthly, the same was calculated to prejudice the prospects of the appellant's election.

For these reasons we are of opinion that the appeal is to be accepted on the ground that respondent Lalchand is guilty of corrupt practice under section 123 (4) of the Act.

The appeal is allowed with costs throughout and the election of the respondent Lalchand is declared void.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—M. Hidayatullah, Chief Justice, AND A. N. RAY, J.

Parasramka Commercial Co., Ltd.

.. Appellant*

v.

Union of India

.. Respondent.

Arbitration Act (X of 1940), section 14 (1) and Limitation Act (IX of 1908), Article 178—Making and signing of the award—Notice—Whether letter necessary—Starting point for limitation.

Section 14 (1) says that when the arbitrators or umpire have given their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and of award. What will be considered as a sufficient notice in writing, of the making and signing of the award is a question of fact. 'Notice', denotes merely an intimation to the party concerned of a particular fact. One cannot limit the words "notice in writing" to only a letter. Notice may take several forms. It must, to be sufficient, be in writing and must intimate quite clearly that the award has been made and signed. To insist upon letter is to refine the law beyond the legitimate

requirements. (On facts). The only omission was that there was no notice of the amount of the fees and charges payable in respect of arbitration and award. But that was not an essential part of the notice for the purpose of limitation. To emphasise the latter part as being the essential part of the notice is to make the first part depend upon the determination of the fees and charges and their inclusion in the notice. A written notice clearly intimating the parties concerned that the award had been made and signed starts limitation.

Appeal by Special Leave from the Judgment and Order dated the 8th August, 1963 of the Punjab High Court, Circuit Bench at Delhi in Civil Revision No. 330-D of 1954.

B. P. Maheshwari and *S. M. Jain*, Advocates, for Appellant.

Dr. V. A. Seyid Muhammad. Senior Advocate (*S. P. Nayar*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, C. J.—This is an appeal against a judgment and order of the Circuit Bench of the Punjab High Court at Delhi (Single Judge) in a matter arising under the Arbitration Act. By an agreement dated 28th April, 1948, the appellant company entered into a contract with the Chief Director of Purchase (Food) acting on behalf of the Government of India. It is not necessary to give the details of this contract, because the matter was referred to arbitration under an arbitration clause included in the agreement between the parties. The award was made and signed on 26th April, 1950. The Arbitrator awarded Rs. 17,080-2-9 with costs in favour of the company. The Arbitrator, however, did not send a notice as such of the making and signing of the award but sent a copy of the award signed by him to the company. The company acknowledged the receipt of this copy by two letters which are dated 5th May and 16th May, 1950. It appears that in the original which was retained in the office of the Arbitrator, it was stated that there was a covering letter giving notice of the making of the award, but the company denied that any such letter had been sent. However, nothing much turns on it as we shall show presently.

After the copy of the award was received by the company, it filed an application under section 14 (1) of the Arbitration Act in the Court of the Subordinate Judge, Delhi on 30th March, 1951 for making the award rule of the Court. It may be mentioned that on 3rd July, 1951, the Arbitrator sent the original award to the Court also. Before the Subordinate Judge objection was taken by the Union of India that the application of the company to the Court was delayed since such an application under section 14 (1) of the Arbitration Act under Article 178 of the Indian Limitation Act had to be made within 90 days of the receipt of the notice intimating that the award had been made and signed. This objection prevailed with the Subordinate Judge who rejected the application. A revision application was unsuccessfully made before the High Court and it is the order on the revision application which is the subject of appeal before us.

Originally the revision application went before a learned Single Judge of the High Court. He referred the matter to a Division Bench which in its turn referred the case for decision to a Full Bench. The Full Bench gave its opinion on 17th November, 1961. Although the Full Bench discussed the matter it did not reach any conclusion in the case, because it felt that whether the application under section 14 (1) of the Arbitration Act had been made within 90 days or not, was a question of fact which has to be decided by the learned Single Judge, and as the learned Single Judge had not gone into that question, the matter had

to go back to him. When the case came before the learned Single Judge, he took some evidence and examined the question in detail. He upheld the decision of the Subordinate Judge and dismissed the revision application. It has been argued before us by Mr. B. P. Maheshwari that the judgment under appeal is erroneous, because section 14 (1) of the Arbitration Act requires that there should be a notice in writing and that notice had to be something besides the award of which a copy had been sent. He has cited a number of rulings in support of his contention that a notice in writing is incumbent before limitation under Article 178 of the Limitation Act which applies to Article 14 (1) petitions can start. In chief, he relies upon *Ratnawa v. Gurishiddappa Gurushantappa Magavi and others*,¹ *Puppla Ram du v. Nagidi App laswami and others*,² *Jagdish v. Sunder*,³ *Ganga Ram v. Radha K. Shan*,⁴ *Badarla Ramakrishnamma and others v. Vattikonda Lakshumbayamma and others*.⁵

It is not necessary to go into the reasoning which made the learned Judges in these cases to lay down that there must be a proper notice in writing of the making of the award. That follows in fact from the words of section 14 (1) of the Arbitration Act. That section says that when the arbitrators or umpire have given their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. What will be considered a sufficient notice in writing of the making and signing of the award is a question of fact. In the cited cases emphasis sometimes has been laid upon the latter part of the sub-section which speaks of the amount of fees and charges payable in respect of the arbitration and award. Sometimes emphasis has been placed upon the opening words namely that there should be a notice in writing. Reading the word 'notice' as we generally do, it denotes merely an intimation to the party concerned of a particular fact. It seems to us that we cannot limit the words 'notice in writing' to only a letter. Notice may take several forms. It must, to be sufficient, be in writing and must intimate quite clearly that the award has been made and signed. In the present case, a copy of the award signed by the arbitrator was sent to the company. It appears to us that the company had sufficient notice that the award had been made and signed. In fact the two letters of 5th May and 16th May to which we have referred quite clearly show that the company knew full well that the arbitrator had given the award, made it and signed it. In these circumstances to insist upon a letter which perhaps was also sent (though there is some doubt about it) is to refine the law beyond the legitimate requirements. The only question was that there was no notice of the amount of the fees and charges payable in respect of arbitration and award. But that was not an essential part of the notice for the purpose of limitation. To emphasise the latter part as being the essential part of the notice is to make the first part depend upon the determination of the fees and charges and their inclusion in the notice. A written notice clearly intimating the parties concerned that the award had been made and signed, in our opinion certainly starts limitation.

In this view of the matter we are in agreement with the decision of the learned Single Judge who has endorsed the opinion of the Subordinate Judge that limitation began to run from the receipt of the copy of the award which was signed by the Arbitration and which gave due notice to the party concerned that the

¹ 1 A.I.R. 1962 Mys. 135.

² 2 A.I.R. 1957 Andh. Pra. 11.

³ 3 A.I.R. (1948) 27 Pat. 86.

⁴ I.L.R. (1955) Punj. 402.

⁵ (1958) 1 An.W.R. 403 : I.L.R. (1958) A.P.

award had been made and signed. That is how the party itself understood when it acknowledged the copy sent to it. Therefore, the application must be treated as being out of time and the decision of the High Court to so treat it was correct in all the circumstances of the case.

We, therefore, do not see any reason to interfere in this appeal and it is dismissed. But we make it clear that the other part of the case, namely what is to happen to the award sent by the Arbitrator himself to the Court has yet to be determined and what we say here will not affect the determination of that question. Obviously enough that matter arises under the second sub-section of section 14 and will have to be considered quite apart from the application made by the company to have the award made into rule of Court.

It was represented to us by Dr. Syed Mohammad that objections had been taken to the validity of the award and they remain still for decision. Those of course must fall to the ground with the application which we have found to be out of time. As to whether similar objections can be raised in answer to the award filed at the instance of the arbitrator is a question which we cannot go into in the present appeal and no expression of opinion must be attributed to us on that point. In the circumstances of the case we leave the parties to bear their own costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT:—S.M. SIKRI, G. K. MITTAL AND K.S. HEGDE, JJ.

Fazal Hussain and Arshad Ahmed

.. *Petitioners**

v.

The State of Jammu and Kashmir

.. *Respondent.*

Jammu and Kashmir Preventive Detention Act (XIII of 1964), section 8, Proviso—Failure of detaining authority to communicate grounds of detention or inform the detenu within 10 days of detention—Detention illegal.

There is no doubt that it is the duty of the detaining authority to communicate the grounds within ten days of the date of detention if the case does not fall within the proviso. If the detaining authority neither communicates the grounds of detention nor informs the detenu under the proviso within 10 days after detention, the detention would become illegal and a subsequent order under the proviso would not have the effect of rendering the detention legal.

One is concerned with the liberty of a subject and one must adopt a construction which would not have the effect of enabling the executive to make an order under the proviso at any time after the lapse of 10 days specified in section 8. Even from the practical point of view one is unable to see that the Government would experience any difficulty in deciding within ten days whether the grounds should be served or not in the public interest. All the material is with the Government when it passes the order of detention and a period of ten days is ample for the Government to make up its mind whether the case falls within the proviso or not.

Petition under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*.

R.K. Garg and Anil Kumar Gupta. Advocates, for Petitioners.

R. Gopalakrishnan and R. N. Sachthey Advocates, for Respondents.

The Judgment of the Court was delivered by

Sikri, J.—This is a joint petition by two detainees under Article 32 of the Constitution praying for the issue of a writ of *habeas corpus* or other appropriate writ, direction or order directing that the petitioners be released.

The petitioner, Arshad Ahmad, was detained in pursuance of Detention Order, dated 19th September, 1967, passed under section 3 (1) (a) (i) of the Jammu and Kashmir Preventive Detention Act, 1964. The copy of the order on the record shows that the order was served on the detenu by Jaswant Singh, Deputy Superintendent of Police (C.I.D.), Jammu on 27th September, 1967.

No grounds of detention were served on the detenu, but an order dated 25th October, 1967, issued by the Secretary to the Government, Home Department, was served on him informing him that it would be against the public interest to disclose the facts or the grounds of detention to him.

The learned Counsel for the petitioner, Mr. Garg, contends that the order dated 25th October, 1967, was served too late and the detention of the petitioner became illegal when the time for serving the grounds of detention had expired.

Section 8 of the Jammu and Kashmir Preventive Detention Act, 1964, provides that :

“When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but not later than ten days, from the date of detention, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the Government.”

But the proviso to section 8 states :

“Provided that nothing in this sub-section shall apply to the case of any person detained with a view to preventing him from acting in any manner prejudicial to the security of the State, if the authority making the order, by the same or a subsequent order, directs that the person detained may be informed that it would be against public interest to communicate to him the grounds on which the detention order has been made.”

The learned Counsel for the State contends that if an order has been made under the proviso it does not matter whether the order is made and served beyond the ten days' time specified in section 8.

We are unable to accept this contention. There is no doubt that it is the duty of the detaining authority to communicate the grounds within ten days of the date of detention if the case does not fall within the proviso. If the detaining authority neither communicates the grounds of detention nor informs the detenu under the proviso within 10 days of the detention, the detention would become illegal and a subsequent order under the proviso would not have the effect of rendering the detention legal.

A similar point arose before this Court in *Abdul Jabbar Butt v. State of Jammu and Kashmir*¹. This Court was then considering the Jammu and Kashmir Preventive Detention Act (IV of Sambat 2011) and similar provisions contained therein. Das, C.J., observed:

“If the grounds are not communicated to the detenu within the period of time prescribed by the expression ‘as soon as may be’ the detenu becomes deprived of his statutory right under sub-section (1) and his detention in such circumstan-

ces becomes illegal as being otherwise than in accordance with procedure prescribed by law. In order to prevent this result in certain specified cases the proviso authorises the Government to issue the requisite declaration so as to exclude entirely the operation of sub-section (1). It, therefore, stands to reason and is consistent with the principle of harmonious construction of statutes that the power of issuing a declaration so as to prevent the unwanted result of the operation of sub-section (1) should be exercised before that very result sets in."

Although there is some change in the language in the present act in substance the provisions are similar as far as the present point is concerned. We are here concerned with the liberty of a subject and we must adopt a construction which would not have the effect of enabling the executive to make an order under the proviso at any time after the lapse of ten days specified in section 8. Even from the practical point of view we are unable to see that the Government would experience any difficulty in deciding within ten days whether the grounds should be served or not in the public interest. All the material is with the Government when it passes the order of detention and a period of ten days is ample for the Government to make up its mind whether the case falls within the proviso or not.

In the result we hold that the detention of the petitioner Arshad Ahmad is illegal and he should be released.

Coming to the case of the second petitioner Fazal Hussain, he was detained by Order dated 3rd January, 1968, passed under section 3 (1) read with section 5 of the Jammu and Kashmir Preventive Detention Act, 1964. The order of detention was served on the petitioner in the Central Jail on 8th January, 1968, and the same was read out to him. By order dated 11th January, 1968, the petitioner was informed that it was against public interest to disclose facts or to communicate to him the grounds on which the detention order was passed. The affidavit stating these facts in shown to by the Additional Secretary to the Government, Jammu and Kashmir, Home Department, and it is stated in the verification that these facts were stated on the basis of information derived from the record of the case which he believed to be true.

The learned Counsel for the petitioner contends that the Deputy Superintendent, Central Jail, who is alleged to have served the order of detention on the petitioner should have filed the affidavit. The State has annexed to the affidavit a copy of the Government Detention Order and below the detention order the following endorsement exists:

"The notice of this order has been served upon Shri Fazal Hussain, s/o. Ayub Khan detenu by reading over the same to him.

(Sd.) Dy. Superintendent,
Central Jail, Jammu 8/1".

In view of this endorsement existing on the order of detention we do not consider that it was necessary that the Deputy Superintendent, Central Jail, should have filed an affidavit to the effect that he had served the order of detention on the detenu Fazal Hussain.

No other point is raised. The petition of Fazal Hussain accordingly fails and is dismissed.

S. V. J.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. S. HEGDE AND A. N. RAY, JJ.

B. P. Maurya

... Appellant*

v.

Prakash Vir Shastri and others

... Respondents.

Representation of the People Act (XLIII of 1951), section 123 (4)—Scope—Act intended to protect freedom of speech and also to restrain malicious propaganda—Personal character and conduct of the candidate—Sub-section (4) contravened when any false allegation of fact pierces the politician and touches the person of the candidate.

Representation of the People Act (XLIII of 1951), section 123 (3-A)—Scope—Promotion of, or attempt to promote, feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community or language made a corrupt practice—Such promotion or attempt to promote enmity or hatred also to be for the furtherance of the election of the candidate or for prejudicially affecting the election of any candidate—Personal character or conduct, meaning of.

The appellant challenged the election of the first respondent on grounds of corrupt practices as mentioned in sub-sections (2), (3), (3-A) and (4) of section 123 of the Representation of the People Act, 1951. The various corrupt practices on which the appellant relied relate to occurrences at six places. The first question was whether a meeting was held at Hapur Town Hall Maidan on 7th February, 1967. Neither the Vir Arjun news item dated 7th February, 1967, nor the news item appearing under the date 7th February, 1967, Hapur published in the Hindustan on 8th February, 1967, contains any intrinsic evidence that a meeting was held at Hapur on 7th February, 1967. With regard to the said meeting the oral evidence on behalf of the appellant is that the meeting was held and oral evidence on behalf of the respondent is that the meeting was not held. In the case of conflicting oral testimony it is safer to place reliance on documentary evidence. The newspaper report on which the appellant relies contained intrinsic evidence which totally nullifies the appellant's case. Again the General Diary of Thana Hapur bearing the date 7th February, 1967, shows that a constable was sent to the Town Hall Maidan to make arrangements in connection with the meeting which was addressed by one Kailash Prakash on behalf of the Congress candidate. It is highly improbable that two meetings of the two rival candidates, namely of the Congress and of the respondent (an Independent candidate) would both be held on the same date and at the same place. The First Information Report dated 7th February, 1967, about the attack on the office of the Republican Party by the supporters of the respondent, is significantly silent about any meeting having been held on 7th February, 1967, at Hapur Town Hall Maidan. The attack on the party office was not proved by the appellant to have been made by respondent's workers and supporters. Therefore, it is clear that no meeting was held at Hapur on 7th February, 1967, and that there was no attack on the office of the Republican Party.

Secondly, the appellant alleged that the Jatav voters were not allowed to vote and that was denied by the respondent. The oral evidence on behalf

of the appellant was not acceptable for two reasons. First, if there had been any incident of a voter being prevented from voting a complaint would have been made to the polling officer of the polling station. Secondly, Vireshwar Tyagi and Mahendra Singh Verma who were the supporters of the appellant and who are alleged to have said that voters at Nagola were prevented from voting did not lodge any report about the alleged corrupt practice particularly when it was said to be committed by the first respondent himself.

On the question of assault on Shamshad Elahi, considering the injury report along with the statement of Shamshad Elahi and the report of the appellant and the complaint of Shamshad Elahi, it becomes clear that there was no complaint about injuries after the injury report and there is also no evidence that the assault was by the workers of the first respondent.

The allegations that on 2nd February, 1967, an election meeting was organised in support of the candidature of the appellant and the supporters of the first respondent created disturbance with the result that the meeting could not be continued and the supporters of the first respondent chased the appellant, cannot be accepted because, first, there was no complaint by the appellant to the Election Commissioner, secondly, there was no police case and no investigation, thirdly the reports did not mention the name of the appellant as having been assaulted or chased and fourthly, the news item in the Patriot was not proved as to the truth of the contents therein.

All the three allegations about the voters having been stopped from casting their franchise followed the same pattern of oral evidence. The absence of any report either to the Election Commission or to the Police authorities is an important and noticeable feature and therefore the oral evidence is not acceptable.

It was said by the appellant that the first respondent promoted feelings of enmity or hatred against the appellant and further raised Communal Propaganda. He also relied on Exhibit 22, being the editorial in Vir Arjun dated 7th February, 1967. Annexure MM was said by the appellant to be a communal propaganda. Annexure MM was not proved. Even if it were proved the slogans do not offend the provisions of either sub-section (3-A) or sub-section (4) of section 123. The statements of Exhibit 22 do not make any reflection on the moral or mental nature of the appellant and they do not touch the personal character of the appellant, nor do they promote enmity or hatred on grounds of religion.

Appeal under section 116-A of the Representation of the People Act, 1951 from the Judgment and Order dated the 12th April, 1968 of the Allahabad High Court in Election Petition No. 19 of 1967.

Appellant in person.

L. M. Singvi and Veda Vvasa. Senior Advocates (Rishi Ram, Bishambhar Lal, K. C. Sharma, H. K. Puri, U. P. Singh and K. K. Jain. Advocates, with them), for Respondents No. 1.

The Judgment of the Court was delivered by

Ray, J.—This is an appeal against the judgment and order of the High Court at Allahabad, dated 12th April, 1968, dismissing the election petition filed by the appellant.

The appellant contested the General Election to the Lok Sabha from Hapur Parliamentary Constituency in the year 1967. There were seven rival candidates numbered respondents 1 to 7. The appellant contested the election on the ticket of the Republican Party. He was then a sitting member of Parliament. Among the rival candidates, Prakash Vir Shastri was an independent candidate. The election symbol of the appellant was elephant and the election symbol of Prakash Vir Shastri was lion. Prakash Vir Shastri secured 1,49,943 votes while

the appellant secured 1,01,875 votes. The Swatantra candidate Sri Naseem secured 34,274 votes. The Congress candidate respondent Smt. Kamla Chaudhury secured 33,988 votes. The appellant challenged the election on grounds of corrupt practices as mentioned in sub-sections (2), (3) and (4) of the Representation of the People Act, 1951 (hereinafter referred to as the Act).

At the hearing of the appeal the appellant appeared in person after Counsel on his behalf had obtained leave of this Court to withdraw and to allow the appellant to appear in person.

The various corrupt practices on which the appellant relied relate to occurrences at six places. The appellant did not press the other occurrences. The first occurrence relates to a meeting held at the Town Hall Maidan at Hapur on 7th February, 1967. The appellant alleged that the Hapur meeting respondent Prakash Vir Shastri and his supporters delivered inflammatory speeches against the appellant and thereafter the said respondent Shastri's supporters entered the office of the Republican Party, to which the appellant belonged, assaulted the workers of the appellant, tore posters, abused the appellant and threatened his workers. In support of the allegations the appellant relied on Exhibit-28 the news report in the 'Hindustan' published on 8th February, 1967 and also on Exhibit-23 the news report in the newspaper named 'Vir Arjun' published on 8th February, 1967 and Exhibit-22 being the editorial in the Vir Arjun published on 7th February, 1967. The newspaper report in the 'Hindustan' Exhibit-28 published on 8th February, 1967, contains the note of the correspondent from Hapur bearing the date 7th February, 1967, stating that a big meeting was held in support of respondent Shastri, Lok Sabha candidate from Hapur-Ghaziabad Constituency. In the 'Vir Arjun' dated 8th February, 1967, Exhibit-23, it is stated that the supporters of the Republican Party were raising slogans that they were championing the cause of Harijans and Muslim youths from Aligarh University were brought for that purpose. It was also stated in the said newspaper that Muslim students of Aligarh were raising the slogans "Harijan Muslim are brothers and where from Hindu community has come. Black face be of a Brahmin, barber and lala. Throw shoes on Bhat, Gujar and Rajput". The appellant in paragraph 11 of the petition further alleged that respondent Shastri was associated with the 'Vir Arjun' and K. Narendra, Editor of Vir Arjun who was a colleague of respondent Shastri wrote an editorial by way of an appeal to support the candidature of respondent Shastri in that newspaper on 7th February, 1967, Exhibit-22 and the said appeal was also an instance of corrupt practice. The further allegations in the petition were that at the meeting which was held at the Town Hall Maidan at Hapur on 7th February, 1967, respondent Shastri and the said K. Narendra, Editor of Vir Arjun delivered inflammatory speeches.

The appellant generally impeached the judgment of the High Court on two grounds. First, that there was no discussion of the entire evidence and, secondly, that there was rejection of the evidence on behalf of the appellant on consideration that the appellant's witnesses belonged to particular castes and sects.

The criticism on behalf of the appellant with regard to Hapur meeting was that respondent Shastri in answer to the petition did not state that there was a meeting on 6th February, 1967 and thereby the appellant was denied the opportunity of meeting that case. The appellant relied on the decision of this Court in *Badat & Company v. E. I. Trading*¹ and the observations appearing at page 547 of the report in support of the contention that under the provisions of the Code of Civil Procedure and, in particular the provisions contained in Order VIII of the Code, respondent Shastri should have alleged in the pleadings that the meeting was held on 6th February, 1967 and in the absence of such allegations respondent Shastri should not have been allowed to make that case. The deci-

1. (1965) 1 S.C.I. 747 : (1964) 4 S.C.R. 19 : A.I.R. 1964 S.C. 538.

sion of this Court is of no aid to the appellant. In the case of *Badat & Company*¹ the question was whether there was a contract between the parties and it was alleged by the plaintiff with reference to two letters that the letters would indicate some of the terms of the transaction. The defendant in the written statement did not specifically deny the said two letters. This Court observed that a mere denial of the contract was not sufficient and the rules of the Code enjoined denial of the existence of the letters. In the present case, the question was whether a meeting was held at Hapur Town Hall Maidan on 7th February, 1967. The respondent denied such a meeting. The respondent was not called upon to state as to whether there was a meeting on 6th February, 1967.

The news item in the newspaper 'Hindustan' Exhibit 28 gave news from Hapur under the date 7th February, 1967, that a meeting was held at Hapur. Exhibit-23 was a news item in the newspaper 'Vir Arjun' under the date 7th February, 1967, that Shri Narendra, Editor of Vir Arjun spoke at an election meeting at Hapur. Neither the Vir Arjun news item dated 7th February, 1967, nor the news item appearing under the date 7th February, 1967, Hapur published in the Hindustan on 8th February, 1967 contains any intrinsic evidence that a meeting was held at Hapur on 7th February, 1967.

Further, of the witnesses on behalf of the appellant P.W. 25 Bal Kishan spoke of the meeting at the Hapur Town Hall Maidan on 7th February, 1967 and he also stated that three pamphlets were distributed and two issues of newspapers were also distributed, namely, the Vir Arjun and Pratap. No such pamphlet was produced. The two witnesses on behalf of respondent Shastri, Bhagwati Prasad Jain D.W. 16 and Rameshwar Prasad Goel D.W. 18 said that a Congress election meeting was held at the Town Hall Maidan, Hapur and no election meeting was held in support of respondent Shastri at the Town Hall Maidan, Hapur on 7th February, 1967.

With regard to the meeting at the Town Hall Maidan at Hapur alleged by the appellant to have been held on 7th February, 1967, the oral evidence on behalf of the appellant is that the meeting was held and the oral evidence on behalf of the respondent is that the meeting was not held. In the case of conflicting oral testimony it is safer to place reliance on documentary evidence. First, the newspaper report on which the appellant relies contained intrinsic evidence which totally nullifies the appellant's case. Exhibit 28 being the 'Hindustan' dated 8th February, 1967, indicates the news about Hapur under the date 7th February, 1967, that a meeting was held "yesterday night" meaning thereby 6th February, 1967, in support of respondent Prakash Vir Shastri. Secondly, the newspaper 'Vir Arjun' published on 8th February, 1967, gave the news at Hapur under the date 7th February, 1967. The news referred to an election meeting at Hapur but did not mention that the meeting was held on 7th February or on 6th February, 1967. Thirdly, Exhibit A-12 which is an application by one Lakhi Ram seeking permission from the Municipal Board for holding a meeting on 7th February, 1967, in the Town Hall Maidan, Hapur throws light on this aspect. The permission given by the authorities which is marked Exhibit A-13 required the persons holding the meeting to pay certain charges towards the use of the electricity. Exhibit A-14 is a receipt for payment of Rs. 5. These three documents indicate that the meeting which was held on 7th February, 1967, was a meeting organised by the supporters of the Congress Party. Fourthly, Exhibit A-2 which is a General Diary of Thana Hapur bearing the date 7th February, 1967, shows that a constable was sent to the Town Hall Maidan to make arrangements in connection with the meeting which was to be addressed by one Kailash Prakash. The witnesses on behalf of the respondent Shastri mentioned the

1. (1965) 1 S.C.J. 747; (1964) 4 S.C.R. 19; A.I.R. 1964 S.C. 538.

name of Kailash Prakash and Smt. Kamla Chaudhury as speakers on behalf of the Congress candidate. It is highly improbable that two meetings of the two rival candidates, namely of the Congress and of the respondent Prakash Vir Shastri would both be held on the same date and at the same place. Fifthly, the reports which were lodged by the supporters of the appellant with regard to the attack on the office of the Republican Party on 7th February, 1967, do not mention or refer at all to any meeting on behalf of respondent Prakash Vir Shastri on 7th February, 1967, at the Town Hall Maidan, Hapur. It would be natural if a meeting had been held on 7th February, 1967, that there would have been reference to the same.

The other allegations of the appellant were that respondent Shastri's supporters on 7th February, 1967, attacked the office of the Republican Party, to which the appellant belonged. There was the First Information Report dated 7th February, 1967, about the attack on the office of the Republican Party. The report is significantly silent about any meeting having been held on 7th February, 1967, at Hapur Town Hall Maidan. Though there was the alleged complaint about the attack on the office of the Republican Party, it appears that there was no investigation. The attack on the party office was not proved by the appellant to have been made by respondent Shastri's workers and supporters. The High Court correctly came to the conclusion that no meeting was held at Hapur on 7th February, 1967 and there was no attack on the office of the Republican Party.

With regard to the attack on the office of the Republican Party to which the appellant belonged though the first information report gave the news about the attack it is strange that there was no investigation. The report of the Joint Secretary of the Republican Party to the President of the Republican Party bearing the date 8th February, 1967, alleged that the supporters of Prakash Vir Shastri attacked the office of the Republican Party on 7th February, 1967, forcibly took necessary papers and a flag of the Party. Dal Chand Nimesh, Joint Secretary of the Republican Party, P.W. 71 in his evidence stated that none of the processionists went to his office and further he did himself in an adjoining room. He did not prove the truth of the statements contained in his report which was marked as Exhibit 11. The attack on the office of the Republican Party was not mentioned at all either in the Vir Arjun of 8th February, 1967, or in the Hindustan dated 8th February, 1967. It is obvious that if in fact any attack had been made on the office of the Republican Party, the supporters of the appellant would have taken steps for investigation and publication.

The second occurrence on which the appellant relied is alleged to have happened at a place called Nagola. The appellant's case was that on 18th February, 1967, Prakash Vir Shastri and his supporters who were mostly Tyagi by caste asked the Tyagis to stop the Jatav voters from going to the polling station to cast their votes. It was alleged that Thawariya made the announcement by beat of drums that the Muslim, Chamar, Bhari and Jatav voters would not be allowed to go to the polling station to cast their votes. The other part of the appellant's case about the Nagola incident was that there was an assault on Shamshad Elahi, a worker of the appellant. The appellant relied on the oral testimony of P.W. 11, P.W. 12, P.W. 15, P.W. 16, P.W. 17, P.W. 19, P.W. 23, P.W. 65 and P.W. 80. The witnesses on behalf of the respondent were D.W. 4, D.W. 12, D.W. 13, D.W. 30 and D.W. 33. The oral evidence is in support of the rival contentions, namely, that the Jatav voters would not be allowed to vote and the denial of the same by the respondent. The appellant also relied on Exhibit N that the Jatav voters would not be allowed to cast their votes by the Tyagis.

In support of the case with regard to assault on Shamshad Elahi the appellant relied on the oral evidence of Shamshad Elahi, P.W. 11 and the injury

report Exhibit 30 and other documents, namely, Exhibits 31, 32 and 35. The appellant criticised the judgment by contending that there was no discussion of the oral evidence of P.W. 17, Satya Pal Malik, P.W. 11, Shamshad Elahi said that he went to Nagola at about 3.30 P.M. on 19th February, 1967, the date of the election and the voters told him about the proclamation by beat of drums on the previous night and the voters further said that they would be insulted and they should remain there. Shamshad Elahi further said that he met Sevak Ram and Surajbhan Tyagi and 10 or 12 other persons were with them and they beat the witness with lathis and he received a number of injuries.

The other witnesses on whose testimony the appellant relied said that people wearing lion badges which was the election symbol of Prakash Vir Shastri asked the witnesses not to cast their votes and they also said that it was announced by beat of drums that no Chamar or Bhangi should cast a vote.

Nagola is a village within the circle of Badhnauli. R. K. Aggarwal, D.W. 33 who was the Presiding Officer at Badhnauli polling station gave evidence. He said that the votes of village Nagola were polled and no Harijan or Mohammedan voter was stopped from casting votes and that there was no complaint that Harijan and Mohammedan voters were being stopped from casting their votes. In cross-examination the witness said that no voters from Haider-nagar or Nagola were brought to the polling station under police protection.

P.W. 80, Sukhbir Singh who was posted as Station Officer Thana Kharkoda said that he received information from Shamshad Elahi that voters at Badhnauli were being stopped from casting their votes. Sukhbir Singh went to Badhnauli. He also went to Nagola. He said that 30 or 40 Harijan voters went to Badhnauli to cast their votes. He said that there was no voter who was taken by him to a polling station in a truck. Sukhbir Singh proved Exhibit 35 which was a contemporaneous report to the effect that no one was stopped from voting at Nagola.

Satya Pal Malik on whose testimony the appellant relied said that Prakash Vir Shastri came to Badhnauli polling station on 19th February, 1967 and there were 40 to 50 persons around him with lion badges on. His further evidence was that Prakash Vir Shastri asked the Pradhan to beat the voters to make them run away. Prakash Vir Shastri however denied having asked Sheoraj Singh Pradhan to drive away the voters.

Thanwaria, P.W. 23 on whose evidence the appellant relied said that he beat the drum in Nagola village on a day before the polling. He said that there were two parties of the Tyagis. One was of Sheoraj Singh and the other was of Pyare Lal. The Jatavs, according to his testimony, were in Pyare Lal's party and the Bhangis were in Sheoraj's party. The appellant said that Thanwaria was disbelieved only because he belonged to the Chamar caste. That is misreading the judgment. The High Court said that the evidence of Thanwaria did not inspire confidence. That criticism of the evidence of Thanwaria is justified because he came to support the case of the appellant and he belonged to the appellant's camp.

Pyare Lal, D.W. 12 said that no Harijan was stopped from casting his vote at Badhnauli polling station and no worker of Prakash Vir Shastri threatened any Harijan voter at the polling station. The appellant criticised the evidence of Pyare Lal that he did not know as to what was happening in the village. Satya Pal Malik, P.W. 17 mentioned the name of Pyare Lal as the leader of one of the parties and Sheoraj Singh as Pradhan of the village Nagola.

The oral evidence on behalf of the appellant is not acceptable for two reasons. First, if there had been any incident of a voter being prevented from voting a complaint would have been made to the polling officer of the polling station.

Secondly, Vireshwar Tyagi and Mahendra Singh Verma, who were the supporters of the appellant and who are alleged to have said that voters at Nagola were prevented from voting did not lodge any report about the alleged corrupt practice particularly when it was said to be committed by Prakash Vir Shastri himself.

The assault on Shamshad Elahi which was also said to be an incident of corrupt practice is unacceptable for these reasons. First, the injury report Exhibit-30 has to be considered along with the statement of Shamshad Elahi being Annexure M and the report of the appellant being Exhibit-32 and the complaint of Shamshad Elahi being Annexure N being Exhibit-30. The appellant in the report dated 17th February, 1967 Exhibit-32 spoke of voters not being allowed to exercise their votes. Shamshad Elahi in his complaint said that 10 or 12 persons beat him with lathis. All this happened on 19th February, 1967. The doctor's report was about the injuries. First, it is peculiar that there was no complaint about the injuries after the injury report. Secondly, there is no evidence that the assault was by the workers of Prakash Vir Shastri. Shamshad Elahi in his evidence mentioned the names of Sevak and Surajbhan Tyagi. These names were not mentioned in the complaint being Exhibit-30. In cross-examination Shamshad Elahi was asked as to how he had obtained the names and his answer was that he met the grass cutter who gave the names. It is curious that the grass cutter who gave the names was not examined.

The third incident on which the appellant relied took place at Chhajjpur. The allegations are that on 2nd February, 1967 an election meeting was organised in support of the candidature of the appellant and the supporters of respondent Prakash Vir Shastri created disturbance with the result that the meeting could not be continued and the supporters of respondent Prakash Vir Shastri are alleged to have chased the appellant. The High Court rightly commented on the absence of any report having been made by the appellant to the Election Commissioner or the police about the alleged occurrence. It is obvious that if the appellant had been chased he would have made report to the Election Commission or to the police. The appellant relied on the news item in the Patriot, dated 5th February, 1967. The news item was referred to by Mahesh Chandra Agarwal, P.W. 14 who, however, was not present at the meeting at Chhajjpur. He referred to a conversation with the Superintendent of Police. The Senior Superintendent of Police was not examined. No police report was produced. The truth of the newspaper report was not corroborated nor was the statement in the news item proved. On the contrary, Mahesh Chandra Agarwal nullified the news item by admitting that he was not present at the meeting.

P.W. 18 Tejpal Singh spoke of the incident of 2nd February, 1967 and mentioned about the shouting of slogans and throwing of brick-bats. P.W. 10, Som Prakash spoke of charge-sheet under sections 147 and 342 of the Indian Penal Code against certain persons. He spoke of the report of 3rd February, 1967 and a report of 9th February, 1967. The report dated 3rd February, 1967 relates to the occurrence on 2nd February, 1967, Chhajjpur. The report of 9th February, 1967 relates to the alleged incident of 2nd February, 1967, at Chhajjpur. The witness Som Prakash P.W. 10 admitted that no investigation was made. It is significant that the name of the appellant is not mentioned in either of complaints or reports. The allegations in the report are that some disturbance was created and names of various persons are mentioned as having tried to run towards the jeep which carried the leaders of the Republican Party. One of the witnesses Devi Dayal Sen, P.W. 63 said that when the appellant rose to speak some people pelted stones at him.

The alleged incident at Chhajjpur is unacceptable because, first, there was no complaint by the appellant to the Election Commissioner, secondly, there was

no police case and no investigation, thirdly, the reports did not mention the name of the appellant as having been assaulted or chased and fourthly, the news item in the Patriot was not proved as to the truth of the contents therein.

The fourth occurrence on which the appellant relied was at a place called Ophera. The appellant alleged that some persons were stopped from casting their votes. The appellant relied on the oral evidence of P.Ws. 58, 59 and 60. P.W. 60 is Manzoor Ahmad, M.L.A. The other two witnesses were Durga Das and Ram Prasad. The appellant criticised the judgment that there was no mention of the name of Manzoor Ahmad. The diaries being Exhibits A-23, A-32 and A-29 were produced to show that the election at Ophera polling station passed off peacefully and therefore no one stopped any voter from casting vote. Manzoor Ahmad in his oral evidence said that he saw people armed with lathis and ballams. He said that he made a complaint to the Presiding Officer and admitted in cross-examination that there was no written complaint. Manzoor Ahmad did not prove that any person was stopped from voting.

The fifth and the sixth occurrences on which the appellant relied took place at Datiyana and Bankhanda. It is alleged by the appellant that at Datiyana the agents and the supporters of respondent Prakash Vir Shastri threatened the Scheduled Caste and Harijan voters and prevented them from going to the polling station. The allegations about the occurrence at Bankhanda are to similar effect. The appellant relied on Exhibit 18 which was a memorandum addressed by several voters who stated that they remained within the house and could not vote because the village Tyagi Kailash Chand threatened to kill them if they would vote. P.W. 65, Vireshwar Tyagi spoke of the incidents at Nagola, Bankhanda and Hapur and his wife Smt. Prakash Vireshwar Tyagi spoke of the alleged incident at Datiyana. The respondent's witnesses denied that any person was prevented from casting vote at Datiyana.

The allegations with regard to the Bankhanda were referred to by Vireshwar Tyagi and other witnesses. The diary which was produced with regard to the polling station disproved any such incident. The diaries are Exhibits A-19 and A-21. D.W. 20, Chandoo Singh stated that he was at the polling station at Bankhanda and no one was stopped from exercising the right of franchise. D.Ws. 21 and 22 also spoke of polling at Bankhanda having been peaceful. The appellant referred to religious songs which were said to be in praise of respondent Prakash Vir Shastri. Mere praiseworthy songs will not be an instance of corrupt practice.

All the allegations about the voters having been stopped from casting their franchise followed the same pattern of oral evidence. The absence of any report either to the Election Commission or to the Police authorities is an important and noticeable feature and therefore the oral evidence is not acceptable.

The other allegations relied on by the appellant are that respondent Prakash Vir Shastri is guilty of corrupt practice under sub-sections (3), (3-A) and (4) of section 123 of the said Act. The appellant contended that respondent Prakash Vir Shastri made communal propaganda against the appellant and also published false statements in relation to the personal character of the appellant. In aid of the contentions the appellant relied on annexures KK and MM. The appellant relied on the upper portion of annexure KK in support of the contention that the slogans amounted to communal propaganda. The lower portion of annexure KK was contended by the appellant to be allegations against the personal character of the appellant. Annexure MM was said by the appellant to contain slogans amounting to communal propaganda against the appellant. It was said by the appellant that respondent Prakash Vir Shastri promoted feelings of enmity or hatred against the appellant and further raised communal

propaganda. The appellant also relied on Exhibit-22 being the editorial in *Vir Arjun*, dated 7th February, 1967, in support of the contention that the editorial constituted communal propaganda against the appellant.

In *Guruji Shrihari Baliram Jovatode v. Vithalrao and others*.¹ this Court dealt with the scope and content of sub-section (4) of section 123 of the Act. The Act is intended to protect freedom of speech on the one hand and to restrain malicious propaganda on the other. The provisions contained in sub-section (4) of section 123 were said by this Court to be contravened when "any false allegation of fact pierces the politician and touches the person of the candidate". It is the personal character and conduct of the candidate which is to be protected from malicious or false attacks. The statement in question has to be first a false statement bearing on the personal character and conduct of the candidate and secondly, the statement complained of must be one which is reasonably calculated to prejudice the prospects of the election of the person.

Under the provisions contained in sub-section (3-A) of the said Act the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community, or language, is the mischief which is sought to be avoided by making the same a corrupt practice. The sub-section further says that such promotion or attempt to promote enmity or hatred is for the furtherance of the election of the candidate or for prejudicially affecting the election of any candidate.

The words "personal character or conduct" were explained by this Court in *T. K. Gangi Reddy v. M. C. Anjaneya Reddy and others*² "to be equated with his mental or moral nature. Conduct connotes a person's actions or behaviour". Annexure KK was not proved and therefore it cannot be said to constitute any communal propaganda. Assuming it were proved there is no appeal to vote for a person on the ground of religion nor is there any appeal not to vote for a person on the ground of his religion. Further, the provisions contained in sub-section (4) of section 123 require the publication with the consent of the candidate or his election agent. In the present case, annexure KK has not been established to be published with the consent of the respondent Prakash Vir Shastri or his election agent. It, therefore, follows that annexure KK offends neither the provisions contained in sub-section (3-A) nor in sub-section (4) of section 123 of the Act.

Annexure MM was said by the appellant to be a communal propaganda. Annexure MM was not proved. Even if it were proved the slogans do not offend the provisions of either sub-section (3-A) or sub-section (4) of section 123 of the Act.

The publication in the newspaper '*Vir Arjun*' Exhibit-22 to the effect that differences between Hindus and Harijans were being spread by the supporters of the Republican candidate meaning thereby the appellant and if students from Muslim University were brought in by them then students from Ghaziabad would be brought into the field. The newspaper certainly was inclined in favour of respondent Prakash Vir Shastri but the newspaper publication said that Prakash Vir Shastri would not unlike the Congress candidate preach communal hatred. The statements in Exhibit-22 do not make any reflection on the moral or mental nature of the appellant and they do not touch the personal character of the appellant, nor do they promote enmity or hatred on grounds of religion.

The appellant failed to prove that respondent Prakash Vir Shastri committed any corrupt practice in relation to the personal character and conduct of the

1. C. A. No. 1778 of 1967, decided on 19th November, 1968. 2. (1965) 1 S.C.R. 175.

appellant. The newspaper publication Exhibit 22 was an appeal on behalf of respondent Prakash Vir Shastri. As long as the publication is not tainted by corrupt practice, such an appeal will not be an infraction of the provisions as to corrupt practices as contemplated in the Representation of the People Act. Suggestions that attempts are made to accentuate the differences between the Hindus and Harijans in the article cannot be extracted in isolation from the entire context. The electorate at the time of the election has to be kept in the forefront in judging whether the article can be said to offend the provisions relating to corrupt practices. The Court is to ascertain whether the statement is reasonably calculated to prejudice the prospects of the candidate's election. This Court observed in *Kuldar Singh v. Mukhtiar Singh*¹ that in reading the documents it would be unrealistic to ignore that when appeals are made by candidate there is an element of 'partisan feeling' and there is 'extravagance of expression in attacking one another' and 'it would be unreasonable to ignore the question as to what the effect of the pamphlet would be on the mind of the ordinary voter who reads the pamphlet'. In the light of these principles, we are of opinion that there is no infraction of the provisions contained in sub-sections (3-A) and (4) of section 123 of the Act.

For the reasons mentioned above, this appeal fails and is dismissed with costs.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S.M. SIKRI, R.S. BACHAWAT AND K.S. HEGDE, JJ.

J.K. Steel Ltd.

.. *Appellant**

v.

Union of India and others

.. *Respondents.*

Central Excises and salt Act, 1944 (I of 1944), Items 25, 26 and 26-A and column 3 of entry (i) of item 26-AA—Interpretation—Manufacture of wires out of imported steel rods—Imposition of excise duty—Levy to consist of ad valorem duty plus the excise duty for the time being leviable on pig iron and steel ingots as the case may—“For the time being leviable”, if indicates a rate—Column 3 of entry (i) if concerned with the actual ingots out of which wires are made—Clause not concerned with whether the steel ingot has paid the excise duty countervailing duty or not.

Indian Tariff Act (XXXII of 1934), First Schedule, item No. 63 (36).

The assessee manufactures iron and steel products. It manufactured wires out of steel rods, which had been imported by it prior to 24th April, 1962. Finance (No. 2) Act 1962 (Act No. XX of 1962) imposed for the first time excise duty on the Iron and Steel Products; and by sub-clause (s) of sub-section (2) of section 16 of the said Act an amendment was made to the first Schedule of the Central Excise and Salt Act, 1944 incorporating after, Item 26-A Item 26-AA. The relevant portion of that entry reads thus : Bars, rods, coils, wires—5 per cent *ad valorem* plus the excise duty for the time being leviable on Pig Iron and Steel Ingots as the case may be.

The short point that arises is this : What is the duty leviable on the wires manufactured by the assessee out of steel rods which had already been imported? *Held by (majority Hegde, J. dissenting)* that the word 'plus' in the context indicates that the rate of duty consists of 2 parts : one part is *ad-valorem* duty and the other is the excise duty calculated according to the formula given. In other words, both duties have to be levied. These words indicate that choice has to be made between two types of excise duties—excise duty leviable on pigs iron or excise

1. (1964) 7 S.C.R. 1790 : (1965) 1 S.C.J. 565.

* C.A. No. 1263 of 1968.

18th October, 1968.

duty leviable on steel ingots. Sub-items (ii), (iii) and (iv) of Item 26-AA use the same set of words. In sub-Items (v) excise duty leviable on steel ingots is only mentioned. This sub-item consists of steel casting. This indicates that the duty is being calculated thus, because steel castings have been made from steel ingots. Item 26-AA deals with iron and steel products. It seems that the context indicates that the words "as the case may be" denote that the excise duty leviable on pig iron is to be charged if the product is an iron products; if it is a steel product then the excise duty leviable on steel ingots is to be levied. In other words, this decides the choice whether Item 25 (Pig iron) or Item 26 (steel ingots) is to be looked at.

Now to come the formula "the excise duty for the time being leviable on pig iron or steel ingots." Item 26-AA (i) simply prescribes a rate of duty as the heading of column indicates. It is not concerned with actual ingots out of which other articles are made. It is not concerned with whether that steel ingot has paid excise duty or countervailing duty or not. It is simple formula perhaps inartistically formulated. It is said that the item should be strictly construed, it being a taxing enactment. But no rule or principle of construction requires that close reasoning should not be employed to arrive at the true meaning of a badly drafted entry in an Excise Act.

It is difficult to appreciate how the insertion of Item No. 63 (36) in the First Schedule of the Tariff Act or the subsequent amendment of the Indian Tariff Act, 1934, by Indian Tariff (Amendment Act) 1963 throw any light on the interpretation of Item 26-AA (i). Item No. 63 (36) is in respect of the same iron and steel products as are mentioned in item 26-AA. The effect of column 4 is to levy an additional customs duty equivalent to the prevalent excise duty on like articles produced and manufactured. In other words, if the customs duty leviable under other entries in the Second Schedule on steel rods is 'D' an additional duty 'E' has to be levied equal to the excise duty leviable on steel rods, i.e., under item 26-AA. This has been called countervailing duty. The manufacturer in India, who used steel rods made in India, and made wires from them was given a certain relief by notification No. 77 of 1962, but the manufacturer in India who used steel rods made abroad to make wires was not first given this exemption. Later by amendments he was given a similar exemption. The only light thrown by these amendments and the notifications is that that it is not the idea to levy excise duty at various stages of manufacture of certain articles and this is achieved by issuing notifications giving appropriate reliefs. But if there is no relief given by notification the full duty at the rate mentioned in column 3 of entry (i) of Item 26-AA has to be paid.

Per Hegde, J. (dissenting): It is difficult to interpret the words "for the time being leviable" as indicating a rate. The expression "leviable on pig iron and steel ingots as the case may be" has reference to pig iron or steel ingots dutiable under the Act. In fiscal legislation the term "rate" is familiar term. In fact Entry 5 of the First Schedule dealing with salt speaks of "rate fixed annually by a Central Act". Therefore it would have been to easiest thing for the Parliament to convey its intention without ambiguity. At this stage it may also be noted that the clause in question refers to "the excise duty" and not excise duty in general. The definite article "the" has considerable significance. It refers to some particular excise duty. If the second part of the clause merely refers to a rate then the article "the" has no place in that context. The expression "the excise duty for time being leviable" by necessary implication refers to an article dutiable under the Act. That must necessarily be the article which is one of the components of the article on which duty is sought to be levied. In the instant case that must be the steel ingot used in the products of the "wires".

For the purpose of interpreting the clause in question, reference may also be made to entry 63 (36) in the First Schedule to the Tariff Act. It may be remembered that, that entry as well as entry 26-AA in the First Schedule of the Act were enacted simultaneously under Finance Act, (No. 2) of 1962. Both these entries came into

force on the same day namely on 24th April, 1962. The Act and the Tariff Act are cognate legislations. In other words they are legislations which are *pari materia*. They form one code. They must be taken together as forming one system and as interpreting and enforcing each other. It is proper to assume from the surrounding circumstances, that these two entries were introduced in pursuance of a common purpose, that purpose being that the articles listed in Entry 26-AA whether produced out of indigenous Pig Iron or Steel Ingot or made out of imported Pig Iron or Steel Ingot must bear the same amount of duty. Evidently in order to equalise the duty on articles made out of indigenous material as well as imported material Entry 63 (36) of the First Schedule to the Tariff Act was enacted. In other words that entry imposes countervailing duty and not additional duty.

The effect of the Finance Act (No. 2) of 1962 and the various Notifications issued for the purpose of implementing the scheme under that Act is that excise duty is leviable at the rate mentioned in column 3 of Item 26-AA on pig iron or steel ingot used in the production of the article on which duty under Entry 26-AA is sought to be levied but to the extent any excise duty or countervailing custom duty had been paid on any of the material used in the manufacture of any of that article, the same is exempt. From this scheme it is clear that when Item 26-AA speaks of 'the excise duty for the time being leviable on Pig Iron or Steel Ingots as the case may be' it refers to the excise duty payable on the Pig Iron or Steel Ingots used in the production of the article dutiable under that item. From the above discussion, it follows that the wires which are the subject-matter of the levy impugned in this case are not liable to pay the duty in dispute in this case.

Appeal by Special Leave from the Order dated the 2nd November, 1967 of the Government of India, Ministry of Finance, Department of Revenue and Insurance, New Delhi in Central Excise Revision Application No. 1323 of 1967.

A.K. Sen and S.V. Gupta, Senior Advocates (Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co., and Ravinder Nath, Advocate, with them, for Appellant.

V.A. Seyid Muhammad, Senior Advocate (S.P. Nayar, Advocate, with him), for Respondents.

The Court delivered the following Judgments

Sikri, J., (Bachawat, J., agreeing) :—I have had the advantage of reading the draft judgment prepared by Hegde, J., but, while I agree with him that there is no force in the plea of limitation advanced on behalf of the assessee, in my opinion the appeal should fail on the ground that the excise duty was levied correctly as determined by the Central Government in its order dated 2nd November, 1967.

The facts are fully set out in the judgment of Hegde, J., It is only necessary to mention a few facts in order to make this judgment readable. The assessee manufactures iron and steel products. It manufactured wires out of steel rods, which had been imported by it prior to 24th April, 1962. Item 26-AA was added to the First Schedule of the Central Excises and Salt Act, 1944 (I of 1944)—hereinafter referred to as the Excise Act—by Finance Act (No. 2) of 1962 (XX of 1962) with effect from 24th April, 1962. This reads as under :

"26-AA. IRON OR STEEL PRODUCTS, THE FOLLOWING, NAMELY:

- | | |
|---|--|
| (i) Bars, rods, coils wires, joists, girders angles, channels, tees, flats, beams, zeds, through, piling and all other rolled, forced or extruded shapes and sections, not otherwise specified. | Five per cent. <i>ad valorem</i> plus the excise duty for the time being leviable on pig iron or steel ingots, as the case may be. |
| (ii) plates and sheets, other than plates and sheets intended for tinning, and hoops, and stripe, all sorts, including galvanised or corrugated plates and sheets. | Seven and a half per cent. <i>ad valorem</i> plus the excise duty for the time being leviable on pig iron or steel ingots, as the case may be. |

- (iii) Uncoated plates and sheets intended for tinning. Seven and a half per cent. *ad valorem* plus the excise duty for the time being leviable on pig iron or steel ingots, as the case may be.
- (iv) Pipes and tubes (including blanks, therefor) all sorts, whether rolled forged, spun, cast, drawn, annealed, welded or extruded. Five per cent. *ad valorem* plus the excise duty for the time being leviable on pig iron or steel ingots, as the case may be.
- (v) All other steel castings, not otherwise specified. Five per cent. *ad valorem* plus the excise duty for the time being leviable on steel ingots."

The short point that arises is this: What is the duty leviable on the wires manufactured by the assessee out of steel rods which had already been imported? For the time being I will ignore notifications issued under rule 8 (1) of the rules made under the Excise Act, and the amendments made by the Finance Act (No. 2) of 1962, and Indian Tariff (Amendment Act) 1963 (III of 1963) to the Indian Tariff Act, 1934.

"Wires" are mentioned in item No. 26-AA (i). Therefore we have to scrutinize the third column of item 26-AA (i) for the rate of duty. Three points need clarification:

- What is the meaning of or inference derivable from the word 'plus'?
- What is the meaning of the formula "the excise duty for the time being leviable on pig iron or steel ingots?"
- What is the import of the words "as the case may be?"

The word 'plus' in the context indicates that the rate of duty consists of 2 parts: one part is *ad-valorem* duty and the other is the excise duty calculated according to the formula given. In other words, both duties have to be levied. I will presently discuss what the formula means but this is clear that the third column contemplates one duty, consisting of two parts, being levied.

Before I discuss the meaning of the formula it will clarify matters if the import of the words "as the case may be" is first ascertained. These words indicate that a choice has to be made between two types of excise duties—excise duty leviable on pig iron or excise duty leviable on steel ingots. Sub-items (ii), (iii) and (iv) of item 26-AA use the same set of words. In Sub-item (v) excise duty leviable on steel ingots is only mentioned. This sub-item consists of steel casting. This indicates that the duty is being calculated thus because steel castings have been made from steel ingots. Item 26-AA deals with iron and steel products. It seems to me that the context indicates that the words "as the case may be" denote that the excise duty leviable on pig iron is to be charged if the product is an iron product; if it is a steel product then the excise duty leviable on steel ingots is to be levied. In other words, this decides the choice whether item 25 (Pig iron) or item 26 (steel ingots) is to be looked at. Although I was not enlightened on the point by Counsel during the course of the hearing, I have no doubt that the excise Department and the trade know how to distinguish a steel product from an iron product. If there is a dispute on the point it will have to be resolved in the future.

Now to come to the formula "the excise duty for the time being leviable on pig iron or steel ingots." Let me give a simple problem in order to illustrate the points which arise under this head of inquiry. "A" manufactures a steel ingot 'X' in May 1961 in Jamshedpur. He pays excise duty on it in May 1961 as he removes it out of the factory. Its value is determined at the wholesale cash price at the time of removal in accordance with section 4 of the Excise Act. Steel ingot 'X' is sold to a manufacturer "B" in Faridabad, who manufactures steel rods ('Y' & 'Z') out of it in May 1962 and removes them in May 1962. What is the excise duty payable on steel rods ('Y' & 'Z')? *Ad valorem* duty is easy to calculate. What about the additional duty? We know that the steel ingot 'X' has paid excise duty. But this does not make any difference. The additional duty

has still to be calculated under the formula. It is also plain that no excise duty is strictly leviable under sections 3 and 4 of the Excise Act on Steel Ingot 'X' as such. Not only that it does not exist any longer but duty on it has already been paid and further no duty would be leviable under section 4 for it was removed from the factory long time ago in May 1961. Therefore, it is clear that the formula cannot be concerned with the particular ingot 'X' at all. It seems to me that what it is concerned with is the duty leviable on a hypothetical Steel Ingot if it had been manufactured or removed at the same time as the steel rods ('Y' & 'Z') were manufactured or removed. In the example given above, under the formula the excise duty leviable under item 26 in May 1962, would have to be charged, i.e., 39.35 per metric tonne. The weight to be taken into consideration would be the weight of steel rods 'Y' & 'Z' and not of the Steel Ingot 'X' out of which they were made.

It seems to me that this is the true interpretation of column 3 of Item 26-AA (i). It simply prescribes a rate of duty as the heading of column indicates. It is not concerned with actual ingots out of which other articles are made. It is not concerned with whether that Steel Ingot has paid excise duty or countervailing duty or not. It is a simple formula perhaps in artistically formulated. It is said that the item should be strictly construed, it being a taxing enactment. But no rule or principle of construction requires that close reasoning should not be employed to arrive at the true meaning of a badly drafted entry in an Excise Act. I believe I am not stretching the language of the entry against the subject, but it appears to me that in the context of the scheme of the Excise Act this is the only reasonable construction to give the entry.

If it is permissible to look at the notifications issued by the Central Government which have given reliefs of various kinds, they seem to me to proceed on the interpretation which I have given above. It will be noted that they do not exempt the article from the levy of duty; they give relief which may in a particular case be the excise duty or countervailing duty levied on the article out of which the assessed article has been manufactured.

To revert to the example given by me above, notification No. 70 of 1962 dated 24th April, 1962, would exempt manufacturer 'B' from so much of the duty of excise leviable on steel rods as is equivalent to the duty leviable under item 26. Therefore, reading entry 26-AA (i) with this notification, manufacturer 'B' does not pay the whole of the duty leviable on steel rods ('Y' & 'Z') under column 3 (item 26-AA) because the Steel Ingot which he has used had already paid the appropriate amount of duty.

I am not able to appreciate how the insertion of Item No. 63 (36) in the First Schedule of the Tariff Act or the subsequent amendment of the Indian Tariff Act, 1934, by Indian Tariff (Amendment Act) 1963 throw any light on the interpretation of Item 26-AA (i). Item No. 63 (36) is in respect of the same iron and steel products as are mentioned in Item 26-AA. Column 4 (standard rate of duty) reads:

"The excise duty for the time being leviable on like articles if produced or manufactured in India, and where such duty is leviable at different rates the highest duty and the duty so leviable shall be in addition to the duty which would have been levied if this entry had been inserted."

The effect of this entry is to levy an additional customs duty equivalent to the prevalent excise duty on like articles produced and manufactured. In other words, if the customs duty leviable under other entries in the Second Schedule on steel rods is 'D', an additional duty 'E' has to be levied equal to the excise duty leviable on steel rods, i.e., under item 26-AA. This has been called countervailing duty.

The manufacturer in India, who used steel rods made in India, and made wires from them was given a certain relief by notification No. 77 of 1962, but the manufacturer in India who used steel rods made abroad to make wires was not first given this exemption. Later by amendments he was given a similar exemption. The Central Excise Manual (Seventh Edition) at page 123 states the position thus:

"26-AA (2) Iron or steel products falling under item No. 26-AA, if made from another article falling under the said item or item No. 63 (36) of the First Schedule to the Indian Tariff Act, (XXXII of 1934) and having already paid the appropriate amount of excise or countervailing customs duty, are the case may be, are exempt with effect from 24th April, 1962, from so much of the duty of excise as is equivalent to the excise or countervailing customs duty payable on the said article—vide Government of India, Ministry of Finance (Department of Revenue) Notification No. 89 of 1962 Central Excises, dated 10th May, 1962, (issued in supersession of Notification No. 77 of 1962—Central Excises, dated 24th April, 1962, as further amended by Notifications No. 93 of 1962—Central Excises dated 26th May, 1962 and No. 225 of 1962 Central Excises, dated 29th December, 1962."

The only light thrown by these amendments and the notifications referred to above is that that it is not the idea to levy excise duty at various stages of manufacture of certain articles and this is achieved by issuing notifications giving appropriate reliefs. But if there is no relief given by notification the full duty at the rate mentioned in column 3 of entry (i) of item 26-AA has to be paid.

In the result the appeal fails and is dismissed with costs.

Hegde, J.—This is an appeal by special appeal leave. It is directed against the order of the Government of India in No. 1323 of 1967 dated 2nd November, 1967, rejecting the appellant's application for refund of the excise duty paid by him under protest.

In order to appreciate the controversy between the parties it is necessary to set out the material facts. The appellant is a Company having a factory at Rishara in the State of West Bengal. It manufactures, among other items, Iron and Steel Products such as Jute Baling Hoops, Wire Ropes, Cold Rolled Strips, Chain Pulley Blocks, Electric Hoists etc. Between December, 1961 and January, 1962 the appellant received various consignments of imported High Carbon Steel Wire Rods. Its opening stock of imported High Carbon Steel Wire Rods on 24th April, 1962, was 2788.401 metric tons. As before, the appellant manufactured wires from those steel rods even after 24th April, 1962.

Finance (No. 2) Act (XX of 1962) imposed for the first time excise duty on the Iron and Steel Products; and by sub-clause (S) of sub-section (2) of section 16 of the said Act an amendment was made to the first Schedule of the Central Excise and Salt Act, 1944 (hereinafter referred to as the Act) incorporating after item 26-A, item 26-AA. The relevant portion of that entry reads thus:

Iron or Steel Products.

The following namely :

- | | |
|--|--|
| (1) Bars, rods, coils, wires, joists, girders, | 5 per cent. <i>ad valorem</i> plus the |
| angles, channels, tees, flats beams, | excise duty for the time |
| zeds, trough, piling and all other | being leviable on Pig Iron |
| rolled, forged or extruded shapes | and Steel Ingots as the |
| and section not otherwise specified. | case may be. |

Pig Iron and Steel Ingots were already subject to excise duty under Items Nos. 25 and 26 in the First Schedule of the Act. The rate of duty in the case of the former at the material time was Rs. 10 per metric tonne and that of the latter Rs. 39/35 per metric tonne. The newly imposed duty under Item 26-AA came into force on 24th April, 1962. The Collector of Central Excise, West Bengal, Calcutta by a Trade Notice, Central Excise No. 32—Iron and Steel Products 2 of 1962 dated Calcutta the 16th May, 1962, notified the procedure to be followed.

By Notification No. 70 of 1962 dated 24th April, 1962, issued in exercise of the powers conferred by rule 8 (1) of the rules framed under the Act (to be hereinafter referred to as the rules), the Central Government exempted Iron and Steel Products falling under Item 26-AA, if made from Pig Iron or Steel Ingots on which the appropriate amount of excise duty has already been paid, from so much of the duty of the

excise leviable thereon as is equivalent to the duty leviable under Item 25 or 26 as the case may be.

On the same day as per Notification No. 77 of 1962, the Central Government exempted Iron and Steel Products falling under sub-items (2), (3), (4) and (5) of Item 26-AA, if made from articles which have already paid the appropriate duty of excise under sub-item (1) of the said Item, from so much of the duty of excise as is equivalent to the duty payable under the sub-item (1). Finance (No. 2) Act of 1962 by section 15 amended the First Schedule of the Tariff Act by adding Item No. 63 (36) which deals with imported Iron and Steel Products. The second column of that entry mentions the various Iron and Steel Products included therein. The items included therein are the very items set out in Item 26-AA of the First Schedule to the Act. The third column of that Item which specifies the levy reads thus:

“The excise duty for the time being leviable on like articles if produced or manufactured in India, and where such duty is leviable at different rates the highest duty so leviable shall be in addition to the duty which would have been levied if this entry had not been inserted.”

On 10th May, 1962, the Government issued a fresh Notification (No. 89 of 1962) under rule 8 (1) of the rules in supersession of the Notification No. 77 of 1962 dated 24th April, 1962. By that Notification, the Government exempted with effect from 24th April, 1962, Iron and Steel Products falling under Item 26-AA if made from another article falling under the said Item and having already paid the appropriate amount of duty from so much of the duty of excise as is equivalent to the duty payable on the said article.

On the same day namely 10th May, 1962, the Government issued yet another Notification (Notification No. 90 of 1962) under rule 8 (1) under which it exempted Iron and Steel Products falling under Item 26-AA specified in column 2 of the table annexed to the Notification if made from Pig Iron or Steel Ingots on which appropriate amount of excise duty has already been paid, from so much of the duty of excise leviable on such products as in excess of the duty corresponding entry in column 3 of the said table. (Wire) the product with which we are concerned in this case is also included in the table. That Notification contains a proviso which says:

“Provided that if the products are made from Pig Iron and Steel Ingots on which appropriate amount of duty has not been paid the excise duty for the time being leviable on Pig Iron or Steel Ingots as the case may be shall be payable in addition to the duties specified in the appropriate entry in column 3 of the table.”

On 29th December, 1962, the Government issued yet another Notification under rule 8 (1) amending the Notification No. 89 of 1962 issued on 10th May, 1962. In the place of words “If made from another article falling under the said item and having already paid the appropriate amount of duty from so much of the duty of excise as is equivalent to the duty payable on the said article,” the following was substituted:

“If made from another article falling under the said Item or Item No. 63 (36) of the First Schedule to the Indian Tariff Act (XXXII of 1934), and having already paid the appropriate amount of excise or countervailing custom duty as the case may be from so much of the duty of excise as is equivalent to the excise or countervailing custom duty payable on the said article”.

By Indian Tariff (Amendment Act 1963) (Act III of 1963) effective from the 25th January, 1963, the Indian Tariff Act 1934 was amended and after section 2, the following section was inserted namely:

“2 (a) (1). Any article which is imported into India shall be liable to custom duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India.

Explanation :—In this sub-section the expression “the excise duty for the time being leviable on a like article if produced or manufactured in India” means the

excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs and where such duty is leviable at different rates, the highest duty.

(2) The customs duty referred to in sub-section (i) shall be in addition to any duty imposed under this Act or under any other law for the time being in force."

On or after 24th April, 1962, the appellants cleared from their warehouse wires produced from the aforementioned imported Steel Rods after obtaining the required permission from the excise authorities and after paying the duty assessed. On those wires, duty was assessed without taking into consideration "the excise duty for the time being leviable on Pig Iron and Steel Ingots as the case may be." At that time the Central Excise authorities proceeded on the basis that on the stock of wire in question only *ad valorem* duty had to be levied and not "excise duty for the time being leviable on Pig Iron or Steel Ingots as the case may be." On 21st March, 1962, the Inspector of Central Excise attached to M/s. J. K. Steel Ltd., Rishara issued the following notice;

**COLLECTORATE OF CENTRAL EXCISE
WEST BENGAL**

No. 6

Range RIS. I.

Date 21-3-1963

Circle-CGR.

Notice of Demand for duty under rule 9 (2) of C.E. Rules, 1944.

To

M/s. J. K. Steel Ltd., Rishara,
Hooghly.

Take notice that on behalf of the Central Government, I hereby demand payment by you of the sum of Rs. 4,18,801-30 nP. (Rupees four lacs eighteen thousand eight hundred one and paise thirty only) within ten days from the date hereof.

Particulars of Demands.

<i>Steel Ingot Duty on Hoops.</i>	<i>Quantity</i>	<i>Rate of duty.</i>	<i>Amount of duty involved.</i>
	6932.964 M.T.	Rs. 39.36 nP. per M.T.	Rs. 2,72,812-13
-do- Strips	921.937 M.T.	-do-	Rs. 36,278-22
-do- Wire	2788.00	-do-	Rs. 1,09,710-95
		TOTAL ..	Rs. 4,18,801-30

No. VI/5-A/I & S/JKS/CE/63/183 dated 21-3-1963.

Sd/.

Inspector I/C Central Excise
M/s. J.K. Steel Ltd., Rishara.

The appellants objected to the demand in question as per their letter of 24th March, 1963. They contended that they had not contravened rule 9 (2) of the rules nor was there any short levy. As per his letter of 26th August, 1963, the Assistant

Collector of Central Excise Calcutta 4th Division confined the demand to that made under serial No. 3 of the notice. The appellants paid the same under protest and thereafter took up the matter in appeal to the Collector of Central Excise who dismissed their appeal as per his order of 19th March, 1964, with these observations:

“The crucial point of this appeal is whether countervailing import duty was paid by the appellants on the imported steel rods from which steel wires were manufactured. The appellants could not produce any documents in support of their argument that either import duty or countervailing duty equivalent to Steel Ingot rate was paid by them on the iron rods from which steel wires were drawn. Such duty is leviable on steel rods under tariff item No. 26-AA. As no such duty on steel rods was paid by the appellants, countervailing duty equivalent to Steel Ingot duty has, therefore, to be paid.”

As against the order of the Collector, the appellants went up in revision to the Central Government. The Central Government allowed the revision petition to some extent. This is what the Central Government ordered:

“The Government of India have carefully considered all the points raised by the petitioners but see no reason to interfere with the Collectors stated that the Steel Wires manufactured out of steel wire rods imported prior to 24th April, 1962, on which no countervailing duty was paid, and cleared during the period, from 24th April, 1962 to 10th August, 1963, were subject to full duty as then leviable under Item 26-AA (1) of Central Excise Tariff.

However the demand for differential duty initially made on 2nd March, 1963 and subsequently amended *vide* the Assistant Collector's order dated 26th August, 1963, shall be restricted to the clearance effected during the 3 months period prior to the initial service of demand on 21st March, 1963, that is to say, upto 21st December, 1962, only as per the provisions of Rule 10 of Central Excise Rules, 1944, which was applicable to this case. The demand in respect of clearances effected prior to 21st December, 1962, is hereby set aside and consequential refund shall be granted to the petitioners.

Subject to the above modifications, the revision application is otherwise rejected.”

Aggrieved by that order, the appellants have brought this appeal. The questions that arise for decision in this appeal are:

- (1) What is the true scope of entry No. 26-AA of the First Schedule to the Act?
- (2) In considering the scope of the said entry, can the Notifications issued by the Government on or after 24th April, 1962; can be taken into consideration?
- (3) Is the demand barred by limitation under rule 10 of the rules?

One other question had been raised in the grounds of appeal namely that the order of the Central Government is vitiated as it had contravened the principles of natural justice. That contention was not pressed at the hearing. In the context of this case that contention loses much of its significance. If we accept the appellant's contention as regards the scope of entry 26-AA then that the Government's order is illegal is immaterial. If on the other hand we accept the interpretation placed by the Revenue on that entry remand of the case to Central Government serves no purpose.

I shall now proceed to consider the questions earlier formulated for decision.

According to the assessee the true import of the clause in column 3 of entry 26-AA is that goods mentioned in column 2 of that entry are dutiable at 5 per cent. *ad valorem* plus the excise duty for the time being leviable under the Act on Pig Iron or Steel Ingot used in the production of these goods. Shri A. K. Sen, the learned Counsel for the assessee urged that that the expression leviable in that clause means

leviable under the Act; in other words dutiable under the Act; the words 'Pig Iron' and 'Steel Ingots' referred to therein is the Pig Iron or the Steel Ingot used in manufacture of the articles on which duty is sought to be levied; otherwise the word leviable becomes inappropriate. In other words according to him the second limb of the levy under that clause is attracted only when any Pig Iron or Steel Ingot dutiable under the Act is used in the manufacture of any article dutiable under sub-clause (1) of entry 26-AA. As the steel bars used in manufacturing the 'wires' with which we are concerned in this case were not made out of Steel Ingot dutiable under the Act, as they were imported bars, that part of the levy is not attracted on those wires.

The contention for the Revenue is that the expression "the excise duty for the time being leviable on Pig Iron or Steel Ingot as the case may be" sets out only a measure; the rate at which the duty is leviable; it has no reference to any particular material; it is merely a yardstick. The argument of Dr. Syed Muhammad, learned Counsel for the Revenue proceed thus:

The entry in question deals with two classes of products *i.e.*, iron products and steel products. The assessing authority has first to decide whether a particular article is an iron product or steel product. If he comes to the conclusion that it is a steel product then he should assess the duty payable firstly by determining the *ad valorem* duty payable on it, thereafter he must find out its weight in metric tons and add to the *ad valorem* duty the amount payable as excise duty under entry 26 of the First Schedule on Steel Ingot of that weight.

If the intention of the Parliament was as suggested by the learned Counsel for the Revenue then column 3 should have read thus:

"5 per cent. *ad valorem* plus excise duty at the rate for the time being leviable on Pig Iron or Steel Ingots as the case may be."

It is difficult to interpret the words "for the time being leviable" as indicating a rate. The expression "leviable on Pig Iron and Steel Ingots as the case may be" in my opinion has reference to Pig Iron or Steel Ingots dutiable under the Act. In fiscal legislation the term "rate" is a familiar term. In fact entry 5 of the First Schedule dealing with salt speaks of "rate fixed annually by a Central Act." Therefore it would have been the easiest thing for the Parliament to convey its intention without ambiguity. At this stage it may also be noted that the clause in question refers to "the excise duty" and not excise duty in general. The definite article "the" has considerable significance. It refers to some particular excise duty. If the second part of the clause merely refers to a rate then the article "the" has no place in that context.

It was urged on behalf of the Revenue that to accept the contention of the assessee and to hold that the second part of the clause refers to the Steel Ingot used in the production of the "wires" is to read into the clause the words "used in the production of the article in question." It was said that such a construction is impermissible. Therefore we should not accede to that contention. I am not prepared to accept that reasoning. In fact in my opinion to accept the construction contended for on behalf of the Revenue, it would be necessary for us to include the words "at the rate" after the words "excise duty" and before the words "for the time being." No such difficulty arises if we accept the interpretation placed by the assessee on that clause. The expression "the excise duty for the time being leviable" by necessary implication refers to an article dutiable under the Act. That must necessarily be the article which is one of the components of the article on which duty is sought to be levied. In the instant case that must be the Steel Ingot used in the production of the "wires" with which we are concerned in this case.

As laid down by this Court in *G. A. Abraham v. I. T.O., Kottayam and another*¹—

1. (1961) 1 An. W.R. (S.C.) 183; (1961) 1 1961 S.C. 609 at 612.
S.C.J. 673; (1961) 1 M.L.J. (S.C.) 183; A.I.R.

"In interpreting¹ a fiscal statute the Court cannot proceed to make good deficiencies if there may be any; the Court must interpret the statute as it stands and in case of doubt in a manner favourable to the tax payer."

This Court also laid down in *Commissioner of Income-tax v. Karamchand Premchand Ltd. Ahmedabad*¹, that if there is any ambiguity of language in fiscal statute, benefit of that ambiguity must be given to the assessee. At this stage I am tempted to recall to my mind the well known observations of Lord Russel of Killowen in *Inland Revenue Commissioners v. Duke of Westminster*² viz.,

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of this case."

About a century ago Lord Cairns in *Partington v. The Attorney General*³ observed :

"As I understand the principle of all fiscal legislation it is this; If the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appeared to be."

Unless I am satisfied that the only reasonable interpretation, that can be placed on the clause in col. 3 of entry 26-AA is that placed by the Revenue, it is not possible to justify the impugned levy.

There is yet another difficulty in accepting the interpretation tried to be placed by the Revenue on entry 26-AA. According to books on steel making Pig iron is the intermediate form through which almost all Iron must pass in the manufacture of steel. (see, "The Making, Shipping and Treating of Steel" edited by Harold E. McGannon at page 384). Therefore every steel product is also an iron product. If the second part of the clause in column 3 of entry 26-AA refers to a rate and not the duty leviable on the material used in the manufacture of the dutiable article under that entry then question arises whether the rate in question is that at which duty is leviable on Steel Ingot or that leviable on Pig Iron. That part of the clause refers to two different materials dutiable at different rates. If on the other hand it refers to the material from which the article on which duty is sought to be levied is made—the proximate raw material and not the material from which that raw material is made, then there is no difficulty in finding out the amount.

Dr. Syed Muhammad was not able to tell us how the assessing authorities classify articles into Iron products and Steel products. It is not his case that there is any recognised basis for doing so. It is also not his case that there is any prescribed procedure for deciding that question. His explanation that it is done on the basis of the practice prevailing in the trade is far from satisfactory. He was not able to tell us how we can ascertain that practice or what that practice is. If his contention is correct then the power of the assessing authorities to determine the nature of an article is an arbitrary power. It is undefined and unguided. The determination may vary from officer to officer. It is doubtful whether such a power is a valid power. That apart Legislature is not likely to have conferred such an arbitrary power on the authorities. That difficulty will not arise if the duty under the second limb of the entry in column 3 of entry 26-AA is determined on the basis of the actual material used.

For the purpose of interpreting the clause in question, reference may also be made to entry 63 (36) in the First Schedule to the Tariff Act. It may be remembered

1. (1960) 3 S.C.R. 727, at p. 742 : (1960) S.C.J. 1289 : 40 I.T.R. 106.

2. (1935) A.C. 1 at p. 24 (A).

3. (1869) 4 H.L. 100 at p. 122 (B.).

that that entry as well as entry 26-AA in the First Schedule of the Act were enacted simultaneously under Finance (No. 2) Act, 1962. Both these entries came into force on the same day namely on 24th April 1962. The Act and the Tariff Act are cognate legislations. In other words they are legislations which are *pari materia*. They form one code. They must be taken together as forming one system and as interpreting and enforcing each other. It is proper to assume from the surrounding circumstances, that these two entries were introduced in pursuance of a common purpose, that purpose being that the articles listed in entry 26-AA whether produced out of indigenous Pig Iron or Steel Ingot or made out of imported Pig Iron or Steel Ingot must bear the same amount of duty. If the interpretation placed on entry 26-AA by the learned Counsel for the assessee is accepted then it would be seen that that entry by itself would not impose the duty contemplated by the second part of the clause in column 3 of entry 26-AA on imported Pig Iron or Steel Ingot. Evidently in order to equalise the duty on articles made out of indigenous material as well as imported material entry 63 (36) of the First Schedule to the Tariff Act was enacted. In other words that entry imposes countervailing duty and not additional duty. It was conceded by the learned Counsel for the Revenue that the duty levied under entry 63 (36) of the First Schedule of the Tariff Act is only a countervailing duty. If that be so, that duty cannot be considered as an additional duty over and above the duty imposed under entry 26-AA of the First Schedule of the Act. But it would be an additional duty if the interpretation of entry 26-AA canvassed on behalf of the Revenue is accepted because according to the Revenue the rate prescribed in that entry is equally applicable to all articles mentioned therein whether manufactured from indigenous or imported material. If that be so the duty collected under entry 63 (36) of the First Schedule under the Tariff Act will be an additional duty and not a countervailing duty. It is true that despite entry 26-AA of the First Schedule to the Act and entry 63(36) of the First Schedule of the Tariff Act if Pig Iron or Steel Ingot imported before 24th April, 1962, is used in the manufacture of an article dutiable under entry 26-AA only the *ad valorem* duty prescribed under that entry can be levied on that article. It may be that the Legislature intended it to be so or there is a lacuna in the provision. In either case the effect is the same.

I now come to the question whether in interpreting a taxing entry I can take any aid from the various steps taken by the Department in implementing that levy. I have earlier referred to a large number of Notifications issued under rule 8 (1) of the rules. The parties have also produced before us the instructions issued by the Department on 16th May, 1962 in the matter of implementation of entry 26-AA. I have now to see whether any aid can be taken from these instructions as well as the Notifications for finding out the true scope of entry 26-AA.

So far as the instructions issued by the Department are concerned there is hardly any doubt that the same are wholly irrelevant. In Craies on Statute Law, Sixth Edition at page 131 it is stated :

“Explanatory notes regarding the working of an Act issued by a Government department for the assistance of their officials are inadmissible for the purpose of construing the Act.”

The same conclusion was arrived at by this Court in *Commissioner of Income-tax, Madras v. K. Srinivasan and K. Gopalan*¹. At pages 502-503 of that report it is observed :

“He (learned Counsel for the assessee), however, drew our attention to the directions contained in the Income-tax Manual in force for a number of years and contended that the department itself placed on sub-sections (3) and (4) of section 25 the same construction as was placed on them by the Senior Judge in the High Court and that was the true construction of these two sub-sections. This argument in our opinion, has no validity. The department changed its view subsequently and amended the manual. The interpretation placed by the department

1. (1953) S.C.J. 115 : (1953) 1 M.L.J. 436 : (1953) S.C.R. 486 : at pp. 502-503.

on these sub-sections cannot be considered to be a proper guide in a matter like this when the construction of a statute is involved."

Therefore I have to exclude from consideration the instructions issued by the Government.

This takes me to the Notifications issued by the Government under rule 8 (1) of the rules. Under section 38 of the Act all rules made and notifications issued under the Act shall be made and issued by publication in the official Gazette. All such rules and notifications shall thereupon have effect as if enacted in the Act. The rules made have to be placed on the table of the Parliament. The Parliament can amend those rules. Section 38 is of no assistance to us in the present case because the notifications referred to earlier are not those issued under the Act. They are notifications issued under rule 8 (1) of the rules. Therefore their relevance has to be considered without taking any assistance from section 38. In Halsbury's Laws of England 3rd edition, volume 36, at page 401, it is observed :

"Where a statute provides that subordinate legislation made under it is to have effect as if enacted in the statute such legislation may be referred to for the purpose of construing a provision in the statute itself. Where a statute does not contain such a provision, and does not confer any power to modify the application of the statute by subordinate legislation, it is clear that subordinate legislation made under the statute cannot alter or vary the meaning of the statute itself where it is unambiguous, and it is doubtful whether such legislation can be referred to for the purpose of construing an expression in the statute, even if the meaning of the expression is ambiguous."

No decision of this Court or of any of the High Courts in this country dealing with this aspect has been brought to my notice. Even the Counsel for the parties were not definite about the stand that they should take. They were changing their position again and again. On this question the opinion in English Courts is not unanimous. That question came up for consideration as early as 1871 in *Ex parte Wier*¹. In re Wier Sir G. Mellish, L.J., delivering the judgment of the Court observed :

"We do not think that any other section of the Act throws any material light upon the proper construction of this section, and if the question had depended upon the Act alone we should have had great doubt what the proper construction was ; but we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction."

In *Re Normal Ex parte Board of Trade*², Lord Esher, M.R., observed :

"It was urged that we ought to hold the Act to be retrospective by reason of the rules and forms which have been made under it, and which have a statutory force; and it is said that they shew that the trustee must go back in his accounts to matters which happened before the Act came into operation. But, when we look at the forms, we see that they are in express terms headed so as to relate to transactions taking place after the coming into operation of the Act ; and, therefore, they supply no reason why we should depart from the ordinary rule that an Act is not retrospective."

From these observations, it is clear that Lord Esher did take into consideration the subordinate legislation in considering the principal Act :

In *Billings v. Reed*³, Lord Greene stated that :

"The fact that the object of this Act was in substance what I have suggested can be seen from a consideration of the way in which the scheme has been framed pursuant to the Act itself and with the tacit approval of Parliament as provided in

1. Ch. Appeal Cases (Vol. 6) at p. 879.

2. (1893) 2 Q.B. Dn. 369 at 373.

3. (1945) 2 K.B. 11.

the Act. At any arate, we are entitled to look at the scheme for the purpose of seeing the kind of practical treatment of these questions which Parliament has authorised."

From this observation, it is seen that the larned Judge did look into the subordinate legislation in finding out the object of the Act.

In *Hales v. Bolton Leathers Ltd.*¹, Somervell, L.J., observed :

"The country Court Judge was referred as we were, to various paragraphs in the regulations made under the Act of 1946. He took the view that these regulations could not affect the construction of the Act. The regulation making power is conferred by section 89, sub-section (1), proviso (b), and is as follows :

regulations may make such transitional or consequential provisions as appear to the Minister to be necessary or expedient, having regard to the repeal of the said enactments in relation to diseases and to injuries not caused by accident, including provision for modifying or winding up any scheme made thereunder. We agree that these regulations could not contradict the Act. They might, we think, properly be referred to as working out in detail the provisions of the Act consistently with its terms."

In *Howgate v. Ganall and another*², Barry, J., observed :

"I cannot, of course, have recourse to these schemes as guide to the correct interpretation of the Act under which they were made, but I am, I think, entitled to consider them for certain limited purposes. In *Billings v. Reed*³, Lord Green, M.R., said in reference to a scheme made under the Act : The fact that the object of this Act was in substance what I have suggested can be seen from a consideration of the way in which the scheme has been formed pursuant to the Act itself and with the tacit approval of Parliament as provided in the Act. At any rate we are entitled to look at the scheme for the purpose of seeing the kind of practical treatment of these questions which Parliament has authorized. It is abundantly clear from the wording of the various schemes made under the Act that the Minister, with the tacit consent of Parliament has throughout considered that "war injuries" may be sustained outside the United Kingdom....."

The decision in *Hales v. Bolton Leathers Ltd.*¹, to which reference has been made earlier was taken in appeal to the House of Lords. The judgment of the House of Lords is reported in (1951) A.C. P. 531. Dealing with the question whether subordinate legislation could be taken into consideration in interpreting the principal Act, Lord Simonds said :

"I much doubt whether I am entitled to look to the regulation for guidance on the meaning of the word in sub-section (1), but I will say something on this point later."

Reverting back to that topic again (at page 541 of the report) the learned Judge observed :

"First, if I may look at the regulations made under section 55, sub-section (4), to assist in the interpretation of the word, I agree with my noble and learned friend Normand, in thinking that they assist or at least are [consistent with this interpretation."

Lord Normand one of the other Judges who heard the appeal observed :

"The National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948, were made under section 55, sub-section (4), and though in my opinion they cannot control the construction of the Act, it is yet of some importance to consider whether they fit into the construction which I think the Act properly bears."

1. (1950) K.B. 493 at p. 505.

2. (1951) 1 K.B. 265 at spl. p. 274.

3. (1945) K.B. 11.

Lord Oaksey in the same case was positive that the regulations could be looked into for certain limited purposes. This is what he observed :

“I agree with your Lordships in thinking that the regulations themselves (National Insurance (Industrial Injuries.) (Prescribed Diseases) Regulations, 1948) cannot alter the meaning of the words of the statute, but they may, I think be looked at as being an interpretation placed by the appropriate Government department on the words of the statute.”

Therein Lord MacDermott also took the assistance of the regulations while considering the statute.

Lastly we come to the decision of the Chancery Division. In *London Country Council v. General Land Board*¹, Danckwerts, J., in that case referred to the regulations made under the Housing Act, 1936 while construing the provisions of the Act.

From the above decisions, it is clear that several judges in England have referred to the subordinate legislation made under a statute for the purpose of interpreting that statute though for the limited purpose of knowing how the department which was entrusted with the task of implementing that statutes, had understood that statute. In the case of fiscal statutes, it may not be inappropriate to take into consideration the exemptions granted in interpreting the nature and the scope of the impost. In the matter of fiscal legislation the initiative is in the hands of the executive. Under Article 112 (1) of our Constitution, the President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure for that year. Under sub-Article (3) of Article 113 no demand for a grant shall be made except on the recommendation of the President. In the matter of taxation very large powers are left in the hands of the executive. Generally speaking the question of exemption is left to the discretion of the Government. It ought to be so because the exercise of that power depends on various circumstances some of which cannot be anticipated in advance. But yet the levy and exemptions are parts of the same scheme of taxation. The two together carry into effect the purpose of the legislation. For finding out the true scheme of a taxing measure we have to take into consideration not merely the levy but also the exemptions granted. This Court in *Kailash Nath and another v. State of U.P. and others*², held that the exemption granted in pursuance of a notification issued under the U.P. Sales Tax Act must be considered as having been contained in the parent Act itself. This is what this Court stated therein :

“This notification having been made in accordance with the power conferred by the statute has statutory force and validity and, therefore, the exemption is as if it is contained in the parent Act itself.”

I do not think it is necessary for me to decide in this case the general question whether subordinate legislation can be used for interpreting a provision in the parent Act. I am not unaware of the danger in accepting that it could be so done. But for the present purpose, it is sufficient to hold that for finding out the scope of a particular levy, notifications issued by the executive Government providing for exemption from that levy can be looked into as they disclose the overall scheme.

Even according to the learned Counsel for the Revenue the notifications referred to earlier were issued with a view to avoid double taxation. If that is so, the exemption granted under those notifications provide a clue as to the scope of the levy made under Item 26-AA.

We have earlier seen that on the very day, the levy came into force the Government had issued two notifications i.e., Notifications Nos. 70 and 77 of 1962. Under Notification No. 70 it exempted Iron and Steel Products falling under item 26-AA if made from Pig Iron or Steel Ingots on which the appropriate amount of duty has already been paid, from so much duty of the excise leviable thereon as is equivalent

1. (1959) Ch. D. 386.

2. A.I.R. 1957 S.C. 790.

to the duty leviable under item 25 or as the case may be under Item 26. Under Notification No. 77, it exempted Iron and Steel Products falling under sub-item Nos. 2, 3, 4 and 5 of Item 26-AA, if made from articles which have already paid appropriate duty of excise under sub-item (1) of the said item from so much of the duty of excise as is equivalent to the duty payable under the said sub-item (1). These Notifications clearly indicate that under Item 26-AA, there was no intention to levy double excise duty on the same material. The intention appears to be that if one article is made out of another article both of which are subject to excise duty, the excise duty paid on the raw material should be deducted in computing the excise duty payable on the finished product. In addition these Notifications clearly show that the Pig Iron and Steel Ingot mentioned in clause 3 of entry 26-AA are those used in the manufacture of the article on which duty is sought to be levied under that entry.

In this connection we may also refer to Notification No. 89/62. Notification No. 77/62 referred merely to Iron and Steel Products falling under sub-items 2, 3, 4 and 5 of item 26-AA manufactured out of articles falling under sub-item (1) thereof. That Notification by itself was not all comprehensive. It did not take in other articles made out of Pig Iron or Steel Ingot. It is for that reason Notification No. 89/62 was issued on 10th May, 1962, under which exemption was given with effect from 24th April, 1962, to all Iron and Steel Products falling under Item 26-AA if *made from another article falling under the said item and having already paid appropriate amount of duty from so much of the duty of excise as is equivalent to the duty payable on the said article*. Notifications Nos. 70, 77 and 89 exempted payment of excise duty on an article to the extent duty had been paid on the raw material used in the manufacture of the article dutiable under entry 26-AA. All these Notifications proceeded on the basis that the second limb of the levy in column 3 of entry 26-AA refers to the duty payable on the Pig Iron or Steel Ingot, as the case may be used in the manufacture of an article dutiable under entry 26-AA.

But the above Notifications do not deal with the countervailing duty levied under entry 63 (36) of the First Schedule to the Tariff Act. This was clearly an omission. To make good that omission the Government amended Notification No. 89/62 by its order dated 29th December, 1962. The amended Notification in addition to the exemption already given under Notification No. 89/62 also exempted from the payment of duty any article falling within any of the sub-items in items 26-AA if made from an article on which countervailing duty has been paid under item 63 (36) of the First Schedule to the Tariff Act from so much of the duty of excise as is equivalent to the countervailing custom duty payable on the said article. This Notification clearly shows that the countervailing duty in question was levied on the basis that the excise duty contemplated by entry 26-AA will not apply to articles made out of imported Pig Iron or Steel Ingot. Further if the legislature intended the duty under entry 63 (36) to be an additional duty, the exemption granted would nullify the legislative mandate.

To summarise the effect of the Finance (No. 2) Act of 1962 and the various Notifications issued for the purpose of implementing the scheme under that Act is that excise duty is leviable at the rate mentioned in column 3 of Item 26-AA on pig iron or steel ingot used in the production of the article on which duty under entry 26-AA is sought to be levied but to the extent any excise duty or countervailing custom duty had been paid on any of the material used in the manufacture of any of that article, the same is exempt. From this scheme it is clear that when Item 26-AA speaks of "the excise duty for the time being leviable on Pig Iron or Steel Ingots as the case may be" it refers to the excise duty payable on the Pig Iron or Steel Ingots used in the production of the article dutiable under that item.

From the above discussion, it follows that the wires which are the subject-matter of the levy impugned in this case are not liable to pay the duty in dispute in this case.

At one stage it was contended on behalf of the assessee that the levy under sub-item (1) of Item 26-AA comes into effect only when an article is made directly

from out of Pig Iron or Steel Ingot as the case may be and not otherwise. It is not necessary to examine the correctness of this contention because at no stage the assessee had challenged his liability to pay *ad valorem* duty under Item 26-AA. He paid the same without objection nor had he claimed refund of the same.

I shall now take up the question of limitation. The written demand made on 21st March, 1963 purports to have been made under rule 9 (2) of the rules. Therein the assessing authority demanded steel ingot duty which according to it the assessee had failed to pay. Quite clearly rule 9 (2) is inapplicable to the facts of the case. Admittedly the assessee had cleared the goods from the warehouse after paying the duty demanded and after obtaining the permission of the concerned authority. Hence there is no question of any evasion. Despite the fact that the assessee challenged the validity of the demand made on him, both the Assistant Collector as well as the Collector ignored that contention; but when the matter was taken up to the Government it treated the demand in question as a demand under rule 10. The Government confined the demand to clearance effected after 21st December, 1962. The demand so modified is in conformity with rule 10. But the contention of the assessee is that the demand having been made under rule 9 (2) and there being no indication in that demand that it was made under rule 10, the Revenue cannot now change its position and justify the demand under rule 10; at any rate by the time the Government amended the demand, the duty claimed became barred even under rule 10. We are unable to accept this contention as correct. There is no dispute that the officer who made the demand was competent to make demands both under rule 9 (2) as well as under rule 10. If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in *B. Balakotaish v. The Union of India and others*¹ and *Aziz Ullah v. State of U.P.*². Further a common form is prescribed for issuing notices both under rule 9 (2) and rule 10. The incorrect statements in the written demand could not have prejudiced the assessee. From his reply to the demand, it is clear that he knew as to the nature of the demand. Therefore I find no substance in the plea of limitation advanced on behalf of the assessee.

For the reasons mentioned above, this appeal is allowed and the Revenue is directed to refund the excess duty paid under protest.

V.M.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

Premier Automobiles Ltd.

... *Petitioner**

v.

S. N. Srivastava, Income-tax Officer, Companies Circle I (3), ... *Respondents.*
Bombay, and another

*Income-tax Act (XLIII of 1961), sections 161 (1), 207, 208, 209, 210 and 212 (3)—
Advance tax—Agent of non-resident—Whether liable to pay advance tax—
Provisions imposing liability to pay advance tax upon an agent of a non-resident—
Whether infringe equality clause of the Constitution.*

Constitution of India (1950), Article 14.

On 25th February, 1965, the Income-tax Officer directed that for the purpose of the Income-tax Act, 1961 the petitioner be treated as an agent of a non-resident company. On the same day the Income-tax Officer issued a notice of demand

1. (1958) S.C.R. 1052 : (1958) S.C.J. 451 :
(1958) 1 An. W.R. (S.C.) 162 : (1958) 1 M.L.J.

(S.C.) 162.

2. (1964) 4 S.C.R. 991.

* W. P. No. 67 of 1965.

under section 156 read with section 210 of the Act calling upon the petitioner to pay on or before March, 1965, advance tax of Rs. 11,51,235-91 as agent of the foreign principal during the financial year 1964-65. The petitioner then moved a petition in the Supreme Court for an order quashing and setting aside the order under section 163 and notice of demand under section 156 for the assessment year 1965-66 and for an injunction or prohibition restraining the Income-tax Officer from enforcing or implementing the order under section 163 and the notice under section 156 read with section 210 of the Income-tax Act, 1961.

Held, that sections 207 and 208 which impose liability to pay advance tax in a financial year, section 210 which authorise the Income-tax Officer to make a demand for payment of advance tax from a person who is previously assessed, and section 212 (3) which imposes the duty to make an estimate of the total income likely to be received or to accrue or arise and to pay advance-tax if the total estimated income exceeds the maximum amount not chargeable to tax in his case by Rs. 2,500, apply to every person whether he is assessed in respect of his own income or as a representative assessee, and there is nothing to imply an unexpressed limitation on the express words of the statute in favour of an agent of a non-resident principal.

The provisions imposing liability to pay advance tax upon an agent of a non-resident do not infringe the equality clause of the Constitution.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

M. C. Chagla, Senior Advocate (*F. N. Kaka* and *O. P. Malhotra*, Advocates, and *J. B. Dadachanji*, Advocate of *M/s. J.B. Dadachanji & Co.*, with him), for Petitioner.

B. Sen, Senior Advocate (*T. A. Ramachandran* and *R. N. Sachthey*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Shah, J.—On 25th February, 1965, the Income-tax Officer, Companies Circle I (3), Bombay, directed that for the purpose of the Income-tax Act, 1961, the Premier Automobiles Ltd.—hereinafter called “the company”—be treated as an agent of *M/s. Dodge Brothers of United Kingdom*—a non-resident company. On the same day the Income-tax Officer issued a notice of demand under section 156 read with section 210 of the Act calling upon the company to pay on or before March, 1965, advance tax of Rs. 11,51,235-91 as agent of the foreign principal during the financial year 1964-65. The company then moved a petition in this Court for an order quashing and setting aside the order under section 163 and notice of demand under section 156 for the assessment year 1965-66 and for an injunction or prohibition restraining the Income-tax Officer from enforcing or implementing the order under section 163 and the notice under section 156 read with section 210 of the Income-tax Act, 1961. The petition was resisted by the Income-tax Officer.

In support of the petition, Counsel for the company raised two contentions :

(1) that under sections 209 and 210 of the Indian Income-tax Act, 1961, no order for payment of advance tax can be made against an agent of a non-resident ; and

(2) that a provision which authorises collection of advance tax from an agent of a non-resident infringes the equality clause of the Constitution and is on that account void.

Sections 207 and 208 of the Income-tax Act, 1961, in so far as they are material, provide :

207—“(1) Tax shall be payable in advance in accordance with the provisions of sections 208 to 219 in the case of income other than income chargeable under the head ‘Capital gains.’

208—Advance tax shall be payable in the financial year :—

(a) where the total income exclusive of capital gains of the assessee referred to sub-clause (i) of clause (a) of section 209 exceeded the maximum amount not chargeable to income-tax in his case by two thousand five hundred rupees ; or

(b)

Section 209 sets out the rules for computation of amount of advance tax payable by an assessee in the financial year. Section 210 provides by sub-section (1)—

“Where a person has been previously assessed by way of regular assessment under this Act or under the Indian Income-tax Act, 1922, the Income-tax Officer may, on or after the 1st day of April in the financial year by order in writing, require him to pay to the credit of the Central Government advance tax determined in accordance with the provisions of sections 207, 208 and 209”.

Sections 207, 208, 209 and 210 prescribe machinery for imposition of liability for and determination of the quantum of advance tax in respect of income which is chargeable to income-tax in the hands of a person on regular assessment.

Under the Income-tax Act, 1961 a person is liable to be assessed to tax in respect of his own income, and also in respect of certain classes of income received by or accruing or arising to others. He is also liable to be assessed to tax as a representative assessee. That is expressly so enacted by section 161 (1) which provides :

“Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income ; but any such assessment shall be deemed to be made upon him in his representative capacity only,

A representative assessee by sub-section (1) of section 160 includes amongst others, the agent of a non-resident in respect of the income of a non-resident specified in section 9 (1) (i), and also a person who is treated as an agent under section 163. By sub-section (2) a representative assessee is deemed to be an assessee for the purpose of the Act. By section 162 the representative assessee, who as such pays any sum under the Act, may recover the sum so paid from the person on whose behalf it is paid. Section 163 (1) defines for the purposes of the Act an “agent” in relation to a non-resident. Resort to the machinery for assessing a representative assessee is however not obligatory : it is open to the Income-tax Officer to make a “direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable”, or to recover “from such person the tax payable in respect of such income.”

On regular assessment an agent of a non-resident is, by virtue of section 160 (1) read with section 163, liable to be assessed to tax and the tax so assessed may be recovered from him. The agent, if assessed to tax, has the right to recover tax paid by him from the person whom he represents : section 162. Since a non-resident is in respect of income which forms part of his total income liable to be assessed to tax, he may also be called upon to pay advance tax in respect of the income accruing to or received by him which forms part of his total income chargeable to tax by virtue of sections 4, 5 and 207. So far there is no dispute. Counsel for the company however urged that an agent of a non-resident may be assessed in regular assessment in respect of the income accruing or arising to his principal, but he cannot be called upon to pay advance tax even though he is by virtue of section 160 (2) deemed an assessee for the purposes of the Act. Diverse reasons were suggested in support of that argument. It was said that since under section 209 (1) the amount of advance tax payable by an assessee in the financial year is to be computed on his total income of the latest previous year in respect of which he has been assessed by way of regular assessment, an agent cannot be directed to pay advance tax the incidence of liability whereof depends upon the determination of total income of the principal. We fail to see any substance in this argument. Section 207 imposes liability for payment of advance tax, and section 208 prescribes the conditions of liability to pay advance tax. Determination of total income of the previous year of the assessee is not made a condition of the liability to pay advance tax. Advance tax payable by an assessee is computed in the manner provided by section 209 when the assessee has been previously assessed to tax. The Income-tax Officer is also enjoined by section 210

to issue a notice to a person who has been previously assessed "by way of regular assessment" to pay advance tax for the financial year. If the assessee has not been previously assessed by way of regular assessment, he is required by section 212 (3) to make an estimate of his total income—excluding capital gains—if it is likely to exceed the maximum amount not chargeable to tax by two thousand five hundred rupees. These provisions apply to all assessees. If an assessee is chargeable to tax in respect of his own income or income of others which is chargeable to tax as his own income, those provisions indisputably apply. It is expressly enacted by section 161 that as regards income in respect of which a person is a representative assessee, he shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially. It is clearly implicit therein that a representative assessee is not exempt from liability to pay advance tax. Of the liability to pay advance tax it is not predicated that the previous year should have come to an end before liability can arise. The previous year of an assessee may, in some cases end after the commencement but before the end of a financial year in which advance tax is payable: it may in other cases commence and end with the financial year. But the liability to pay advance tax is not in any manner affected because the previous year ends before or with the financial year. Where an assessee's previous year is the financial year, his total income may not be determined for the previous year before the commencement of the financial year, but on that account no exemption from payment of advance-tax is granted by the Act. On the commencement of a financial year, a person who is previously assessed to tax is liable to pay advance tax on demand by the Income-tax Officer under section 210. The quantum of tax will be determined by section 209 and will be adjusted in the manner provided by section 210 (3). That applies to every assessee whether the tax is liable to be paid by him on his own total income, or on the income assessed in his hands as a representative assessee. If he has not been previously assessed in the character in which he is liable to pay tax, an obligation is imposed by section 212 (3) upon him to make an estimate of his income and to pay advance tax. That provision applies to his own income and also to the income in respect of which he is a representative assessee. There is nothing in the Act under which the liability to pay advance tax of a representative assessee depends upon determination of the total income for the previous year.

An argument of hardship was also raised. It was said that an agent of a non-resident may not normally have in his possession any materials on which he may estimate the income in respect of which he may be chargeable to advance-tax, if he had not been previously assessed to tax as an agent of a non-resident. That again, in our judgment, is not a ground which exempts an agent from liability to pay advance tax on behalf of his principal. Liability to submit an estimate necessarily implies the duty to secure the requisite information from the non-resident for submitting the estimate. The tax, it must be remembered, is assessed on the agent for and on behalf of the principal, and the Act has made an express provision enabling the agent to recover from the principal the tax so paid by him. Once the Income-tax Officer treats a person as an agent of non-resident, liability to pay tax on regular assessment arises; and his liability as a representative assessee to pay advance tax is not excluded by any provision of the Act.

In our judgment, sections 207 and 208 which impose liability to pay advance tax in a financial year, section 210 which authorise the Income-tax Officer to make a demand for payment of advance tax from a person who is previously assessed, and section 212 (3) which imposes the duty to make an estimate of the total income likely to be received or to accrue or arise and to pay advance-tax if the total estimated income exceeds the maximum amount not chargeable to tax in his case by Rs. 2,500 apply to every person whether he is assessed in respect of his own income or as a representative assessee, and we are unable to imply an unexpressed limitation on the express words of the statute in favour of an agent of a non-resident principal.

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Volume XLII (1970) I S. C. J. will end with next Part. The index for the Volume will be issued in due course.

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THE ROLE OF LAW TEACHERS IN THE FUTURE DEVELOPMENT OF INTERNATIONAL LAW.

By

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The role that a teacher can play in the future growth of International Law would be a limited one, but supreme within the limits. There are two powers that effect in their conjunction the desired changes in any situation, no less in law. One is the power that perceives the need of or conceives the changes, and the power that executes or implements those changes which it accepts. In old Indian sociological terms the Brahmin and the Kshatriya stand respectively for these. The Brahmin's instrument is the pen or the idea, and the Kshatriya's instrument is the weapon or the tool. And the teacher is the Brahmin, he can with his pen create an opinion which is supreme or tends to be supreme in the long run, if not immediately. Shelley, the English poet, has said. "Poets are the unacknowledged legislators of mankind. With no less justice and justification an 18th century writer on International Law writes that a writer on International Law is the legislator of the future. It is this role that a teacher can best play in International Law. And perhaps for good, in the field of International Law, the teacher tends to be a jurist as well as the lawyer, or the role of all the three is rolled into one.

The teacher by his wise and patient labour, scientific and rational, and liberal and humanistic approach can suggest solutions to the chronic problems of our age, solutions at once just and fair, though indeed what is just and fair may remain a matter of deep controversy.

Law has to change with the changing needs of society, the new temper of the world. In rendering possible a right change, the teacher can create an atmosphere which is conducive to its ready acceptance.

As the statement principles laid down by the Bangkok Conference of International Commission of Jurists in 1965 reads :

"Law and lawyers are instruments of social order.....The law is not negative and unchanging.Order is important, but it must be an evolving order; the law must be firm yet flexible and capable of adopting itself to a changing world.

The lawyer has a deep moral obligation to uphold and advance the rule of the law in whatever spheres he may be engaged....."

The problems require the lawyer to play a vital role in their solution. The lawyer must look beyond the narrow confines of the law and gain understanding of the society in which he lives, so that he may play his part in its advancement.

Life is a continual growth, a constant flux and the challenges that life—here the life of International community—offers also change if not in kind at least in emphasis. In anticipating the change in making pre-fabricated solutions by constructive imagination he can indeed play an important part.

In providing anticipatory solutions which make the adjustments simpler, involving less frictions, in rendering the birth-pangs of a new international order or an international order based on wider justice or richer concept of justice less painful. He can be the midwife of the new order at the ideational level.

It may be said life is so new and changing that the search of justice is continual, almost unceasing, unending, that the role of a lawyer or law teacher would indeed remain as one of sharpening the tools of justice, deepening the quest of justice, in broadening its base, to make justice more realized in international affairs. The law-teacher is also a lawyer and the lawyer can by his understanding better help shape the future order. In laying the bricks of international order he can does have a role at the least of miner and the sapper. And when the order is fully operative of rightly implementing its mandates.

Sri Aurobindo, one of the greatest philosophers, has said, that before a thing becomes a reality it must be conceived in thought, in seed-form. In broadcasting that seed-form, making the ideal more easily acceptable to the large generality of mankind, in making the soil more ready for the realization of the ideal, the teacher's role can indeed be supreme. In several ways he can render this possible :

(1) By teaching he can influence human minds and if child is the father of man, he is influencing the future generations with his ideas and the ideas he sows shall germinate in the future.

(2) By writing on law and research in improving methods and institutions of law he can make his solutions acceptable to the world at large.

(3) He can create models for the future world law as Clark-Sohn, the model envisaged in 'World Peace through World Law, Harvard University' Press, 1964, as patterns for the future and comparing and contrasting the present with future of the ideal and suggesting the ways and means of bridging the gulf and of filling the lacuna.

(4) The idealists as Bhave or Gandhi type would tend to be soaring in the ethereal ideal ground ; the politician or the man of action who has decisions in his hands tends to be more crude in his approach. The wise-teacher can be mediator between the two. He may make the high-soaring idealism, an idealism with its legs more firmly implemented on the soil and at the same time make the crude realists or realities look to the ideas and make them less crude and try to widen its horizons and may make those with political decisions more amenable to higher influences, to larger vistas of justice or fair play.

The challenge to the teacher indeed is great. One does not know if he can rise to the challenge of the situation. But if he has the mettle, he has an opportunity.

The teacher may not have to teach but preach, may have to shed his ivory-tower isolation and not merely preach but work for it. The teacher has a certain detachment that helps him offer solutions, but he may have to fight for solutions when things acquire acute urgency or imperative importance.

The chief problem for the world law is depoliticising politics, to create binding legal norms where only power-politics or vested interests rule the roost. But in depoliticising the political decisions, the crucial decisions can only be taken by the politician. Therefore, he has to be persuaded for he cannot be coerced or cajoled even if one wills. In making the might subordinated to right, political powers to Dharma, the key role of a silent persuasion, persistent persuasion, tire-less propaganda can be performed by a law-teacher.

The Role of a teacher is of a propagandist, jurist, practical man of affairs, bricklayer of a right international order. As D. P. O. Connell has said :

" He must attain to some degree of abstraction in order to perceive the beginnings and ends of his subject and the relevance of the data to his acknowledged goal and to render explicit that which was implicit in the vital relationships of the peoples"¹

To realize the unrealised harmonies of law the international lawyer must play a creative role and for that he must as D. P. O. Connell says : He must be a historian, a linguist, a sociologist and a critic.²

He must be a historian, we may add, because he must have the total perspective, he must be a philosopher for he must have a vision which he wants to implement, he must be a sociologist for he must understand the social framework within which he has to act and uplift things he must be a critic for he must criticise the limitations of methods and institutions he or others use to reshape them to advantage; he must be a linguist for language is a delicate tool which he has to employ to effect in his search for an ideal order of things or achieving higher standards of international justice.

Certainly the teacher can play a very important role in resolving the tension between the actual and the ideal, in rendering more meaningful the dialogue between the present and the future ideal state of affairs in bridging the gap between them, in implementing the higher goals.

1. International Law, 1965, P. 36

2. Ibid.

LIABILITY FOR INJURY OR DAMAGE CAUSED BY SPACE CRAFT

By

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A problem much mooted by the first generation of space lawyers is that of liability for damage caused to life or property on earth, in air space, or in outer space by a space instrumentality through its falling, collision, explosion or the like.¹ In other words, the problem of compensation to third States is knocking at the doors of international jurists for its best and just solution.²

It would be difficult to find any aspect of space law as complex as that relating to the definition and delimitation of liability of States for space activities causing injury or damage to third States. The purpose of the present article is to study the problem in question from its various angles: Who should be liable? Whether liability should be joint or several? What type of interest is to be protected? What type of activity makes a State liable? What is proper machinery, if any to determine liability? What are the sanctions available to make a State bear the loss? What is the impact of Space treaty on the problem? These are some questions which have received varying answers under different municipal systems.³

The dangers and risks to life and property are present at every step in space exploration. In the event of unsuccessful launching, a space activity may result in destruction of the space instrumentality itself including astronauts or scientists handling it on one hand and damage or loss to person or property of a third State. In the case of Appollo-13 which missed attaining its prime objective of landing men on the moon, the mysterious accident that put its main electric supply out of action took place about 320,000 kilometres from earth as the craft was nearing the moon. A little disbalance of mind of the astronauts might have resulted in the sad death of all the astronauts. The disaster was avoided, however by the brilliant individual and team performances of the astronauts and the equally skilled and devoted men at mission control.⁴ Space travel still is, therefore in its early pioneering stage. However, the safe return of the Appollo-13 astronauts demonstrates man's increasing mastery over the domains surrounding the earth.⁵ Alterations are likely to be made in the electrical engineering system in order to avoid the Appollo-13 type explosion which occurred in a section where oxygen and hydrogen were stored.⁶ Swigert answered the newsman, "You are asking me whether I prayed. I certainly did, and I have no doubt that perhaps my prayers and the prayers of the rest of the people contributed an awful lot to us getting back".⁶ Thus it seems that success or failure of space venture depends on the kindness of the Supreme Power. Under the circumstances where there is every chance to cause damage or loss to person or property, the problem of compensation is of prime importance.

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1. Jessup and Taubenfeld, 'Controls for Outer Space' (1959) p. 241.

2. Author's article, 'Problem of sovereignty in Outer Space and Celestial bodies, S C J Vol. 1 (1970), p. 9 (Journal).

3. J.F. McMahon, 'Legal aspects of Outer Space' B.Y.I.L. 1962, p. 384.

4. Walter Froehlich 'Investigations begun on manned project's future', American Reporter, April, 22, 1970, p. 9.

5. *Ibid* p. 9.

6. American Reporter, May 6, 1970, p. 8.

It is often suggested that the International Convention is the only solution to this problem⁷, and it has been observed, "The question of liability may be one of non-political subjects on which international agreement can be reached".⁸

1. *Who should be liable?*

Under this head, there are various relevant questions such as: Is liability to be assumed by the launching State, or the State that operates and controls the satellite or the State which supplied the finance, material and technical skill? Is liability to be joint or several? How much compensation is to be paid?

One may refer here to the draft convention put forward by the United States, at Geneva, in 1962, which contained provisions as under:

(a) States or international organizations responsible for the launching of Space vehicles should be liable internationally for personal injury, loss of life, or property damage caused thereby, whether such injury, loss of life, or property damage occurs on land, on the sea or in the air. (b) A claim based on personal injury, loss or damage caused by a space vehicle, should not require proof of fault on the part of the State or States or international organization responsible for launching the space vehicle in question, although the degree of care which reasonably ought to have been exercised by the person or entity on whose behalf claim is made, might properly be taken into account. (c) A claim may be presented internationally to the State or States or international organization responsible for the launching of a space vehicle causing exhaustion of any local remedies that may be available. (d) The presentation of claim should be made within a reasonable time after the occurrence of injury, loss, or damage. (e) The International Court of Justice should have jurisdiction to adjudicate on any dispute relating to the interpretation or application of international agreement on liability in the absence of an agreement between the States concerned on another means of settlement".⁹

In the sub-committee there was general agreement on principle (a) of the above draft resolution, but with respect to the principle of absolute liability, views were expressed that it would be difficult to prove fault or negligence in the case of space vehicles in contrast with air-craft, and that this principle could not be applied in all instances, for example, where two space vehicles collided".¹⁰

It would seem desirable that in cases where several States are involved, where for example, the State constructing and owning the space vehicle was not the same, as the launching State, one State should be held liable instead of an artificial arithmetical exercise being undertaken to allocate liability. As Prof. Cooper observed: "I happen to have been a rather careful student of the recently discussed proposed conventions on catastrophic damage caused by nuclear incidence; they deal with the problem on the basis of channelling the liability to a single entity to save much trouble. I would say without question that liability should be channelled as an international obligation to the State which has launched or authorised the launching of the space vehicle".¹¹

Such a proposition would seem to be in accordance with the views of many writers and States.¹² It has also been proposed that there should be some form of

7. Bresford, 'Liability for ground damage caused by Space craft' Federal Bar Journal (July, 1959), p. 254.

8. Jassup and Taubenfeld *loc. cit.*, p. 241.

9. U. S. Proposal on liability for space vehicle accidents. U. N. Doc. A/A C 105/C 2/14 (June 4, 1962).

10. 'Every Man's United Nations' (7th Edn. p. 447.)

11. 'Damage to third parties on the surface caused by space vehicles' Survey of legal opinion on the law of Outer Space (edited by Haley etc., 1960) p. 133.

12. U. N. Doc., A/JAC 105/C 2/SR 1, p. 9 (August 21, 1962).

licensing between a State and private companies and that a State should still retain international responsibility for those activities which it had authorised.¹³

The Legal Sub-committee has been engaged in working out acceptable draft agreements on basic principles governing the activities of States in outer space, on liability for damage resulting from such activities and on rescue of astronauts and space-ships making emergency landings. In 1963, the Sub-committee produced an agreed text on the above subject, which was unanimously adopted in the form of a resolution by the General Assembly on 13th December, 1963.

Paragraph 5 of the resolution focussed attention on the legal liability or responsibility in operating space objects. It reads thus, "States bear international responsibility for national activities in Outer Space, whether carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried on in conformity with the principles set forth in the present declaration. The activities of non-governmental entities in Outer Space shall require authorisation and continuing supervision by the State concerned. When activities are carried on in Outer Space by an international organization, responsibility for compliance with the principles set forth in this declaration shall be borne by the International Organization and by the State participating in it."¹⁴

Commenting on the provisions, Mr. Gardner observed: "The paragraph gave assurance to the Soviets and others that a State is responsible for the private space activities of its national as well as for public efforts carried on by the Government itself. Pursuant to the terms of the resolution, every State must take care that private activities are authorised and supervised by the State concerned".¹⁵

Para. 8 of the Resolution provides: "Each State which launches or procures the launching of an object into Outer Space, and each State from whose territory or facility, an object is launched, is internationally liable for the damage, to a foreign State or to its natural or juridical persons, by such object or its component parts on the earth, in the air space, or in outer space".¹⁶

Implementation of this principle will require not only a detailed express agreement setting forth substantive rights; there will be need also to make provision for international institutions to resolve such issues. It is expected that disputes of this kind can be settled through peaceful processes including recourse to diplomacy or the world Court.¹⁷ The view has also been advocated that each State might create a guarantee fund or otherwise bind itself to compensate its nationals who suffer damage upto a fixed minimum. The affected State should, then be able to proceed against the States, who in fact, caused the damage and so recover the money.¹⁸

Other writers favour the establishment of an 'international guarantee fund' to pay for damage caused by satellites, except where such damage was caused internationally. The view has been criticised on the ground of possible complications.¹⁹ One more difficulty, in such a case, may arise that many States may not be willing to contribute to such fund.

13. U. N. Doc A/A C 105/C 2/S R 10, p. 6.

14. Resolution 1962 (XVIII), Y. U. N. 1963, p. 101.

15. 'Outer Space: A breakthrough for International Law', 50, American Bar Association Journal (Jan. 1964) p. 31.

16. U. N. Doc. A/Resolution/1962 (XVIII).

17. C. Q. Christol, 'Space Stations: A Lawyer's point of view'—4, I.J. I.L. (1964), p. 496.

18. Cooper *loc. cit.*, p. 133.

19. *Ibid.*, p. 134.

When the Legal Sub-committee began its third session in March, 1964, it had before it, in addition to a working paper on the unification of certain rules governing liability for damage caused by space devices introduced by Belgium in 1963, two other drafts concerning liability for damage caused by the launching of objects into Outer Space: a draft convention proposed by the United States and a draft agreement proposed by Hungary.²⁰

It may be correct to say that in this field, there has been progress. There is need for the establishment of an international institution to deal with the issues. If an international space authority or organisation is established, provision will have to be made in its constitutive instrument for capacity to sue and be sued for damage and injury caused by space craft. Such provision will be all the more necessary if the organisation has authority to launch satellite for the common benefit of its members.²¹

It is gratifying that an international space treaty on outer space has been concluded. It has embodied principles contained in Resolution 1962 (XVIII). It has provided that the State which launches or procures the launching of an object into Outer Space or from whose territory such object is launched, shall be internationally liable for any damage which may result therefrom²²

The liability will attach even where the activities are carried out by a non-governmental entity, which, however, is permitted to do so only under the authorisation and continuing supervision of the State concerned.²³ The Article also provides for activities carried out by International Organization, e.g. E.L.D.O., where there could be a combination of interests as far as the launching, owning, and controlling States are concerned. The Treaty in such cases provides for the joint and concurrent liability of the member States of its international organization and the organization itself.²⁴

The reference to the international organization has been specially made in view of the fact that countries with limited resources would be more inclined to participate in activities undertaken jointly through such organizations, e.g. in projects like the rocket sounding range at Thumba, in India.²⁵

On the matter of return of, and assistance to astronauts and space ships making emergency landings, Article VIII of the Space treaty provides that jurisdiction, control and ownership over objects launched into Outer Space or on personnel thereon, shall remain with the State on whose registry the object is carried. Therefore they shall be returned to that State, wherever they may be found, on furnishing identifying data.²⁵

Since activities in Outer Space are intended for the common benefit of all mankind the treaty emphasises the status of the astronauts as "envoys of mankind in Outer Space", with a corresponding obligation on all States to render all possible assistance in the event of accident, distress or emergency landing, and to return them promptly to the State registry of the space vehicle.¹

It is significant to note, that on these two subjects: liability for damage caused as a result of activities in space—and on assistance to and return of the astronauts and space crafts in distress, the treaty only presents the bare ground-

20. Y.U.N., 1964, p. 77.

21. J. F. McMahon *loc. cit.*, p. 388.

22. Space Treaty, 1966, (Article VII) International Legal Material Vol., V, Nov, 1966 pp. 1109, 1112.

23. The Space Treaty, Article VI.

24. M. Chandrashekhara, 'The Space Treaty', 7 I.J. I L, (Jan. 1967), p. 64.

25. *Ibid*, p. 64.

1. Space Treaty, Article V

work of the legal sub-committee which has been engaged in preparing two draft agreements to regulate them.²

The work of making rules regarding liability has been left to the Legal Sub-Committee, due to divergent views on the point. The Legal Sub-Committee is constantly working in this field and the laws relating to Outer Space are gradually taking shape.³ The United Nations had convened an International Conference in Vienna. The Conference had examined the practical benefits of space exploration and the opportunities available to non-space powers for international co-operation with special relevance to the needs of the developing countries.⁴

The U.S.S.R. representative said that the agreement on the rescue and the return of astronauts was of great importance, as also the proposed convention on liability for damage which might be caused by objects launched into outer space. The Outer Space Committee should now make every effort to have the convention apply not only to damages on earth and in the air but also in Outer Space.⁵

It follows from the above discussion that under the provisions of the Treaty concerning the Exploration of the Moon and other celestial bodies, viz., the *Space Treaty of 1966*, the question, 'who should be liable' seems to have been solved and rules relating to damages are under consideration.

2. Type of conduct giving rise to liability.

The next important question is relating to the nature of the liability. If injury, or damage is sustained while a space vehicle is being launched, or while it is in the air space or in outer space, should the criterion for liability be one of absolute liability or strict liability, or should it be based on the nature and character of the activity?

(a) *Absolute liability*.—A good number of writers favour a principle of absolute liability. Some are of the opinion that in any event it would seem to be an unfair burden to impose upon the person injured, the obligation to prove a defect or negligence in manufacture or in operation. Accordingly the principle of absolute or strict liability should be accepted.⁶ It has been observed: "One of two parties has to bear the consequences of an accident; it is reasonable that it should be the person whose negligence caused the accident rather than the victim".⁷

Russian writers do not appear to have dealt with this question. However, what small evidence is available indicates that they might not be opposed to a principle of absolute liability. As Mr. Korovin has observed: "It should be added that with launching objects into the cosmos (rockets, satellites, etc.) under present conditions being solely under the auspices of governmental bodies, full responsibility for eventual damage lies with the Government concerned in the event of personal or property losses for citizens of foreign countries."⁸ Analogy with the Soviet domestic law would also seem to support absolute liability for damage caused by Soviet space vehicles.⁹ The United Arab Republic¹⁰.

2. M. Chandrashekharan, *loc. cit.*, p. 64.

3. Author's article, 'Legal Status of Outer Space' (1970) 1 M.L.J. (Journal), pp. 15-16.

4. U. N. Monthly Chronicle, Jan. 1969, p. 62.

5. *Id.*, p. 62.

6. 'Every Man's United, Nations' (VII, Edn.), p. 447.

7. Jessup and Taubenfeld, *loc. cit.*, p. 243.

8. 'International Status of Cosmic Space', Reprinted in the Legal problems of Space Exploration—A symposium, p. 1067.

9. R.D. Crane, 'Soviet attitude toward International Space Law', 56, A.J.I.L., (1962) p. 709.

10. U. N. Doc A/AC 105/C2/S R 11, p. 8 (Aug 21, 1962).

Japan¹¹ Great Britain¹² and the United States¹³ were all explicitly in favour of a principle of absolute liability at the Geneva conference. All the representatives felt the difficulty of proving fault or negligence in case of space vehicles as shown above. It may well be reasonable to hold that in such a case the operating States should each bear their own loss.¹⁴

The U. N. *ad hoc* Committee on the Peaceful Uses of Outer Space was of the view that if the above principle of absolute liability is adopted, no doubt the Rome Convention of 1952 on damage caused by foreign air-craft to third parties on the surface may prove of some value.¹⁵

When the space treaty was under consideration, Mr. Parthasarathi (India) also suggested that the principle of 'absolute liability' be embodied in the Treaty. It was felt, however, to be more advisable to leave the matter to the Legal Sub-Committee in view of divergent view points held by various countries on what the nature of liability in the present instance should be.¹⁶

(b) *The principle of Strict liability.*—The second possible solution is the principle of strict liability. Strict liability proceeds upon the theory that he who engages in an immensely hazardous activity, must bear responsibility for the risks, he thereby creates. The doctrine has long been established in Anglo-American Law in accordance with the leading case of *Rylands v. Fletcher*¹⁷, which held that one who keeps or operates a wild or uncontrolled instrumentality is absolutely liable for any damage caused to persons or property by the instrumentality.¹⁸ The liability here is by no means absolute. Winfield for instance, lists at least eight possible exceptions to this rule; some of them are consent of plaintiff, common benefit and Act of God, etc.¹⁹

According to some writers all the three draft agreements prepared by the United States, Hungary and Belgium, provide for a strict liability without fault. It is believed that at the present it would also be necessary to impose a strict liability on States for damage caused by activities carried out on the surface of a celestial body *via* Outer Space.²⁰ It is observed: "In the case of damage caused by activities carried out on the surface of a celestial body it should be based on fault except in the case when damage was done by an activity involving increased danger".²¹

(c) *Liability based on Nature and Character of activity* —A third suggestion is that liability for damage may well depend on the nature and character of the activity that is being pursued. If it is primarily of a military nature and for the benefit of one country, no doubt, liability should be absolute. If it is of a commercial nature and such as to benefit a large number of States, liability may well be imposed only for negligent conduct. Alternatively liability may be absolute, but State should be compensated from some International Fund to which all nations who might be benefited from the activity, should contribute. However, as has

11. U. N. Doc. A/AC/105/ C 2/S R 13, p. 9. (Aug. 22, 1962).

12. U. N. Doc. A/A C 105/C/2, S R 10, pp. 5-6, (Aug. 21, 1962).

13. U. N. Doc. A/A C 105/C 2/S R 1. p. 9, (21st Aug., 1962).

14. 'Draft Code of Rules on the Exploration and Uses of Outer Space' in David Davies Memorial Institute of International Studies (1962) p. 16.

15. U. N. Doc. A/4141, July 14, 1959.

16. M. Chandrashekharan, *loc. cit.*, p. 64.

17. (1868) L R. 3 H L. 320.

18. Jessup and Taubensfeld, *loc. cit.*, p. 243.

19. Winfield On Tort (1963), pp. 449-462.

20. Imre Csabafi and Savita Rani: 'The Law of Celestial Bodies', 6, I J I L., (1966), p. 229.

21. Imre Csabafi and Savita Rani *loc. cit.*, p. 229.

been indicated earlier, the unsolvable difficulty is to disengage a commercial from a military activity for this purpose.²²

It leads to the conclusion that a State is liable for damage caused. It may be submitted that the principle of absolute liability may serve in a better way. It is also submitted that compensation must be paid in proportion to the actual loss suffered.

3. Machinery for enforcement.

The real problem in this area is that of enforceability. If for some time only States will be responsible for launching space craft then any claim which is likely to arise would have to be prosecuted at the international level. In this respect, one may refer to the provisions in the American Draft Convention²³, that local remedies need not be exhausted, that claims should be made within a reasonable time and that the International Court of Justice should have jurisdiction to settle disputes. As it is apparent from the foregoing discussion that Mr. Christol is also of the opinion that disputes of this kind can be settled through peaceful processes including recourse to diplomacy or world Court. Other processes available include enquiry, mediation, conciliation, arbitration, resort to regional agencies or arrangements, or other peaceful means selected by disputants.²⁴ With the establishment of an international liability, it becomes the duty of States to conform their national laws to facilitate the standard.

A small number of incidents have already arisen which might well have involved questions of liability. The seriousness of this problem can be seen in the abortive launching of a powerful U. S. rocket designed to place a navigational satellite into orbit. The flight miscarried and parts of the craft landed in Cuba.²⁵ Another occurrence has been reported, that a fragment from a Russian sputnik which fell on U. S. territory has been returned to the Soviet Union¹

As to the settlement of disputes, some delegates suggested that arbitration should be envisaged. Some other delegates suggested that the establishing of a special tribunal to settle the amount of compensation payable for damage caused, be studied. Some representatives advocated that the jurisdiction of International Court of Justice should be extended to cases involving space vehicle accidents only when the parties to the dispute consented.²

Commenting on paragraph 8 of the Resolution 1962 (XVIII), Mr. Christol observed: "This provision of the Resolution sought only to deal with liability situations, and as time goes on there will be much additional effort dedicated to the formulation of a detailed code on damages".³

It may be noted that the Space treaty has embodied provisions relating to liability but is silent on the machinery for enforcement. It has presented the bare groundwork of the Legal Sub-Committee. The Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space concluded its eighth session on 4th July, with the adoption of the report to its parent body. The session began on 9th June, 1969 in Geneva.⁴ It was devoted to a consideration of a draft agreement on liability for damage caused by objects launched into Outer Space, and to the study of questions relative to the definition of Outer Space and to the utiliza-

22. J. F. McMahon, *loc. cit.* p. 387.

23. U. S. Proposal, Liability for space vehicle accidents, U. N. Doc. A/A C 105/C 2/14, June 4, 1962.

24. U. N. Charter, Article 33.

25. 'New York Times' October 1, 1961.

1. 'New York Herald Tribune' (European Edn.), Jan. 9, 1963.

2. 'Every Man's United Nations' (VII Edn.). p. 447-448.

3. C. Q. Christol, *loc. cit.* pp. 495-496.

4. U. N. Monthly Chronicle, July 1969, p. 61.

tion of Outer Space and Celestial Bodies, including the various implications of space communications. The matter of a draft agreement on liability had been on the Sub-Committee's agenda for the past five years. At the present session five proposed texts for the draft agreement were considered which were submitted respectively by Belgium, Hungary, India, Italy and the United States. Also considered were the formulations of principles as worked out at informal consultations held in New Delhi last March among various delegations which concentrated on five major outstanding issues with respect to the draft agreement. These were: International organizations, applicable law, settlement of claims, ceiling on liability and nuclear damage. The Sub-committee also took up proposals on individual articles and provisions submitted by the various delegations.⁵

The Sub-committee reached agreement on formulations of certain principles relating to the law applicable to compensation for damage caused by objects launched into Outer Space as follows:

(1) The compensation which the respondent State shall be required to pay for the damage under this convention shall be determined in accordance with International Law;

(2) if there is agreement on the applicable law between the claimant and the respondent, then that law should be applied.⁶

The agreement on the second formulation was a reaffirmation of a principle approved by the Sub-committee at its last session. The Sub-committee also agreed provisionally on two points concerning the relationship between the agreement on liability and International Organizations as follows:

(1) International Organizations that launch objects into Outer Space, should be liable under the convention for damage caused by such activities;

(2) if damage is caused by a space object to the property of an international inter-governmental organization, the claim should be presented by one of the States-members of the international inter-governmental organization which are parties to this convention.⁷

The Sub-committee decided to reflect in its report to the Outer Space Committee that no agreement was reached on the question whether the liability of the States-members of the international organization that were parties to the liability convention, (a) should be residual and arise only in the event of default by the international organization, or (b) should arise at the same time as the liability of the international organization. Nor was agreement reached on other aspects of the question of the rights of International Organizations under the convention. The Sub-committee noted that this problem required further consideration.⁸

A series of Articles of the draft agreement on liability were considered and approved by the Working Group of the whole committee. According to the latter's decision, the Working Group was set up in order that Articles pertaining to non-controversial problems, other than the five outstanding issues, could be decided and acted upon. The Articles approved by the Working Group, and subsequently by the Sub-committee, come under the following sections of the agreement: field of applications and exemptions from provisions of agreement; question of absolute liability; presentation of claims by States or international organizations and in respect of natural or juridical persons; presentation of claims for compensation through diplomatic channels; pursuit of remedies available to respondent State or other international agreements; time-limits for presenta-

5. U. N. Monthly Chronicle, (August-September) 1969, pp. 123-124.

6. *Ibid.*, p. 124.

7. U. N. Monthly Chronicle, (August-September) 1969, p. 124.

8. *Ibid.*, p. 124.

tion of claims; and question of joint liability. Agreement was also reached on a number of definitions, namely 'damage' 'launching', and 'launching state'.⁹

Necessary steps should be taken towards the establishment of a suitable machinery for enforcement. There may be two suggestions in this respect : First, the jurisdiction of the International Court of Justice should be extended to adjudicate on such disputes, even where only one party to such a dispute refers any such matter to it, or secondly, a separate machinery should be established equipped with power to adjudicate on matters like, liability of State, joint liability of States in appropriate cases, amount of compensation, and to provide any other remedies in appropriate situations. It should be under direct control and supervision of the United Nations so far as may be necessary for the maintenance of international peace and security.

The problem of liability for injury or damage caused by spacecraft is not beyond control in the world arena of today. The Legal Sub-Committee has made marked success in this field. It may be expected that in the near future, if space powers pay proper attention to this problem, a detailed code on damages would be finalised and proper remedies will be available in all cases where injury or damage is caused by a space object to any person or property of a state or international organization.

[END OF VOLUME (1970) I S. C. J. (JOURNAL.)]

[S.C. N.C. 85]

*J. C. Shah,
K. S. Hegde,
A. N. Grover,
A. N. Ray and
I. D. Dua, JJ.*
9-3-1970.

Satyanarain Prasad v.
State of Bihar.
C.A. No. 272 of 1969.

Constitution of India (1950), Article 133 (1) (a) and (b)—When attracted.

In order that a certificate may be issued by the High Court for leave to appeal to the Supreme Court under clause (a) of Article 133 (1) of the Constitution, it is one of the conditions that the value of the subject-matter in dispute in the Court of first instance and still in dispute on appeal in the Supreme Court is not less than Rs.20,000. A certificate under clause (b) may be granted if the judgment, decree or final order involves a claim or question relating to property of the like amount or value. A claim in a petition challenging the validity of a notice to show cause why a person in the public service shall not be dismissed or removed from service is not capable of valuation and can in no event be regarded as of a value not less than Rs. 20,000. A certificate under Article 133 (1) (a) or (b) to appeal to the Supreme Court against such an order would therefore be incompetent.

In such a case a concession by the Counsel that the valuation was not less than Rs. 20,000 will not invest the High Court with jurisdiction to grant a certificate under clause (a) or (b) of Article 133 (1).

V.K.

Appeal dismissed.

[S.C. N.C. 86.]

*M. Hidayatullah, C. J.
A. N. Ray and
I. D. Dua, JJ.*
13-3-1970.

State of Assam v.
Abdul Noor.
Crl. A. No. 20 of 1968.

Constitution of India (1950), Article 134 (1) (c)—Certificate under—When may be granted.

It is manifest that before granting a certificate under Article 134 (1) (c) of the Constitution the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication what substantial question of law or principle is involved in the appeal to bring it within the scope of Article 134 (1) (c). Where the Supreme Court finds that the certificate is not in compliance with the requirements of Article 134 (1) (c), it can decline to accept the certificate. There are instances, however, where the Supreme Court after declining to accept the certificate has allowed the appellant to apply under Article 136 of the Constitution in proper cases.

In the present case the certificate did not indicate any reason as to why the High Court granted it. Hence the Supreme Court declined to accept the certificate.

V.K.

Appeal dismissed.

[S.C. N.C. 87]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
 13-3-1970.

D. P. Mishra v.
Kamal Narain Sharma.
 C.A. No. 1738 of 1969.

Representation of the People Act (XLIII of 1951), section 116-A (3)—Appeal under—Computation of period of limitation—Applicability of sections 4 and 12 of Limitation Act (XXXVI of 1963).

Election petition—Proof of corrupt practice—Giving of benefit of doubt—Discretion of Court.

Representation of the People Act (XLIII of 1951), sections 90 (5), 77, 123 (6) and 99—Scope.

By virtue of section 29 (2) of the Limitation Act, 1963, sections 4 and 12 thereof apply to an appeal under section 116-A of the Representation of the People Act and hence if such an appeal is filed on the date on which the Court re-opens after the summer recess it will be regarded as within time if the period of limitation prescribed under section 116-A (3) of the Representation of the People Act, after taking into account the time requisite for obtaining a certified copy of the order appealed from, had expired during the course of the recess.

In an election petition a corrupt practice may be proved only by evidence which establishes the case beyond reasonable doubt. But in giving the benefit of doubt the Court has to reach a judicial conclusion. It cannot vacillate.

The words of clause (5) of section 90 of the Representation of the People Act, 1951 are clear. The Tribunal has no power to allow any amendment of the election petition so as to supply or introduce particulars of a corrupt practice not alleged in the petition. But the particulars of the corrupt practice alleged in the petition may in appropriate cases be permitted to be introduced by amendment.

In the present case by the impugned amendment particulars of corrupt practice previously alleged in the petition were introduced and not particulars of a corrupt practice not previously set up in the petition. The High Court was therefore right in allowing the amendments to be made.

Held on facts, that the High Court was right in its conclusion that the returned candidate had spent an amount which exceeded the amount permissible under section 77 of the Representation of the People Act, 1951, and so was guilty of a corrupt practice under section 123 (6) and that therefore his election was void under section 100 (1) (b) of the Act.

Under section 99 of the Representation of the People Act the Court has no discretion in the matter, if it was of the view that any person is proved at the trial to have been guilty of any corrupt practice, not to name that person. The duty under the Act is cast on the Court or the Tribunal and on the ground that the party has not applied for a notice, the High Court could not avoid the obligation imposed by statute to take proceeding under section 99 against the person proved at the trial to have been guilty of corrupt practice and to name him.

V.K.

Case remanded to High Court.

[S.C. N.C. 88]

S. M. Sikri,
V. Bhargava and
C. A. Vaidialingam. JJ.
13-3-1970.

State of U. P. v.
Ram Naresh Lal.
C.A. No. 463 of 1969.

Constitution of India (1950), Article 311—Government servant transferred from one department to another—Authority competent to dismiss him from service—Delegation of power of dismissal to head of transferee department—Legality.

If a person is a member of the service and he is transferred from one department to another it is not necessary that he should be re-appointed to the service or he should be appointed to the department to which he is transferred. As soon as he is transferred permanently he begins to hold the permanent post which he starts holding in the transferee department and the appointing authority for the transferee department would be competent to dismiss him from service.

Assuming that the respondent in the instant case had not been permanently transferred from the Irrigation Department to the Office of the Development Commissioner (Planning Department), even then the Development Commissioner was entitled to dismiss him by virtue of various orders of Government. The order, dated 21st May, 1958, clearly placed the control over the entire staff on deputation from the Irrigation Department to the Planning Department with the Development Commissioner. The word "control" is a wide word and includes disciplinary jurisdiction. In the context there is no doubt that it was the intention to give disciplinary jurisdiction over the entire staff on deputation to the Development Commissioner. There is nothing in the Constitution which debars the Government from conferring powers on an officer other than the appointing authority to dismiss a Government servant provided he is not subordinate in rank to the appointing officer or authority.

Whether a person has a lien in one department or in other department, the Government is entitled, subject to the provisions of Article 311 (1) of the Constitution, to delegate power of dismissal to any officer.

V.K.

Appeal allowed.

[S.C. N.C. 89]

J. C. Shah and
K. S. Hegde, JJ.
13-3-1970.

Dr. Sewa Singh v.
Ravinder Kaur
C.A. No. 468 of 1967.

East Punjab Urban Rent Restriction Act (III of 1949), section 2 (h)—"Scheduled building"—Meaning of.

It is impossible to hold on the language of the definition of "scheduled building" contained in section 2 (h) of the East Punjab Urban Rent Restriction Act, that the original purpose of the tenancy is decisive of the question whether it is a scheduled building. In terms it is enacted that a residential building will be deemed to be a scheduled building if it is used by a person engaged in one or more of the specified professions, partly for the business and partly for his residence. The Court below (the High Court of Punjab) was therefore not right in holding that the house which was let out for residential purposes could not, at the option of the tenant, be converted into a scheduled building.

The finding of the High Court, that the user of the building by the tenant for professional purposes was casual cannot also be supported.

V.K.

Appeal allowed.

[S.C. N.C. 90]

A. N. Ray and
I. D. Dua, JJ.
16-3-1970.

Nafe Singh v.
State of Haryana.
Crl.A. No. 125 of 1968.

Penal Code (XLV of 1860), sections 366 and 376—Persons found guilty of offence under—Proper sentence.

Constitution of India (1950), Article 136—Appeal under in a criminal case—Interference with question of sentence by Supreme Court—Practice.

Merely because the helpless victim of rape was frightened into resignation and non-resistance in the face of inevitable compulsion, it cannot be considered as a mitigating circumstance for awarding a lenient sentence.

The two appellants were convicted for both the offences under sections 366 and 376 of the Penal Code. After the amendment of section 35 of the Code of Criminal Procedure in 1923 a person convicted of two or more offences (which may not be distinct) at one trial is liable to be sentenced to the several punishments prescribed therefor subject of course to the provisions of section 71, Indian Penal Code. This aspect may therefore legitimately be kept in view when considering whether the sentence imposed in this case is excessive. (Sentence of 7 years rigorous imprisonment and a fine of Rs. 100 for both the offences was held not to be excessive in the circumstances of the case.)

Further, it has to be borne in mind that the question of sentence is normally a matter of judicial discretion of the trial Court and the Supreme Court on appeal by Special Leave does not, as a rule, interfere with the exercise of such discretion.

V.K.

Appeal dismissed.

[S.C. N.C. 91.]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
16-3-1970.

State of Madhya Pradesh v.
Dadu Jagdish Prasad.
C.A. No. 232 of 1967.

Rewa State Land Revenue and Tenancy Code (1935), section 20—Pawai Rules (1934), Rule 3—Order dated 18th March, 1948 by Maharaja of erstwhile Rewa State that Anandgarh Estate should be exempted from land revenue—Nature of—Successor State if bound by it.

It is clear that the law in force at the material time viz., Pawai Rules, 1934 and the Rewa State Land Revenue and Tenancy Code, 1935, contained specific provisions that the Durbar could exempt any estate from payment of land revenue. The trial Court and two judges of the High Court held that the Maharaja, by means of an order, dated 18th March, 1948, had made such an exemption in the case of Anandgarh Estate. This finding is unexceptionable on the facts and circumstances including the evidence in the present case.

It is true that there is a well-recognised distinction between the legislative and executive acts in regard to the orders issued by absolute rulers and that whenever a dispute arose as to whether an order passed by an absolute ruler of an Indian State represented a legislative act all relevant factors were considered before the question was answered. These relevant factors were, the nature of the order, the scope and effect of its provisions, its general setting and context, etc. But in the present case the order made by the Durbar was under legislative sanction inasmuch as it was made in terms of the provisions of statutory rules and the Rewa Land Revenue and Tenancy Code. It cannot therefore be contended that the exemption granted in respect of Anandgarh Estate was merely an executive act which would not be binding on the Successor State.

V.K.

Appeal dismissed.

[S.C. N.C. 92]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
 16-3-1970.

Om Prakash v.
 State of Haryana.
 C.A. No. 2542 of 1969.

Constitution of India (1950), Article 226—Petition under raising issues of facts—Summary dismissal without calling upon State to file reply affidavit—Propriety.

There is no rule that the High Court will not try issues of fact in a writ petition. In each case the Court has to consider whether the party seeking relief has an alternative remedy which is equally efficacious by a suit, whether refusal to grant relief in a writ petition may amount to denying relief, whether the claim is based substantially upon consideration of evidence oral and documentary of a complicated nature and whether the case is otherwise fit for trial in exercise of the jurisdiction to issue high prerogative writs.

In the present case the High Court did not call upon the State to file a reply affidavit and did not consider whether the facts raised were so complicated or that for other reasons it would be inappropriate to try the dispute in the writ petition. The High Court was in error in summarily rejecting the petition.

V.K.

Appeal allowed.

[S.C. N.C. 93]

J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.
 17-3-1970.

Perumal Nadar (dead) v.
 Ponnuswami.
 C.A. No. 354 of 1967.

Hindu Law—Marriage—Marriage of Hindu male with Christian female after her conversion to Hinduism—Validity—Conversion to Hinduism—Essentials and evidence of.

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949)—Applicability—Pleading and proof.

Evidence Act (I of 1872), section 112—Birth during subsistence of valid marriage—Presumption.

A person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to be converted to the Hindu faith. But such an intention accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion.

The evidence in the present case clearly establishes that the 'parents of A, an Indian Christian, arranged her marriage with P, a Hindu. The marriage was performed according to Hindu rites and ceremonies in the presence of relatives who were invited to attend. Customary ceremonies peculiar to a marriage between Hindus were performed: no objection was raised to the marriage and after the marriage A was accepted by the local Hindu Nadar community as belonging to the Hindu faith, and the son born to her was also treated as a Hindu. On the evidence there can be no doubt that A *bona fide* intended to contract marriage with P. Absence of specific expiatory or purificatory ceremonies will not be sufficient to hold that she was not converted to Hinduism before the marriage ceremony was performed. The fact that P chose to go through the marriage ceremony according to Hindu rites with A in the presence of large number of persons clearly indicates that he accepted that A was converted to Hinduism before the marriage ceremony was performed. Hence the marriage is valid.

It cannot be held, in the absence of a specific plea and issue raised to that end, that a person was domiciled in the State of Madras and was on that account governed by the provisions of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949.

If it be accepted that there was a valid marriage between *P* and *A* and during the subsistence of the marriage the plaintiff was Lorn, a conclusive presumption arises that he was the son of *P*, unless it be established that at the time when the plaintiff was conceived, *P* had no access to *A*.

V.K.

Appeal dismissed.

[S.C. N.C. 94]

*J. C. Shah and
K. S. Hegde, JJ.*
17-3-1970.

State of Maharashtra v.
Champalal Kishanlal Mohta.
Review Petition No. 29 of 1969.
in C.A. No. 1878 of 1967.

Bombay Sales Tax Act (LI of 1959) as amended by Maharashtra Act (XV of 1967), section 2 (13)—Sale of standing trees—Exigibility to tax.

Standing timber may ordinarily not be regarded as "goods", but by the inclusive definition given in section 2 (7) of the Sale of Goods Act things which are attached to the land may be the subject-matter of contract of sale provided that under the terms of the contract they are to be severed before sale or under the contract of sale.

In the present case it was expressly provided that the timber agreed to be sold shall be severed under the contract of sale. The timber was therefore "goods" within the meaning of section 2 (7) of the Sale of Goods Act and the expression "sale of goods" in the Constitution in Entry 54, List II, Schedule 7, having the same meaning as that expression has in the Sale of Goods Act, sale of timber agreed to be severed under the terms of the contract may be regarded as sale of goods, chargeable to sales tax under the Bombay Sales Tax Act, 1959 by virtue of the Amendment made with retrospective effect by the Maharashtra Act XV of 1967.

V.K.

Appeal allowed.

[S.C. N.C. 95]

*J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.*
17-3-1970.

Jhanda Singh V.
Gram Sabha of Village Umri.
C.A. No. 1487 of 1968.

Civil Procedure Code (V of 1908), section 100—Second appeal—Admission on the ground that the matter will be settled by compromise—No compromise—Power of High Court to dismiss without hearing.

The High Court had no power, once the second appeal was admitted to file, to dismiss it without a hearing. The appeal was not disposed of for non-prosecution nor on the ground of abatement. The appellant was ready to argue the appeal on the merits. Even if it be that the Court would not have admitted the appeal but for the representation made to it that it was likely to be settled by compromise, once it was admitted the Court had no power to dispose of the appeal without a hearing on the merits. The appeal must be heard subject of course to the limitation of section 100, Civil Procedure Code.

V.K.

*Appeal allowed and
case remanded.*

[S.C. N.C. 96]

*M. Hidayatullah, C.J.,
A. N. Ray and
I. D. Dik, JJ.*
17-3-1970.

*Bharat v.
State of U. P.*
Crl.A. No. 158 of 1969.

Criminal Trial—Confessions and retracted confessions—Evidentiary value of.

The law as to confessions is perhaps too widely stated. Confessions can be acted upon if the Court is satisfied that they are voluntary and that they are true. The voluntary nature of the confessions depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most potent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A Court may take into account the retracted confessions, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the Court is satisfied that it was retracted because of an after-thought or advice, the retraction may not weigh with the Court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the Courts do not act upon retracted confession without finding assurance from some other source as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an after-thought and that the earlier statement was true.

V.K.

Appeal dismissed.

[S.C. N.C. 97]

*J. C. Shah,
K. S. Hegde and
A. N. Grover, JJ.*
18-3-1970.

*Vasudev Dhanjibhai Modi v.
Rajabhai Abdul Rehman.*
C.A. No. 406 of 1967.

Civil Procedure Code (V of 1908), section 47—Execution of decree—Objection on the ground that Court which passed the decree had no jurisdiction—If may be raised before the executing Court.

A Court executing a decree cannot go behind the decree : between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that it is incorrect in law or in facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

When a decree which is a nullity, for instance where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record : where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

Thus, if the decree is on the face of the record without jurisdiction and the question does not relate to the territorial jurisdiction or under section 11 of the Suits Valuation Act, objection to the jurisdiction of the Court to make the decree may be raised : where it is necessary to investigate facts in order to determine whether the Court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding.

V.K.

Appeal allowed.

[S.C. N.C. 98]

*J. C. Shah and
K. S. Hegde, JJ.*
18-3-1970.

*Debi Prasad v.
Iribeni Devi.*
C.A. No. 707 of 1965.

Hindu Law—Adoption—Essentials—Proof.

For an adoption to be valid under the Hindu law, there must be a formal ceremony of giving and taking. This is true of the regenerate castes as well as of the Sudras. Although no particular form is prescribed for the ceremony, the law requires that the natural parent should hand over the adoptive boy and the adoptive parent must receive him, the nature of the ceremony varying according to the circumstances.

It is true that it is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. But in the case of an ancient adoption evidence showing that the boy was treated for a long time as the adopted son at a time when there was no controversy, is sufficient to prove the adoption although evidence of actual giving and taking is not forthcoming.

In the case of all ancient transactions, it is but natural that positive oral evidence will be lacking. Passage of time gradually wipes out such evidence. Human affairs often have to be judged on the basis of probabilities. Rendering of justice will become impossible if a particular mode of proof is insisted upon under all circumstances. In judging whether an adoption pleaded has been satisfactorily proved or not, we have to bear in mind the lapse of time between the date of the alleged adoption and the date on which the concerned party is required to adduce proof. In the case of an adoption said to have taken place years before the same is questioned, the most important evidence is likely to be that the alleged adoptive father held out the person claiming to have been adopted as his son ; the latter treated the former as his father and their relations and friends treated them as father and son. There is no pre-determined way of proving a fact. A fact is said to have been proved where after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Hence if after taking an overall view of the evidence adduced in the case, the Court is satisfied that the adoption pleaded is true, it must necessarily proceed on that basis, in the absence of any evidence to the contrary, that it is a valid adoption as well.

V.K.

Appeal dismissed.

In the present case by order, dated 25th February, 1965, for the assessment year 1964-65 the company was treated as an agent of the non-resident principal. Since the company was treated as an agent of the non-resident it became liable to pay advance tax in the financial year 1964-65. By virtue of section 207 read with section 208 the declaration that the company was an agent involved liability to pay advance-tax as well as tax assessed on regular assessment. We are unable to hold that the liability to pay advance tax did not arise against the company.

The plea that the provisions imposing liability to pay advance tax upon an agent of a non-resident infringe the equality clause of the Constitution has no substance. As already observed, the liability to pay advance tax arises under sections 207 and 208 and its quantum is determined by sections 209, 210 and 212 (3), and it is not predicated of the accrual of liability that the total income of the previous year should be ascertained or precisely ascertainable when demand is made by the Income-tax Officer under section 210, or when the assessee is required to make an estimate. The assumption that an assessee whose year of account coincides with the financial year is not in respect of that year liable to pay advance tax is not warranted. The computation of advance tax is not dependent upon the completion of the previous year : it depends upon the rules prescribed by sections 209, 210 and 212. Every person who has been previously assessed to tax is liable when ordered by the Income-tax Officer to pay advance tax, subject to the right to make an estimate under section 212 (1). A person who has not been previously assessed but whose income is likely to exceed the specified amount is also liable to pay advance tax. The Act does not accord discriminatory treatment between different assessees. Payment of advance tax is on account and is always liable to be adjusted against the tax assessed on regular assessment. That again applies to all assessees. It is then difficult to appreciate the grounds on which the plea of denial of equal protection may be sustained. The only ground urged, that an assessee may escape liability to pay advance tax where his previous year coincides with the financial year, is without substance, and no other ground is set up in support of the plea of violation of the guarantee of equality under Article 14 of the Constitution.

The petition therefore fails and is dismissed with costs.

T.K.K.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting C. J.*, V. RAMASWAMI AND A. N. GROVER, JJ.

State of Kerala

... *Appellant**

v.

A. B. Abdul Kadir and others

... *Respondents.*

Luxury Tax on Tobacco (Validation) Act, 1964 (IX of 1964) and Constitution of India (1950), Articles 301 and 304 (a)—Prohibition imposed by article 301 when attracted—Every case must be judged on its own facts and circumstances—Duty of High Court.

It is well-established by numerous authorities of this Court that only such restrictions or impediments which directly or immediately impede the free flow of trade, commerce and intercourse fall within the prohibition imposed by Article 301. A tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of time and circumstance. In the present case the High Court has not gone into the question whether the provisions of Act IX of 1964 and the notification dated 25th

* C.A. No. 517 of 1967.

January, 1951, issued under the Cochin Tobacco Act constitute such restrictions or impediments as directly and immediately hamper free flow of trade, commerce and intercourse and, therefor, fall within the prohibition imposed under Article 301 of the Constitution. Unless the High Court first comes to the finding on the available material whether or not there is infringement after guarantee under Article 301 of the Constitution, the further question as to whether the statute is saved under Article 304 (b) does not arise and the principle laid down by this Court in *Kalyani stores case*, (1966) 1 S.C.R. 865: (1966) 2 S.C.J. 367, cannot be invoked.

Appeal from the Judgment and Order dated the 3rd October, 1966 of the Kerala High Court in Original Petition No. 934 of 1964.

M. R. K. Pillai, Advocate for Appellant.

R. Gopalakrishnan, Advocate, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate from the judgment of the Kerala High Court in O. P. No. 934 of 1964.

The respondents are dealers in tobacco and tobacco preparation and are doing business in Mattancherry in the name and style of A. S. Bava, Tobacco. In the year 1909, Cochin Tobacco Act (VII of 1084 (M.E.)) was enacted by the Maharaja of Cochin. Section 4 of that Act prohibited the transport, import of export, sale and cultivation of tobacco except as permitted by the Act and Rules framed thereunder. Section 5 of the Act gave power to the Dewan to make rules from time to time consistent with the Act, to permit absolutely or subject to any condition the possession for sale, or cultivation of tobacco. In pursuance of the power given by this section the Dewan was making rules from time to time relating to the matters specified in the Act. Cochin State was integrated with Travancore on 1st April, 1950 in order to form the new State of Travancore-Cochin. On that date, after the Constitution came into force the State of Travancore-Cochin became a Part B State and by the Finance Act, 1950, the Central Excise and Salt Act (I of 1944) was extended to the Travancore-Cochin State. Section 13 (2) of the Act provided that if immediately before the first day of April, 1950 there was in force in any State other than Jammu and Kashmir a law corresponding to, but other than, an Act referred to in sub-section (1) or (2) of section 11, such law was repealed with effect from such date. In consequence of this provision in the Finance Act, rules which were in force on 1st April, 1950 were changed in Cochin and by a notification dated 3rd August, 1950, the system of auction sales of A and B Class shops was done away with and instead graded licence fees were introduced for various clauses of licences including 'C' class licences. The State of Travancore-Cochin was collecting licence fee from the respondents for the period from 17th August, 1950 to 31st December, 1957 on the strength of the said rules framed by the Travancore-Cochin State. In 1956 the respondents filed O. P. No. 70 of 1956 in the High Court of Kerala for the refund of the licence fee collected after 1st April, 1950 on the ground that the Cochin Tobacco Act stood repealed by the Finance Act, 1950 because of the extension of the Central Excise and Salt Act (I of 1944) to the Part B State of Travancore-Cochin and in consequence the notifications issued in August, 1950 and January, 1951 framing new rules for the issue of licences and prescribing fees therefor under the powers conferred by the Cochin and Travancore Acts were *ab initio* void because the Acts under which the notifications were purported to be issued stood repealed from 1st April, 1950. The petition was opposed by the appellant on the ground that the Act and the rules were not repealed by the extension of the Central Excise and Salt Act (I of 1944) to Travancore-Cochin State. The High Court dismissed the writ petition holding that

the tax levied by virtue of the rules framed under the Travancore-Cochin Tobacco Acts was not a duty of excise coming within the Union List but it was a tax on luxuries coming within Entry 62 of the State List. The respondents took the matter in appeal to this Court which held that the rules framed under the Cochin Tobacco Act of 1084 (M.E.) and the Travancore Tobacco Regulation of 1087 (M.E.) requiring licences to be taken out for storage and sale of tobacco and for payment of licence fee in respect thereof were law corresponding to the provisions of the Central Excise and Salt Act, 1944 and hence were superseded on 1st April, 1950 by virtue of section 13 (2) of the Finance Act, 1950. Consequently, the new rules framed in August, 1950 and January, 1951 for the respective areas of Cochin and Travancore for the issue of licences and payment of fee for storage of tobacco were invalid *ab initio*. The Court did not consider it necessary to decide whether the Cochin and Travancore Acts were within the competence of the State Legislature under Entry 62 of List II for that question would only arise if those Acts were not repealed as corresponding law under section 13 (2) of the Finance Act.

Soon after the decision of this Court the respondents complained to the appellant that a sum of Rs. 1,11,750 had been illegally collected as licence fee from 1125 to 1133 (M.E.). On 29th April, 1962, the appellant refunded a sum of Rs. 73,500 but did not return the balance.

On 16th December, 1963, the Government of Kerala promulgated Ordinance I of 1963 which was later replaced by Act IX of 1964. The Ordinance was promulgated in order to avoid the effect of the decision of this Court in *A. B. Abdul Kadir and others v. The State of Kerala*¹ in respect of the period from 17th August, 1950 to 31st December, 1957. Section 3 of the Act provides:

“For the period beginning with the 17th day of August, 1950 and ending on the 31st day of December, 1957 every person vending or stocking tobacco within any area to which this Act extends shall be liable and shall be deemed always to have been liable to pay a luxury tax on such tobacco in the form of a fee for licence for the vend and stocking of the tobacco, at such rates as may be prescribed not exceeding the rates specified in the schedule.”

Section 4 confers rule-making power and states:

“(1) The Government may, by notification in the Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for:—

- (i) the prohibition of the vending of tobacco except under a licence;
- (ii) the issue of licences for the vend and stocking of tobacco and the procedure therefor;
- (iii) Classification of licences and the rate at which tax in the form of a fee for licence may be levied for each class of licences;
- (iv) appeals from orders under the rules.

(3) The rules and notifications specified below purported to have been issued under the Tobacco Act of 1087 (Travancore Act I of 1087) or the Cochin Tobacco Act VII of 1084 as the case may be, in so far as they relate or purport to relate to the levy and collection of fees for licences for the vend and stocking of tobacco, shall be deemed to be rules issued under this section and shall be deemed to have been in force at all material times.”

* * *

Section 5 provides:

"Notwithstanding any judgment, decree or order of any Court, all fees for licences for the vend or stocking of tobacco levied or collected or purported to have been levied or collected under any of the rules or notifications specified in sub-section (3) of section 4 of the period beginning with the 17th day of August, 1950 and ending on the 31st day of December, 1957 shall be deemed to have been validly levied or collected in accordance with law as if this Act were in force on and from the 17th day of August, 1950 and the fees for licences were a luxury tax on tobacco levied under the provisions of this Act and accordingly (a) no suit or other proceeding shall be maintained or continued in any Court for the refund of any fees, paid or purported to have been paid under any of the said rules or notifications;

and

(b) no Court shall enforce a decree or order directing the refund of any fees paid or purported to have been paid under any of the said rules or notification."

Section 6 enacts:

"Where any amount paid or purported to have been paid as a fee for licence under any of the rules or notifications specified in sub-section (3) of section 4 has been refunded after the 24th day of January, 1962 and such amount would not have been liable to be refunded if this Act had been in force on the date of the refund, the person to whom the refund was made shall pay the amount so refunded to the credit of the Government in any Government treasury on or before the 16th day of April, 1964 where such amount is not so paid, the amount may be recovered from him as an arrear of land revenue under the Revenue Recovery Act for the time being in force."

The notification dated 25th January, 1951, issued under the Cochin Tobacco Act of 1984 reads as follows:

"In exercise of the powers conferred by section 5 of the Cochin Tobacco Act VII of 1984 as subsequently amended and as continued in force by the Travancore-Cochin Administration and application of Laws Act VI of 1125 and in supersession of all previous notifications and Rules on the subject, the following rules are prescribed under sanction of His Highness the Raj Pramukh for the import, export, sale, transport, possession, disposal of things confiscated and the grant of rewards under the said Act and for generally carrying out the provisions thereof.

* * *

Clause 16:

"(i) Holders (stockist or 'A' Class licences shall be entitled to purchase tobacco from any dealer within or without the State without any quantitative restriction. This class of licences shall sell only to other 'A' Class licencees or to 'B' class licencees.

(ii) the annual fees for these licencees shall be as follows :

Variety of tobacco stocked	Maximum quantity Cds	Minimum fee prescribed Rs.	Fee payable for stocking additional quantities Rs.
A. Jaffna tobacco	100	1500	Rs. 100 for additional quantity of 100 Cds or fraction thereof
B. Tobacco produced in India (Mfd.)	100	1000	Rs. 750 do
C. Bædi or Bædi tobacco	25	1000	Rs. 750 for additional quantity of 25 Cds or fraction thereof.
D. Tobacco preparation of all kinds	to the value of 20,000	1000	Rs. 750 for additional quantity to the value of Rs. 20,000 or fraction thereof.

N.B.—For the purpose of calculating stockist licence fee in respect of tobacco preparations, the cost price of the article will be taken into account. The licence fee will be realised only for the quantities brought in from outside the State.”

After the enactment of Act IX of 1964, the appellant made a demand on the respondent to repay the amount of Rs. 73,500 which had been refunded to the respondent in accordance with the Supreme Court judgment. Thereupon the respondent filed writ petition O.P. No. 934 of 1964 which was allowed by the High Court on the ground that Act IX of 1964 and the rules were *ultra vires* the Constitution of India.

It was held by the High Court that in the absence of any production of tobacco inside the Kerala State it was not competent for the Kerala Legislature to impose a tax on tobacco imported from outside the State and therefore the provisions of the Luxury Tax on Tobacco (Validation Act) 1964 violated the guarantee contained in Articles 301 and 304 of the Constitution. In reaching this conclusion the High Court purported to follow the decision of this Court in *Kalyani Stores v. The State of Orissa*¹.

It is necessary at this stage to set out the relevant Articles in Part XIII of the Constitution as it stood at the material times :

“Article 301 :

Subject to the other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free.

Article 302 :

“Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.”

Article 304 :

“Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law :

(a) impose on goods imported from other States (or the Union territories) any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest :

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.”

The true scope and effect of these Articles was the subject-matter of consideration in *Atiabari Tea Co., Ltd. v. The State of Assam*¹. The majority view was expressed by Gajendragadkar, J. at page 860 as follows :

“In construing Article 301 we must, therefore, have regard to the general scheme of our Constitution as well as the particular provisions in regard to taxing laws. The construction of Article 301 should not be determined on a purely academic or doctrinaire considerations; in construing the said Article we must adopt a realistic approach and bear in mind the essential features of the separation of powers on which our Constitution rests. It is a federal constitution which we are interpreting, and so the impact of Article 301 must be judged accordingly. Besides, it is not irrelevant to remember in this connection that the Article we are construing imposes a constitutional limitation on the power of the Parliament and State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement?”

In the *Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan*², the view of Gajendragadkar, J., was accepted as corrected by the majority of the Judges. The principle was reiterated by this Court in *Andhra Sugars Ltd. v. State of Andhra Pradesh*³. In that case the question which arose was whether section 21 of the Andhra Pradesh Sugar Cane (Regulation of Supply and Purchase) Act which authorised the State Government to levy a tax at such rate not exceeding five rupees per metric tonne as may be prescribed on the purchase of cane

1. (1961) 1 S.C.R. 809.

2. (1963) 1 S.C.R. 491.

3. (1968) 1 M.L.J. (S.C.) 117 : (1968) 1 An.

W.R. (S.C.) 117 : (1968) 1 S.C.J. 694 : A.I.R. 1968 S.C. 599.

required for use, consumption or sale in a factory was whether section 21 of the Andhra Pradesh Sugar Cane Regulation of Supply on the sale of goods did not directly impede or hamper the flow of trade and section 21 was no exception and was not violative of Article 301 of the Constitution. A similar view was expressed in the *State of Madras v. K. Nataraja Mudaliar*¹ in which the question at issue was whether sections 8 (2) and 8 (5) of the Central Sales Tax Act, 1956 were *intra vires* of Articles 301 and 303 of the Constitution. It was pointed out that an Act which was merely enacted for the purpose of imposing tax which was to be collected and to be retained by the State did not amount to a law giving or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another merely because of varying rates of tax prevailing in different States. At page 156 of the report Shah, J., speaking for the Court observed :

“The flow of trade does not necessarily depend upon the rates of sales tax : it depends upon a variety of factors, such as the source of supply, place of consumption, existence of trade channels, the rates of freight, trading facilities, availability of efficient transport and other facilities for carrying on trade. Instances can easily be imagined of cases in which notwithstanding the lower rate of tax in a particular part of the country goods may be purchased from another part, where a higher rate of tax prevails. Supposing in a particular State in respect of a commodity the rate of tax is 2 per cent., but if the benefit of that low rate is offset by the freight which a merchant in another State may have to pay for carrying that commodity over a long distance, the merchant would be willing to purchase the goods from a nearer State even though the rate of tax in that State may be higher. Existence of long-standing business relations, availability of communications, credit facilities and a host of other factors—natural and business—enter into the maintenance of trade relations and the free flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular State the rate of tax on sales is higher than the rates prevailing in other States”.

On behalf of the appellant it was contended that the High Court was not right in holding that the ratio of *Kalyani Stores case*² applied to the present case and that Kerala Act IX of 1964 was violative of Article 301 of the Constitution. The view taken by the High Court was that in the absence of any production of tobacco inside Kerala State, it was not competent for the Kerala Legislature to enact the impugned Act under Article 304(a) of the Constitution. In support of this view the High Court relied upon the following passage from the judgment of this Court :

“Exercise of the power under Article 304(a) can only be effective if the tax or duty imposed on goods imported from other States and the tax or duty imposed on similar goods manufactured or produced in that State are such that there is no discrimination against imported goods. As no foreign liquor is produced or manufactured in the State of Orissa, the power to legislate given by Article 304 is not available and the restriction which is declared on the ground of trade, commerce or intercourse by Article 301 of the Constitution remains unfettered.”

In our opinion the High Court has not correctly appreciated the import of the decision of this Court in the *Kalyani Stores case*². The appellant in that case challenged the imposition of a duty of excise on ‘foreign liquor’ imported into the Orissa State which had been levied at Rs. 40 per L. P. Gallon until

¹ (1959) 1 S.C.J. 318; (1959) 1 An.W.R. S.C.R. 829; A.I.R. 1959 S.C. 147.
² (S.C.) 28; (1963) 1 M.L.J. S.C. 28; (1965) 3 S.C.R. 865; (1966) 2 S.C.J. 367

31st March, 1961 by virtue of a notification issued in 1937 under section 27 of the Bihar and Orissa Excise Act, 1915 and which had been enhanced with effect from 1st April, 1961 by a fresh notification. It was contended on behalf of the appellant that since no 'foreign liquor' was manufactured within the State and consequently no excise duty was being levied on any locally manufactured 'foreign liquor' countervailing duty could not be charged on such liquor brought from outside the State and that the impost was in violation of Articles 301, 303 and 304 of the Constitution. It was held by the majority of Judges that the notification dated 31st March, 1961 enhancing the levy by Rs. 30 per L. P. Gallon infringed the guarantee of freedom under Article 301 and may be saved only if it falls within the exception contained in Article 304. As no liquor was produced or manufactured within the State, the protection of Article 304 was not available. The decision was based on the assumption that the notification dated 31st March, 1961 enhancing duty on Foreign liquor infringed the guarantee under Article 301 and may be saved if it fell within the exceptions contained in Article 304 of the Constitution. The Court did not intend to lay down the proposition that the imposition of a duty or tax in every case would be tantamount *per se* to an infringement of Article 301. As we have already pointed out it is well established by numerous authorities of this Court that only such restrictions or impediments which directly or immediately impede the free flow of trade, commerce and intercourse fall within the prohibition imposed by Article 301. A tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of time and circumstance. In the present case the High Court has not gone into the question whether the provisions of Act IX of 1964 and the notification dated 25th January, 1951 issued under the Cochin Tobacco Act constitute such restrictions or impediments as directly and immediately hamper free flow of trade, commerce and intercourse and, therefore, fall within the prohibition imposed under Article 301 of the Constitution. Unless the High Court first comes to the finding on the available material whether or not there is infringement of the guarantee under Article 301 of the Constitution the further question as to whether the statute is saved under Article 304 (b) does not arise and the principle laid down by this Court in *Kalyani Stores case*¹ cannot be invoked.

It was also said on behalf of the respondents that the State Legislature had no power to levy and collect licence fee under the impugned Act as it was in substance a duty of excise falling under the Union List. The contrary viewpoint was presented on behalf of the appellant and it was contended that the legislation falls under Entry 62 of List II and the State Legislature was competent to enact. It is open to the parties to argue this matter before the High Court at the time of re-hearing.

For the reasons already expressed we hold that the appeal should be allowed and the judgment of the Kerala High Court dated 3rd October, 1966 in O.P. No. 934 of 1964 should be set aside and the case should go back for hearing in the light of the law laid down in this judgment.

It is desirable that the High Court should give an opportunity to the parties to file further affidavits before taking up the case for re-hearing.

On behalf of the appellants Mr. Chagla has given an undertaking that the provisions of the Act would not be enforced against the respondents for a month from this date. The respondents say that they will apply to the Kerala High Court for stay in the meanwhile.

S.V.J.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice* AND K. S. HEGDE, J.

Sidramappa

... *Appellant* *

v.

RajasheTTY and others

... *Respondents*.*Civil Procedure Code (V of 1908), Order 2, rule 2—Bar under—When attracted.*

The requirement of Order 2, rule 2 is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance in independent proceedings.

In the instant case, the cause of action on the basis of which the previous suit was brought does not form the foundation of the present suit. The cause of action mentioned in the earlier suit, assuming the same afforded a basis for a valid claim, did not enable the plaintiff to ask for any relief other than those he prayed for in that suit. In that suit he could not have claimed the relief which he seeks in this suit. Hence the trial Court and the High Court were not right in holding that the plaintiff's suit is barred by Order 2, rule 2, Civil Procedure Code.

Quære : Order 2, rule 2 whether applicable to a suit under section 42 of the Specific Relief Act.

— *Answered* by Special Leave from the Judgment and Decree, dated the 18th October, 1968 of the Mysore High Court in Regular First Appeal No. 56 of 1963.

M. C. Chagla, Senior Advocate, (*R. Gopalakrishnan*, Advocate, with him), for Appellant.

S. V. Gupte, Senior Advocate, (*R. V. Pillai*, *Sadashiv Rao* and *P. Keshava Pillai*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Hegde, J.—This is a plaintiff's appeal by Special Leave. The plaintiff sued for possession of the suit properties on the basis his title. The suit properties originally belonged to the family of one Veerbaswanth Rao Deshmukh. He died in 1892 without male issues, leaving behind him his widow Ratnabai and a daughter by name Lakshmibai. Ratnabai succeeded to the estate of her husband. She died in 1924. On her death Lakshmibai became entitled to the suit properties. But one Parwatibai *alias* Pravag Bai took unlawful possession of the suit properties. Hence Lakshmibai instituted a suit for their possession in the Court of Sadar Adalath, Gulbarga against the said Parwatibai and obtained a decree. In execution of the said decree Lakshmibai obtained delivery of the lands described in Schedule II to the plaint. Lakshmi died in 1948. Sometime thereafter Parwatibai also died. The defendant claiming to be the sister's son of Veerbaswanth Rao Deshmukh got himself impleaded as the legal representative of Lakshmibai in the execution proceedings and sought delivery of the lands mentioned in Schedule I of the plaint. Meanwhile one Vishwanath alleging to be the legal representative of Parwatibai got himself impleaded in the execution proceedings. Thereafter the defendant and Vishwanath entered into a compromise in pursuance of which Vishwanath delivered possession of the lands included in Schedule I to the defendant. Sometime thereafter the plaintiff applied to the Court to reopen the execution proceedings and implead him as the legal representative of Lakshmibai claiming that he is the adopted son

of Lakshmibai. The executing Court dismissed his application holding that his remedy was by way of a separate suit. A revision taken against that order to the High Court was rejected. Thereafter the plaintiff filed a suit in the Court of Subordinate District Judge. Bidar for a declaration that he is entitled to be impleaded in the execution proceedings mentioned earlier as the representative of Lakshmibai and to proceed with the execution after setting aside the order made by the executing Court on the basis of the compromise entered into between the defendant and Vishwanath. It may be noted that that was the only relief asked for in the plaint. The purported cause of action for the suit was the dismissal of the plaintiffs application for impleading him in the execution proceedings. That suit should have been dismissed on the ground that it was not maintainable in law. But strangely enough it was dismissed on the ground that it was hit by section 42 of the Specific Relief Act inasmuch as the plaintiff did not sue for possession of the concerned property. Thereafter the suit from which this appeal arises was instituted by the plaintiff on the basis of his title. The trial Court dismissed his suit in respect of the lands mentioned in Schedule I of the plaint on the ground that the relief in question is barred by Order 2, rule 2, Code of Civil Procedure. It decreed the suit for the possession of the lands mentioned in Schedule II except items 3 and 9. It also decreed the plaintiff's claim in respect of the cash amount mentioned in the plaint.

Both the plaintiff and the defendant went up in appeal to the High Court of Mysore as against the decision of the trial Court to the extent that decision was against them. The High Court affirmed the decision of the trial Court.

Before the trial Court and the High Court, there was controversy as regards the truth of adoption pleaded by the plaintiff. Both the Courts have upheld the plaintiff's claim that he was adopted by the husband of Lakshmibai. That question was not reopened before us.

Before the High Court, the learned Counsel for the plaintiff conceded that the plaintiff's suit in respect of items 3 and 9 of Schedule II of the plaint is barred by limitation. Hence that question stands concluded.

The only question that remains for consideration is whether the High Court and the trial Court were right in their conclusions that the plaintiff's claim in respect of the lands mentioned in Schedule I of the plaint is barred by Order 2, rule 2, Code of Civil Procedure.

We are of the opinion that the trial Court and the High Court erred in holding that the plaintiff's suit in respect of the lands mentioned in plaint Schedule I is barred by Order 2, rule 2, Code of Civil Procedure. The suit instituted by the plaintiff in the Court of Subordinate District Judge. Bidar for a declaration that he is entitled to be impleaded in the execution proceedings as legal representative of Lakshmibai and to proceed with the execution proceedings, was as mentioned earlier, a misconceived one. It was exercise in futility. His remedy was to file a suit for the possession of the concerned properties on the basis of his title.

The High Court and the trial Court proceeded on the erroneous basis that the former suit was a suit for a declaration of the plaintiff's title to the lands mentioned in Schedule I of the plaint. The requirement of Order 2, rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. "Cause of action" means the 'cause of action for which the suit was brought'. It cannot be said that the cause of action on which the present suit was brought is the same as that in the previous suit. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause

of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings—see *Mohd. Hafiz v. Mohd. Zakaria*¹.

As seen earlier the cause of action on the basis of which the previous suit was brought does not form the foundation of the present suit. The cause of action mentioned in the earlier suit, assuming the same afforded a basis for a valid claim, did not enable the plaintiff to ask for any relief other than those he prayed for in that suit. In that suit he could not have claimed the relief which he seeks in this suit. Hence the trial Court and the High Court were not right in holding that the plaintiff's suit is barred by Order 2, rule 2, Code of Civil Procedure.

In view of our above conclusion, we have not thought it necessary to go into the controversy whether Order 2, rule 2, Code of Civil Procedure is applicable to a suit under section 42 of the Specific Relief Act.

We are unable to accept the contention of the learned Counsel for the appellant that we should allow to the appellant mesne profits at least from the date of the suit. No claim for mesne profits was made in the plaint. Therefore we cannot go into that question in this appeal. For the mesne profits, if any, due to the plaintiff, he must take separate steps according to law.

In the result this appeal is allowed and the trial Court's decree is modified by including therein the lands mentioned in Schedule I of the plaint. In other respects the decree of the trial Court is sustained. The appellant will be entitled to his costs both in this Court as well as in the High Court.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, S. M. SIKRI, R. S. BACHAWAT, G. K. MITTER AND K. S. HEGDE, JJ.

M/s. Tilokchand Motichand and others

... *Petitioners**

v.

H. B. Munshi, Commissioner of Sales Tax, Bombay and another ... *Respondents.*

Constitution of India (1950), Article 32—Scope—The Sales Tax Officer forfeiting the amount (from the petitioner) realised from their customers outside Bombay on account of sales tax—Petitioner questioning the vires of the provision as violative of Article 19(1) (f) under Article 226 of the Constitution—Payment under coercion after failing in the High Court—Supreme Court striking down the provision as violative of Article 19(1) (f)—Petitioner filing the petition under Article 32 within six months from the date of judgment—Laches on the part of the petitioner if deprives him of the relief under Article 32.

Bombay Sales Tax Act (Bombay Act III of 1953), S. 12-A (4), Limitation Act (XXXVI of 1963.)

The Sales Tax Officer, by his order dated 17th March, 1958, forfeited a sum of Rs. 26,563.50 under section 21 (4) of the Bombay Sales Tax Act (Bombay Act III of 1953), which provision is similar to section 12-A (4) of the Bombay Sales Tax Act, 1946. The petitioner promptly filed a writ petition in Bombay High Court challenging this order. His petition was dismissed on 28th November, 1958. He also failed in appeal before the Division Bench on 7th July, 1959. An order of attachment followed. The petitioner paid the sum of Rupees 26,563.50 in various instalments from 3rd October, 1959 to 8th August, 1960.

1. L.R. (1922) 49 I.A. 9: 42 M.L.J. 248.

* W.P. No. 53 of 1968.

22nd November, 1968.

On 29th September, 1967, on appeal from the decision of the Gujarat High Court in *Kantilal Bahulal v. H. G. Patel Sales Tax Officer* (1965) 16 S.T.C. 973. Section 12-A (4) of the Bombay Sales Tax Act, 1946 was struck down in *Kantilal Bahulal v. H. C. Patel, Sales Tax Officer*, (1968) 21 S.T.C. 174: (1968) 1 S.C.J. 768, as it infringed Article 19 (1) (f) of the Constitution. On 9th February, 1968, the petitioner filed a writ petition under Article 32 of the Constitution praying that the order dated 17th March, 1958 and the notice and the order, dated 18th December, 1958 and 24th December, 1958, be quashed.

Could any time-limit be imposed on petitions under Article 32 of the Constitution?

Could the Indian Limitation Act be applied by analogy appropriate to the facts of the case?

What is to be done in this case?

Held by majority (*Hidayatullah, C. J.* and *Bachawat* and *Mitter, JJ.*) with *Sikri* and *Hedge, JJ.* dissenting.

Per *Hidayatullah, C. J.*—A petition under Article 32 is not a suit and it is also not petition or an application to which the Limitation Act applies. To put curbs in the way enforcement of Fundamental Rights through legislative action might well be questioned under Article 13 (2). If a short period of limitation were prescribed the Fundamental Right might well be frustrated. Prescribing too long period might enable stale claims to be made to the detriment of other rights which might emerge. If then there is no period prescribed what is the standard to follow? Utmost expedition is the *sine qua non* for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance of delay. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction. Therefore, the question is one of discretion for this Court to follow from case to case. It will depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose.

The question is: Can the petitioner in this case take advantage, after a lapse of a number of years, of the decision of this Court? Everybody is presumed to know the law. It was his duty to have brought the matter before this Court for consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another person more adventurous than he in his turn got the statute declared unconstitutional, and got a favourable decision. There is no question here of a mistake of law entitling the petitioner to invoke analogy of the Article in the Limitation Act. The present petitioner should have taken the right ground in the High Court and taken it in appeal to this Court after the High Court decided against it. Not having done so and having abandoned his own litigation years ago, this Court cannot apply the analogy of the Article in the Limitation Act and give him the relief now.

Per *Sikri, J.*—The petitioner was under a mistake of law, when he paid up, the mistake being that he thought section 12-A (4) was a valid provision in spite of its imposing unreasonable restrictions. This mistake he discovered like all assesses when this Court struck down section 12-A (4) of the Bombay Sales-tax Act. He has come to this Court within six months of that day and there is no delay.

Per *Bachawat, J.*—The normal remedy for recovery of money paid to the State under coercion or mistake of law is by suit. Where the remedy in a writ application under Article 32 or Article 226 corresponds to a remedy in an ordi-

nary suit and the latter remedy subject to the bar of a statute of limitation, the Court in its writ jurisdiction acts by analogy to the statute, adopts the statute as its own rule of procedure and in the absence of special circumstances imposes the same limitation on the summary remedy in the writ jurisdiction. If the right to property is extinguished by prescription under section 27 of the Limitation Act, 1963, the petitioner has no subsisting right which can be enforced under Article 32.

Per Mitter, J.—A payment under coercion has to be treated in the same way for the purpose of a claim to refund as a payment under mistake of law, but there is an important distinction between the two. A payment under a mistake of law may be questioned only when the mistake is discovered but a person who is under no misapprehension as to his legal rights and complains about the illegality or the *ultra vires* nature of the order passed against him can immediately after payment formulate his cause of action as one of payment under coercion. As the petitioners have come to this Court long after the date when they could have properly filed a suit, the application must be rejected.

Per Hedge, J.—The right given to the citizens to move this Court under Article 32 is itself a fundamental right and the same cannot be circumscribed or curtailed except as provided by the Constitution. It is inappropriate to equate the duty imposed on this Court to the powers of Chancery Court in England or the equitable jurisdiction of the American Courts. A duty imposed by the Constitution cannot be compared with discretionary powers. The power conferred on this Court by Article 32 is not a discretionary power. This power is not similar to the power conferred on the High Courts under Article 226 of the Constitution. Hence laches on the part of an aggrieved party cannot deprive him of the right to get relief from this Court under Article 32.

(Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights).

H. K. Shah and B. Datta, Advocates and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, for Petitioners.

C. K. Daphary, Attorney-General for India (*R. Gopalakrishnan, R. H. Dhebar and S. P. Nayar*, Advocates, with him), for Respondents.

The Judgments of the Court were delivered by

Hidayatullah, C. J.—This petition has led to a sharp division of opinion of among my brethren: Sikri and Hedge, JJ., would allow the petition and Bachawat and Mitter, JJ., would dismiss it. They have differed on the question whether the petition deserves to be dismissed on the ground of delay. I agree in the result reached by Bachawat and Mitter, JJ., and would also dismiss it. I wish to state briefly my reasons.

At the threshold it appears to me that as there is no law which prescribes a period of limitation for such petitions, each of my brethren has really given expression to the practice he follows or intends to follow. I can do no more than state the views I hold on this subject and then give my decision on the merits of the petition in the light of those views.

The problem divides itself into two. The first part is a general question to be considered in two aspects: (a) whether any limit of time at all can be imposed on petitions under Article 32, and (b) whether this Court would apply by analogy an article of the Indian Limitation Act appropriate to the facts of the

case or any other limit? The second is what is to be done in this case? I shall begin by stating my views on the first question.

There appears to be some confusion about the scope of Article 32. That Article gives the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution. The provision merely keeps open the doors of this Court, in much the same way, as it used to be said, the doors of the Chancery Court were always open. The State cannot place any hindrance in the way of an aggrieved person seeking to approach this Court. This is logical enough for it is against State action that Fundamental Rights are claimed. But the guarantee goes no further at least on the terms of Article 32. Having reached this Court, the extent or manner of interference is for the Court to decide. It is clear that every case does not merit interference. That must always depend upon the facts of the case. In dealing with cases which have come before it, this Court has already settled many principles on which it acts. A few of them may be mentioned here.

This Court does not take action in cases covered by the ordinary jurisdiction of the civil Courts, that is to say, it does not convert civil and criminal actions into proceedings for the obtainment of writs. Although there is no rule or provision of law to prohibit the exercise of its extraordinary jurisdiction this Court has always insisted upon recourse to ordinary remedies or the exhaustion of other remedies. It is in rare cases, where the ordinary process of law appears to be inefficacious, that this Court interferes even where other remedies are available. This attitude arises from the acceptance of a salutary principle that extraordinary remedies should not take the place of ordinary remedies.

Then again this Court refrains from acting under Article 32 if the party has already moved the High Court under Article 226. This constitutes a comity between the Supreme Court and the High Court. Similarly, when a party had already moved the High Court with a similar complaint and for the same relief and failed, this Court insists on an appeal to be brought before it and does not allow fresh proceedings to be started. In this connection the principle of *res judicata* has been applied, although the expression is somewhat inapt and unfortunate. The reason of the rule no doubt is public policy which Coke summarised as "*interest reipublicæ res judicatas non rescindi*" but the motivating factor is the existence of another parallel jurisdiction in another Court and that Court having been moved, this Court insists on bringing its decision before this Court for review. Again this Court distinguishes between cases in which a speaking order on merits has been passed. Where the order is not speaking or the matter has been disposed of on some other ground at the threshold, this Court in a suitable case entertains the application before itself. Another restraint which this Court puts on itself is that it does not allow a new ground to be taken in appeal. In the same way, this Court has refrained from taking action when a better remedy is to move the High Court under Article 226 which can go into the controversy more comprehensively than this Court can under Article 32.

It follows, therefore, that this Court puts itself in restraint in the matter of petitions under Article 32 and this practice has now become inveterate. The question is whether this Court will inquire into belated and state claims or take note of evidence of neglect of one's own rights for a long time? I am of opinion that not only it would but also that it should. The party claiming Fundamental Rights must move the Court before other rights come into existence. The action of Courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court. This principle is well-recognised and has been applied by Courts in England and America.

The English and American practice has been outlined in Halsbury's Laws of England and *corpus juris secun.um*. It has been mentioned by my brethren in their opinions and I need not traverse the same grounds again except to say this that Courts of Common Law in England were bound by the Law of Limitation but not the Courts of Chancery. Even so the Chancery Courts insisted on expedition. It is trite learning to refer to the maxim "delay defeats equity" or the latin of it that the Courts help those who are vigilant and do not alumber over their rights. The Courts of Chancery, therefore, frequently applied to suits in equity the analogy of the law of Limitation applicable to actions at law and equally frequently put a special limitation of their own if they thought that the suit was unduly delayed. This was independently of the analogy of law relating to limitation. The same practice has been followed in the United States.

In India we have the Limitation Act which prescribes different periods of limitation for suits, petitions or applications. There are also residuary Articles which prescribe limitation in those cases where no express period is provided. If it were a matter of a suit or application, either an appropriate article or the residuary article would have applied. But a petition under Article 32 is not a suit and it is also not a petition or an application to which the Limitation Act applies. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13 (2). The reason is also quite clear. If a short period of limitation were prescribed the Fundamental Right might well be frustrated. Prescribing too long a period might enable stale claims to be made to the detriment of other rights which might emerge.

If then there is no period prescribed what is the standard for this Court to follow? I should say that utmost expedition is the *sine qua non* for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactory all semblance of delay. I am not indicating any period which may be regarded as the ultimate limit of action for that would be taking upon myself legislative functions. In England a period of 6 months has been provided statutorily, but that could be because there is no guaranteed remedy and the matter is one entirely of discretion. In India I will only say that each case will have to be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction.

Therefore, the question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some Article but this Court need not necessarily give the total time to the litigant to move this Court under Article 32. Similarly in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose.

Applying these principles to the present case what do I find? The petitioner moved the High Court for relief on the ground that the recovery from him was unconstitutional. He set out a number of grounds but did not set out the ground on which ultimately in another case recovery was struck down by this Court. That ground was that the provisions of the Act were unconstitutional. The question is: can the petitioner in this case take advantage, after a lapse of a number of years, of the decision of this Court? He moved the High Court but did not come up in appeal to this Court. His contention is that the ground on which his petition was dismissed was different and the ground on which the statute was struck down was not within his knowledge and therefore he did not know of it and pursue it in this Court. To that I answer that law will presume that he knew the exact ground of unconstitutionality. Everybody is presumed

to know the law. It was his duty to have brought the matter before this Court for consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another person more adventurous than he in his turn got the statute declared unconstitutional, and got a favourable decision. If I were to hold otherwise, then the decision of the High Court in any case once adjudicated upon and acquiesced in may be questioned in a fresh litigation revived only with the argument that the correct position was not known to the petitioner at the time when he abandoned his own litigation. I agree with the opinion of my brethren Bachawat and Mitter, JJ., that there is no question here of a mistake of law entitling the petitioner to invoke analogy of the Article in the Limitation Act. The grounds on which he moved the Court might well have impressed this Court which might have also have decided the question of the unconstitutionality of the Act as was done in the subsequent litigation by another party. The present petitioner should have taken the right ground in the High Court and taken it in appeal to this Court after the High Court decided against it. Not having done so and having abandoned his own litigation years ago, I do not think that this Court should apply the analogy of the Article in the Limitation Act and give him the relief now. *The petition, therefore, fails and is dismissed with costs.*

Sikri, J.—I have had the advantage of reading the drafts of the judgments prepared by Mitter, J., and Bachawat, J. I agree with Mitter, J., in his conclusion that the rule laid down in *Daryao v. State of U.P.*¹ is inapplicable to the facts of the case, but for the reasons I will presently give, in my opinion the petition should be allowed.

Article 32 (2) of the Constitution confers a judicial power on the Court. Like all judicial powers, unless there is an express provision to the contrary, it must be exercised in accordance with fundamental principles of administration of justice. General principles of *res judicata* were accordingly applied by this Court in *Daryao v. State of U.P.*¹ and *Amalgamated Coalfields Ltd. v. Janapada Sabha, Chinawara*². I understand that one of the fundamental principles of administration of justice is that, apart from express provisions to the contrary, stale claims should not be given effect to. But what is a stale claim? It is not denied that the Indian Limitation Act does not directly apply to a petition under article 32. Both the English Courts and the American Courts were confronted with a similar problem. In the United States the Federal Courts of Equity solved the problem thus:

“Except, perhaps, where the statute by its express terms applies to suits in equity as well as to actions at law, or where the jurisdiction of law and equity is concurrent, the rule appears to be that Federal Courts sitting in equity are not bound by state statutes of limitation. Nevertheless, except where unusual conditions or extraordinary circumstances render it equitable to do so, the Federal Courts usually act in analogy to the state statutes of limitation applicable to cases of like character.” (Vol. 34, American Jurisprudence, Limitation of Actions, 154).”

In Courts of Admiralty, where the statutes of limitation do not control proceedings, the analogy of such statutes is ordinarily followed unless there is something exceptional in the case. (*ibid*)

Story on Equity Jurisprudence states the legal position thus:

“It was too, a most material ground, in all bills for an account, to ascertain whether they were brought to open and correct errors in the account *recenti facto*; or whether the application was made after a great lapse of time. In

1. (1962) 1 S.C.R. 574 : (1963) 1 S.C.J. 702: (S.C.) 16.
(1962) 2 An.W.R. (S.C.) 16: (1962) M.L.J. 2. A.I.R. 1964 S.C. 1013, 1018.

cases of this sort, where the demand was strictly of a legal nature, or might be cognizable at law, Courts of equity governed themselves by the same limitations as to entertain such suits as were prescribed by the Statute of Limitations in regard to suits in Courts of common law in matters of account. If, therefore, the ordinary limitation of such suits at law was six years, Courts of equity would follow the same period of limitation. In so doing, they did not Act, in cases of this sort (that is, in matter of concurrent jurisdiction) so much upon the ground of analogy to the Statute of Limitations, as positively in obedience to such statute. But where the demand was not of a legal nature, but was purely equitable; or where the bar of the statute was inapplicable; Courts of equity had another rule, founded sometimes upon the analogies of the law, where such analogy existed, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence. Hence, in matters of account, although not barred by the Statute of Limitations, Courts of equity refused to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions had become obscure by time, and the evidence might have been lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *Vigilanti bus, non dormientibus jura subveniunt*. Under peculiar circumstances, however, excusing or justifying the delay, Courts of equity would not refuse their aid in furtherance of the rights of the party; since in such cases there was no pretence to insist upon laches or negligence, as a ground for dismissal of the suit; and in one case carried back the account over a period of fifty years." (Third Edition, page 224, 529).

In England, as pointed out by Bachawat, J., the Court of Chancery acted on the analogy of Statute of Limitation (*vide* Halsbury, Vol. 14 p. 647, article 1190).

It seems to me, however, that the above solution is not quite appropriate for petitions under article 32. A delay of 12 years or 6 years would make a strange bed-fellow with a direction or order or writ in the nature of *mandamus*, *certiorari* and prohibition. Bearing in mind the history of these writs I cannot believe that the Constituent Assembly had the intention that five Judges of this Court should sit together to enforce a fundamental right at the instance of a person, who had without any reasonable explanation slept over his rights for 6 or 12 years. The history of these writs both in England and the U.S.A., convinces me that the underlying idea of the Constitution was to provide an expeditious and authoritative remedy against the inroads of the State. If a claim is barred under the Limitation Act, unless there are exceptional circumstances, *prima facie* it is a stale claim and should not be entertained by this Court. But even if it is not barred under the Indian Limitation Act, it may not be entertained by this Court if on the facts of the case there is unreasonable delay. For instance, if the State had taken possession of property under a law alleged to be void, and if a petitioner comes to this Court 11 years after the possession was taken by the State, I would dismiss the petition on the ground of delay, unless there is some reasonable explanation. The fact that a suit for possession of land would still be in time would not be relevant at all. It is difficult to lay down a precise period beyond which delay should be explained. I favour one year because this Court should not be approached lightly, and competent legal advice should be taken and *pros* and *cons* carefully weighed before coming to this Court. It is common knowledge that appeals and representations to the

higher authorities take time; time spent in pursuing these remedies may not be excluded under the Limitation Act, but it may ordinarily be taken as a good explanation for the delay.

It is said that if this was the practice the guarantee of article 32 would be destroyed. But the article nowhere says that a petition, howsoever late, should be entertained and a writ or order or direction granted, howsoever remote the date of infringement of the fundamental right. In practice this Court has not been entertaining stale claims by persons who have slept over their rights. There is no need to depart from this practice and tie our hands completely with the shackles imposed by the Indian Limitation Act. In the case of applications under article 226 this Court observed in *State of Madhya Pradesh v Bhailal Bhai*.¹

"It may however be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of *mandamus*. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a *prima facie* triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of *mandamus* for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil Court and to refuse to exercise in his favour the extraordinary remedy under article 226 of the Constitution."

In *State of Kerala v. Aluminium Industries*² Wanchoo, J., speaking on behalf of a large Bench of this Court, observed:

"There is no doubt in view of the decision of this Court in *Sales Tax Officer v. Kanhaiyalal*³ that money paid under a mistake of law comes within the word "mistake" in section 72 of the Contract Act and there is no question of estoppel when the mistake of law is common to both the parties, which was the case here inasmuch as the respondent did not raise the question relating to Article 286 of the Constitution and the Sales Tax Officer had no occasion to consider it. In such a case where tax is levied by mistake of law it is ordinarily the duty of the State subject to any provision in the law relating to sales tax (and no such provision has been brought to our notice) to refund the tax. If refund is not made, remedy through Court is open subject to the same restrictions and also to the period of limitation (see Article 96 of the Limitation Act, 1908), namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake (see *State of Madhya Pradesh v. Bhailal Bhai*¹). In this view of the matter it was the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund if mistake was proved and the claim was made within the period of limitation."

But these cases cannot directly apply to petitions under article 32 because they proceed from the premise that the remedy is discretionary under article 226.

Coming to the facts of this case, which have been stated in detail by Mitter, J., it seems to me that the delay in coming to this Court has been adequately explained. In brief, the facts are these: The Sales Tax Officer, by his order dated 17th March, 1958, forfeited a sum of Rs. 26,563.50 under section 21 (4) of the Bombay Sales Tax Act (Bombay Act III of 1953), which provision is similar

1. (1964) 6 S.C.R. 261, 271-72.

2. (1965) 16 S.T.C. 689, 692.

3. (1959) 8 C.J. 53 : (1959) 1 A.W.R.

(S.C.) 35 : (1959) 1 M.L.J. (S.C.) 35 : (1959) S.C.R. 1350.

to section 12-A (4) of the Bombay Sales Tax Act, 1946. The petitioner promptly filed a writ petition in the Bombay High Court challenging this order. His petition was dismissed on 28th November, 1958. He also failed in appeal before the Division Bench on 7th July, 1959. An order of attachment followed. The petitioner paid the sum of Rs. 26,563.50 in various instalments from 3rd October, 1959, to 8th August, 1960. By letter dated 9th January, 1962, the petitioner was called upon to pay a penalty amounting to Rs. 12,517.68 on account of late payment of Sales Tax dues but this order of penalty was ultimately cancelled.

The Gujarat High Court (Shelat, C.J., and Bhagwati, J.) in *Kantilal Babulal v. H. C. Patel, Sales Tax Officer*¹ held on 2nd December, 1963, that section 12-A (4) of the Bombay Sales Tax Act, 1946 was valid and did not violate Article 19 (i) (f) as it was saved by article 19 (5). On 29th September, 1967, this Court, on appeal, in *Kantilal Babulal v. H. C. Patel, Sales Tax Officer*² struck down this provision as it infringed Article 19 (1) (f). On 9th February, 1968, four petitioners—hereinafter compendiously referred to as the petitioner—filed this petition praying that the order dated 17th March, 1958, and the notice and order dated 18th December, 1958, and 24th December, 1958, be quashed.

There is no doubt that under section 72 of the Contract Act the petitioner would be entitled to the relief claimed and the refund of the amount if he paid the money under mistake of law. I find it difficult to appreciate why the payment was not made under a mistake of law. In my opinion the petitioner was mistaken in thinking that the money was liable to be refunded under a valid law. No body has urged before us that the grounds which he had raised before the High Court were sound.

The petitioner had attempted to raise before the Bombay High Court the following grounds:

“1. Inasmuch as the sum of Rs. 26,563.50 was paid by way of refund under the Bombay Sales Tax Act, 1946, the taxing authorities had exceeded their power under section 21 (4) of the Act of 1953, in forfeiting the said sum of money.

2. Assuming that the respondent had power to forfeit the sum under the Act of 1953, it was strictly limited to taxes payable under the provisions of the Act and as no tax was payable on outside sales the authorities had no power to forfeit the sum of Rs. 26,563.50

3. * * * * *

4. Even assuming while denying that the respondent had power to forfeit the sum of Rs. 26,563.50, the power to forfeit an amount as a tax presupposes a power to impose a tax and inasmuch as on a proper construction of the relevant provisions of the Constitution no State Legislature had at any time a power to impose tax on the aforesaid transactions, the power to forfeit tax in respect of those transactions is *ultra vires* the State Legislature.”

The learned Single Judge held:

“This appears to me to be a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights I would not in my discretion interfere by way of issuing a writ. I am not depriving the petitioner of any other appropriate remedy. I have, therefore, decided to dismiss this petition on that single ground.”

The Division Bench, on appeal, decided on the limited ground that “Mr. Justice K. K. Desai having exercised his discretion no case is made out for

1. (1965) 16 S.T.C. 973.

2. (1968) 21 S.T.C. 174 : (1968) 1 S.C.J. 763.

interference with the exercise of that discretion." The petitioner rightly did not file an appeal to this Court for he would have had little chance of succeeding.

Suppose a petitioner challenges a provision of the Sales Tax Act before the High Court on the ground that it does not fall within List II or List III of the Seventh Schedule. He fails and pays the tax and does not appeal to the Supreme Court. Ultimately, in another petition, the provision is struck down under article 14 or article 19, a point which he and his lawyers never thought of. All assesseees who had paid tax without challenging the provision would be entitled to approach this Court under article 32 and claim a refund (see *Sales Tax Officer, Benaras v. Kanhaiya Lal Mukundlal Saraf*). But why not the assessee who applied to the High Court? The answer given is that he had thought at one time that the law was bad, though on wrong grounds. If a law were framed sanctioning the above discrimination, I believe, it would be difficult to sustain it under article 14, but yet this is the discrimination which the respondent wants me to sanction.

The grounds extracted above show that it never struck the petitioner that the provision could be challenged on the ground ultimately accepted by this Court. If the petitioner had not thought of going to the Bombay High Court on the points he did, and had paid on demand, as most of the assesseees do, he would, I imagine, have been entitled to maintain this petition. But it is now said that the petitioner's position is worse because he exercised his right to approach the High Court under Article 226. The contention seems to be that when a petitioner approaches a High Court and fails, he can no longer suffer from any mistake of law even if the point on which this Court ultimately strikes down the provision, never struck him or his lawyer or the Court. I cannot uphold this contention.

In my opinion the petitioner was under a mistake of law, when he paid up, the mistake being that he thought that section 12-A (4) was a valid provision in spite of its imposing unreasonable restrictions. This mistake he discovered like all assesseees when this Court struck down section 12-A (4) of the Bombay Sales Tax Act. He has come to this Court within six months of that day and there is no delay.

The petition is accordingly allowed and the impugned order dated 17th March, 1958, quashed and the respondent directed to refund the amount. Under the circumstances there will be no order as to costs.

Bachawat, J.—I have had the advantage of reading the judgment prepared by G. K. Mitter, J. For the reasons given in this judgment, I agree with the order proposed by him. As the earlier petition filed in the High Court was not dismissed on the merits, the present petition is not barred by *res judicata* or principle analogous thereto.

The petitioners realised Rs. 26,563.50 P from their customers outside Bombay on account of sales tax. The Sales Tax Officer by his order dated 17th March, 1958 forfeited this sum under section 21 (4) of the Bombay Sales Tax Act (III of 1953). On 28th March, 1958, the petitioners filed a writ petition in the Bombay High Court seeking to restrain Sales Tax Officer from recovering the amount. They pleaded that they were not liable to pay the amount, that section 21 (4) was *ultra vires* the powers of the State Legislature and that the order of forfeiture was violative of Articles 19 (1) (f) and 365 of the Constitution and was invalid. On 28th November, K. K. Desai, J., dismissed the petition. He held that the petitioners having defrauded other persons were not entitled to any relief. The petitioners filed an appeal against the order. In the memorandum

of appeal, they pleaded that the threatened levy was in violation of Articles 19 (1) (f) and 31 of the Constitution. The appeal was dismissed on 13th July, 1959. In the meantime on 24th December, 1958, the Collector of Bombay attached the petitioners' properties. Between 3rd August, 1959 and 8th August, 1960, the petitioners paid the sum of Rs. 26,563.50 P. to the Collector of Bombay. In *Kantilal Bapulal and Brothers v. H. C. Patel*¹ decided on 29th September, 1967, this Court struck down section 12-A (4) of the Bombay Sales Tax Act, 1946, as unconstitutional and violative of Article 19 (1) (f). The arguments in the present appeal proceeded on the assumption that section 21 (4) of the Bombay Sales Tax Act, 1953 is liable to be struck down on the same ground. On 9th February, 1968, the petitioners filed the present writ petition under Article 32 of the Constitution claiming refund of Rs. 26,563.50P under section 72 of the Indian Contract Act, 1872. They alleged that they paid this sum to the Collector under coercion and/or mistake of law, and that they discovered the mistake on 29th September, 1967.

The points arise for decision in this writ petition: (1) Would the claim be barred by limitation if it were the subject-matter of a suit in February, 1968 and (2) if so, are the petitioners entitled to any relief in this petition under Article 32 of the Constitution.

Subject to questions of limitation, waiver and estoppel, money paid under mistake or coercion may be recovered under section 72 of the Indian Contract Act. The right to relief under section 72 extends to money paid under mistake of law, i.e. "mistake in thinking that the money paid was due when, in fact, it was not due." *Shiva Prasad Singh v. Srish Chandra Nandi*², *Sales Tax Officer v. Mulchandlal Saraf*³.

In my opinion, the petitioners were not labouring under any mistake of law when they made the payments. As early as March, 1958, they filed a writ petition for restraining the levy under the order dated 17th March, 1958, claiming that the order was in valid and that section 21 (4) of the Bombay Sales Tax Act, 1953, was *ultra vires* and unconstitutional. They might not have then known the precise ground upon which the Court subsequently struck down a similar provision of law, but they had discovered presumably under legal advice that they were not legally bound to make any payment. After the writ petition was dismissed their properties were attached and they made the payments under coercion in 1959 and 1960. The payments were not made under a mistake of law or as pointed out in *Shiva Prasad Singh's case*² under a mistake in thinking that the money was due. They cannot claim any relief on the ground of mistake.

As we are assuming in favour of the petitioners that section 21 (4) of the Bombay Sales Tax Act, 1953 as invalid, we must hold that they made the payments under coercion. A suit for the recovery of the money on this ground instituted on 1st January, 1964, would be governed by Article 24 of the Limitation Act, 1963, and the period of limitation would be three years from the dates in 1959 and 1960 when the money was received by the respondents. The petitioners cannot obtain an extension of the period under section 30(a) of the Limitation Act, 1963, as Article 62 of the Indian Limitation Act, 1908, prescribed the same period of limitation. A suit for recovery of tax or other levy illegally collected was governed by Article 62 and not by Article 120, see *A. Venkata Subba Rao v. State of Andhra Pradesh*⁴. Accordingly a suit

1. (1968) 1 S.C.J. 768; (1968) 21 S.T.C. 174.

2. L.R. (1942) 76 I.A. 244, 254; (1949) 2 M.L.J. 657.

3. (1959) S.C.R. 1350, 1361, 1362; (1959

S.C.J. 53.

4. (1965) 2 S.C.R. 577, 612-620; (1966) 1 M.L.J. (S.C.) 42; (1966) 1 An.W.R. (S.C.) 42; (1965) 1 S.C.J. 241.

for the recovery of money instituted in February, 1968, would be barred by limitation.

If the petitioners could claim relief on the ground of mistake the suit would be governed by Article 96 of the Indian Limitation Act, 1908, and time would begin to run from the date when the mistake becomes known to the plaintiff. In *State of Madhya Pradesh v. Bhailal Bhai and others*¹ and *State of Kerala v. Aluminium Industries Ltd.*² it was held that Art. 96 applied to a suit for recovery of money paid under a mistake of law. Section 17 (1) (c) of the Limitation Act, 1963, now provides that in the case of a suit for relief from the consequences of a mistake the period of limitation does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. Section 17 (1) (c) corresponds to section 26 (c) of the Limitation Act, 1939 (2 & 3 Geo. 6, c. 21). It was held in *Re Diplock*³ that section 26 (c) applied by analogy to a suit for recovery of money paid under mistake of law. On appeal, the House of Lords said that the section presented many problems and refrained from saying more about it, see *Ministry of Health v. Simpson*.⁴ In some American States, it has been held that a mistake of law cannot be regarded as a mistake within a similar statute and time ran from the date of the accrual of the cause of action, see *Corpus Juris Secundum* Vol. 54, Limitation of Actions, Article 198, page 202, *Morgans v. Jasper County*,⁵ and the cases referred to therein. It is not necessary to pursue the matter any further as the petitioners cannot claim relief on the ground of mistake. Accordingly, I express no opinion on the scope of section 17 (c) of the Limitation Act, 1963. For the reasons already stated a suit for the recovery of the money instituted in February, 1968, would be barred by limitation.

The next and the more fundamental question is whether in the circumstances the Court should give relief in a writ petition under Article 32 of the Constitution. No period of limitation is prescribed for such a petition. The right to move this Court for enforcement of fundamental rights is guaranteed by Article 32. The writ under Article 32 issues as a matter of course if a breach of a fundamental right is established. Technical rules applicable to suits like the provisions of section 80 of the Code of Civil Procedure are not applicable to a proceeding under Article 32. But this does not mean that in giving relief under Article 32, the Court must ignore and trample under foot all laws of procedure, evidence, limitation, *res judicata* and the like. Under Article 145 (1) (c) rules may be framed for regulating the practice and procedure in proceedings under Article 32. In the absence of such rules the Court may adopt any reasonable rule of procedure. Thus a petitioner has no right to move this Court under Article 32 for enforcement of his fundamental right on a petition containing misleading and inaccurate statements, and if he files such a petition the Court will dismiss it, see *Indiam Sugar and Refineries Ltd. v. Union of India*⁶ decided on 12th March, 1967. On grounds of public policy it would be intolerable if the Court were to entertain such a petition. Likewise the Court held in *Daryao v. The State of U. P.*⁷ that the general principles of *res judicata* applied to a writ petition under Article 32. Similarly, this Court has summarily dismissed innumerable writ petitions on the ground that it was presented after unreasonable delay.

The normal remedy for recovery of money paid to the State under coercion or mistake of law is by suit. Articles 32 and 226 of the Constitution provide concurrent remedy in respect of the same claim. The extraordinary remedies

1. (1964) 6 S.C.R. 261, 274.

2. (1965) 16 S.T.C. 689, 692.

3. (1948) 7 Ch. 465, 515-516.

4. (1951) A.C. 251, 277.

5. 11 A.L.R. 624-274 N.W. 310.

6. W.P. No 133 of 1966.

7. (1962) 1 S.C.R. 574 : (1962) 1 S.C.J. 702.

under the constitution are not intended to enable the claimant to recover monies, the recovery of which by suit is barred by limitation. Where the remedy in a writ application under Article 32 or Article 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of a statute of limitation, the Court in its writ jurisdiction acts by analogy to the statute, adopts the statute as its own rule of procedure and in the absence of special circumstances imposes the same limitation on the summary remedy in the writ jurisdiction. On similar grounds the Court of Chancery acted on the analogy of the statutes of limitation in disposing of stale claims though the proceeding in a Chancery was not subject to any express statutory bar, see Halsbury's Laws of England, Vol. 14, page 647. Article 1190, *Knox v. Gve.*¹ Likewise, the High Court acts on the analogy of the statute of limitation in a proceeding under Article 226 though the statute does not expressly apply to the proceeding. The Court will almost always refuse to give relief under Article 226 if the delay is more than the statutory period of limitation, see *State of Madhya Pradesh v. Bhailal Bhai*² at pages 273-274.

Similarly this Court acts on the analogy of the statute of limitation in respect of a claim under Article 32 of the Constitution though such claim is not the subject of any express statutory bar of limitation. If the right to a property is extinguished by prescription under section 27 of the Limitation Act, 1963, the petitioner has no subsisting right which can be enforced under Article 32 (see *Sobhraj Odharma v. State of Rajasthan*³). In other cases where the remedy only and not the right is extinguished by limitation, it is on grounds of public policy that the Court refuses to entertain state claims under Article 32. The statutes of limitation are founded on sound principles of public policy. As observed in Whitley Stoke's Anglo-Indian Codes, Vol. 11, page 940: "The law is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence, and to prevent oppression." In *Her Highness Rukmahar v. Tu'qabbah Mattickshund*⁴ the Privy Council observed that the object of the statutes of limitation was to give effect to the maxim, "*interest Reipublice ut sit finis litium*"⁵ (*co lutt* 303)—the interest of the State requires that there should be a limit to litigation. The rule of *res judicata* is founded upon the same rule of public policy, see *Daryao v. State of U.P.*⁶ at page 584. The other ground of public policy upon which the statutes of limitation are founded is expressed in the maxim "*vigilantibus non dormientibus jura subveniunt*" (2 *Co. Inst.* 690)—the laws aid the vigilant and not those who slumber. On grounds of public policy the Court applies the principles of *res judicata* to writ petitions under Article 32. On like grounds the Court acts on the analogy of the statutes of limitation in the exercise of its jurisdiction under Article 32. It follows that the present petition must be dismissed.

Mitter, J.—The facts leading up to the filing of the petition under Article 32 of the Constitution are as follows.

The first petitioner before us is a registered partnership firm (hereinafter referred to as 'the firm') carrying on business in Bombay and the other petitioners are partners of the said firm. The firm has been carrying on business as a dealer in and a trader of textiles and art silk, etc. It was registered as a dealer and has held registration certificates under the various sales tax laws prevailing in the State of Bombay from 1946 onwards including the Bombay Sales Tax Act (V of 1946), the Bombay Sales Tax Act (III of 1963) and the Bombay Sales Tax Act (LI of 1959).

1. L.R. 5 H.L. 656, 674

2. (1964) 6 S.C.R. 261.

3. (1963) 1 S.C.R. (Supp.) 99 : 111 : (1963) 2

S.C.J. 188.

4. (1851-52) 5 M.I.A. 234, 251.

5. (1962) 1 S.C.J. 702.

In the course of assessment for the assessment period commencing on 1st April, 1949, and ending on 31st October, 1952, the firm contended that its sales of the value of Rs. 13,42,165-15-6 were not liable to be taxed under the provisions of the Bombay Sales Tax Act then in force as the goods were delivered as a direct result of such sales for purposes of consumption outside the State of Bombay. The firm claimed that it was entitled to a refund of the amount which it had collected from its customers and paid on account of the aforesaid sales at the time of submitting the returns of its turnover. The Sales Tax Officer did not accept this contention but on appeal the Assistant Collector of Sales Tax upheld the firm's contention after examining the details submitted by it and found that the sales involving the sum of Rs. 26,563-8-0 realised by way of tax were protected under Art. 286 of the Constitution. He therefore directed that the said sum be refunded to the firm on a proper application. This appellate order was passed on 7th November, 1956. The firm preferred an application for refund of Rs. 26,563-50 on 13th November, 1956, whereupon the Assistant Collector (the appellate authority) simultaneously with the issue of a cheque for the above amount by way of refund wrote a letter dated 11th May, 1957, to the effect that the petitioner should produce before him within one month of the date of the cheque receipt totalling Rs. 26,563-50 from its customers outside Bombay State to show that the refund had been passed on to them. It appears that the petitioner did not fulfil this condition and a notice dated 28th January, 1958, was issued calling upon the firm to show cause why the said sum of Rs. 26,563-50 should not be forfeited under section 21 (4) of the Bombay Sales Tax Act, 1953. In reply thereto, the firm stated by letter dated 7th February, 1958, that it had collected from its customers outside the State of Bombay the said sum of money and "under an honest mistake of law had paid the same to the sales tax authorities". The firm went on to add that the order for refund had been made only when the authorities were satisfied that it was not liable to pay the said sum but the latter had insisted upon a condition that the firm should in its turn refund the said amount to its customers from whom the collection had been made. The letter records that the firm "had agreed to that condition under coercion even though in law the authorities were bound to refund the said amount without any such condition." Further the firm's case in that letter was that the authorities had "no right to forfeit any amount collected by a dealer under a mistake of law in respect of these transactions" and the threat to forfeit the amount on the ground that it had not been refunded to the firm's customers was without the authority of law.

The order on the show cause notice passed on 17th March, 1958, records that though given sufficient opportunity to produce stamped receipts from its customers the firm had failed to do so and had thereby contravened the provisions of section 21 (2) of the Bombay Sales Tax Act. The firm was directed to refund the said sum to the Reserve Bank of India on or before 1st April, 1958, failing which it would be recoverable as arrears of land revenue from the firm together with penalty. The order was purported to be passed under section 21 (4) of the Bombay Sales Tax Act, 1953.

Within a few days thereafter, i.e. on 28th March, 1958, the firm presented an application to the High Court of Bombay under Article 226 of the Constitution for the issue of a writ in nature of *certiorari* quashing the above mentioned order of forfeiture and for incidental reliefs. In paragraph 4 of the petition it was stated that the order of forfeiture was "without the authority of law and therefore in violation of Art. 19 (1)(g) and Article 265 of the Constitution."

It appears that a similar application had been presented on behalf of Pasha Bhat Patel & Co. (P.) Ltd. to the Bombay High Court and the application of the firm along with the first mentioned application were disposed of by a learned

single Judge of the Bombay High Court on 28th November, 1958. The main judgment was delivered in Pasha Bhai Patel and Company's case. The learned Judge observed in the course of his judgment that there was no merit whatsoever in it and "justice did not lie in his (the petitioner's) side and this was a matter in which the Court should not interfere by way of a writ and give relief to the petitioner company." The Judge further observed that "the petitioner has not referred to fundamental rights of any kind in the petition and said:

"This appears to me to be a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights, I would not in my discretion interfere by way of issuing a writ. I am not depriving the petitioner of any other appropriate remedy. I have therefore decided to dismiss this petition on that single ground."

No copy of the petition in Pasha Bhai Patel and Company's case is before as but the present petitioner, as shown already, did complain of violation of Article 19 (1) (g) and Article 265 of the Constitution besides contending that the order was "*ultra vires* bad and inoperative in law." Dealing with the petition of the firm the learned Judge said that "there was no merit in the case and justice did not lie on the side of the petitioner" and for reasons given in Pasha Bhai Patel and company's case the petition was dismissed.

The firm went up in appeal to the same High Court. A note may be taken of some of the grounds in the memorandum of appeal filed by the firm. They were *inter alia*:

"(13) The learned Judge erred in not deciding the petition on merits even when there was a question of violation of fundamental rights.

(16) The learned Judge erred in holding that this was a gross case where even if he had been of the opinion that the order was invalid or that it involved violation of fundamental rights, he would not in his discretion interfere by way of issuing a writ.

(30) The learned Judge failed to appreciate that the order of forfeiture was nothing but the deprivation of property without the authority of law and the action of the respondent was an unreasonable restriction on the fundamental rights of the petitioner under Article 19 (1)(f) and Article 31 of the Constitution of India."

In dismissing the appeal the learned Judges of the Division Bench observed:

"The appellant claims to retain with himself amounts to which he has no claim and the appellant is seeking to come before this Court to retain with himself amounts which he has obtained from the sales tax authorities on a representation that he is going to refund the same and which he has not refunded. Mr. Justice K. K. Desai was of the view that the claim made by the appellant was a gross claim and even if it involved violation of fundamental rights, in exercise of his discretion, he will not interfere by issuing a writ. The learned Judge having exercised his discretion which he undoubtedly was entitled to exercise, we do not think sitting in appeal we would be justified in exercising our powers as an appellate Court in interfering with the order under appeal. We may observe that we are not dealing with this case on the merits at all. We have not considered the question whether the appellant is entitled in law to retain the moneys which he has obtained from the sales tax department. We have decided this appeal on the limited ground that Mr. Justice K. K. Desai having exercised his discretion, no case is made out for our interference with the exercise of that discretion."

It is therefore amply clear from the above that the learned Judges of the Bombay High Court did not examine the merits of the firm's contention that the order of refund was without the authority of law or *ultra vires* or in violation of any fundamental rights of the partners of the firm. They merely exercised their discretion on the question of issue of a writ under Article 226 of the Constitution in view of the firm's conduct in obtaining an order for refund of the amount mentioned and later on refusing to fulfil the condition imposed.

It does not appear that the firm took any further steps in the Court of law for vindicating its position before filing the present writ petition. It received a notice, dated 18th December, 1958, under the Bombay City Land Revenue Act (II of 1876) calling upon it to pay the said sum of Rs. 26,563-50 to the State of Bombay failing which proceedings were threatened to be taken by attachment and sale of its property and by other remedies provided by section 13 of the Land Revenue Act. It appears that the Collector of Bombay actually issued an order of attachment on the right, title and interest of two of the partners of the firm including goodwill and tenancy right in the premises where the business was carried on. The firm paid the sum of Rs. 26,563-50 in various instalments beginning on 3rd October, 1959 and ending on 8th August, 1960.

In paragraph 8 of the present petition to this Court it is submitted that the petitioners "naid the sum to the State of Bombay under coercion and/or mistake of law." The petitioners also state they "did not know that the sections of the Sales Tax Acts under which the said sum was sought to be forfeited and/or recovered and/or retained were *ultra vires*." In paragraph 10 of the petition it is stated that the petitioners discovered their mistake in law when they came to know of the decision of this Court dated 29th September, 1967, that section 12-A (4) of the Bombay Sales Tax Act (V of 1946) was *ultra vires*. In paragraph 14 of the petition the firm also states :

"that the said sum had been forfeited and/or recovered and/or retained by the respondents from that petitioners in violation of Article 265, Article 31 and Article 19 (1) (f) of the Constitution. The fundamental rights of the petitioners have thus been violated. The petitioners submit that they have been deprived of their property, to wit, the said sum, by the respondents without any authority in law and contrary to the fundamental rights guaranteed to the petitioners by Articles 19 (1) (f) and 31 of the Constitution."

The grounds of law under which the firm claimed that the action of the State of Bombay and the respondents in recovering, retaining, forfeiting and not returning the said sum were void and invalid in law are set forth in paragraph 15 of the petition. In the view which we take of the firm's claim and in view of the decision of this Court in *Kantilal Babulal and Brothers v. H. C. Patel*¹ dated 29th September, 1967, it is not necessary to examine the validity or otherwise of the provisions of section 12-A (4) of the Act of 1946 or the corresponding section of the Act of 1953, i.e., section 21 (4). The appeal of *Kantilal Babulal and Brothers v. H. C. Patel* decided by this Court on 29th September, 1967, was from a decision of the High Court of Gujarat reported in 16 Sales Tax Cases 973. The Gujarat High Court had held that section 12-A (4) was saved by Article 19 (5) of the Constitution. The appeal by the assessee was allowed by this Court on the short ground that assuming that section 12-A (4) was a penal provision within the legislative competence of the Legislature, it was violative of Article 19 (1) (f) inasmuch as it did not lay down any procedure for ascertaining whether in fact the dealer concerned had collected any amount by way of tax from his purchasers outside the State and if so what that amount was. It was

further observed that the section did not contemplate any adjudication nor did it provide for making any order and on a reasonable interpretation of the impugned provision it was observed "that the power conferred under section 12-A (4) was unguided, uncanalised and uncontrolled." On the above reasoning the Court held that the provisions in section 12-A (4) were not a reasonable restriction on the fundamental right guaranteed under Article 19 (1) within the meaning of Article 19 (5).

To establish that the payments totalling Rs. 26,563-50 made in the years 1959 and 1960 were under a mistake of law, the petitioners must satisfy the Court that they paid the money under a genuine belief that the law allowed it but that they later discovered that they were under no legal obligation to pay. Repayment of money paid under a mistake is provided for by section 72 of the Indian Contract Act occurring in Chapter V of the said Act which deals with certain relations resembling those created by a contract. It reads :

"A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

It was laid down by the Judicial Committee of the Privy Council in *Sri Sri Shiba Prasad Singh, deceased now represented by Kali Prasad Singha v. Maharaja Srish Chandra Nandi*¹ that

"Payment 'by mistake' in section 72 must refer to a payment which was not legally due and which could not be enforced: 'the mistake' is thinking that the money paid was due when in fact it was not due."

The above decision of the Judicial Committee was relied on by this Court in *Sales Tax Officer v. Kanhaiya Lal Mukundlal Saraf*² where it was said :

"The Privy Council decision has set the whole controversy at rest and if it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can therefore be made in respect of a tax liability and any other liability on a plain reading of section 72 of the Contract Act...."

In *Mukundlal's case*² the respondent firm had paid sales tax in respect of its forward transactions in pursuance of the assessment orders passed by the Sales Tax Officer for the years 1949 to 1951. The levy of sales tax on forward transactions being held to be *ultra vires* by the High Court of Allahabad by its judgment delivered on 27th February, 1952, in the case of *Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur*³, the respondent by its letter dated 8th July, 1952 asked for a refund of the amount of sales tax paid by it under assessment orders passed on 31st May, 1949, 30th October, 1950 and 22nd August, 1951. The Commissioner of Sales-Tax, U.P., refused to refund the amount claimed by letter dated 19th July, 1952. The above judgment of the Allahabad High Court was confirmed by this Court on 3rd May, 1954, see *Sales-Tax Officer Pilibhit v. Budh Prakash Jai Prakash*⁴. In the meanwhile the respondent had filed a Writ Petition No. 355 of 1952 in the High Court for quashing the assessment orders which was allowed by an order of a single Judge on 30th November, 1954. The appellants' Special Appeal from the said order contending that money paid under a mistake of law was irrecoverable being dismissed, a further appeal was taken to this Court under a certificate. On the facts of that case the Court

1. L.R. (1949) 76 I.A. 244 : (1949) 2 M.L.J. 3. A.I.R. 1952 All. 764.

657. 2. (1959) S.C.R. 1350 at 1353; (1959) S.C.J. (1954) 2 M.L.J. 124 : 53. 4. (1954) S.C.J. 73; (1954) 2 M.L.J. 124 :

5. (1955) 1 S.C.R. 243.

held that both the parties were labouring under a mistake of law the legal position as established later as by the decision of the Allahabad High Court in *Budh Prakash Jai Prakash v. The Sales Tax Commissioner, Kanpur*¹, subsequently confirmed by this Court in *Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash*² not having been known to the parties at the relevant time. This mistake of law had become apparent only on 3rd May, 1954 when this Court confirmed the decision of the Allahabad High Court in *Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash*² observing :

"On that position being established the respondent became entitled to recover back the said amounts which had been paid by mistake of law. The state of mind of the respondent would be the only thing relevant to consider in this context and once the respondent established that the payments were made by it under a mistake of law. . . . it was entitled to recover back the said amounts and the State of U. P. was bound to repay or return the same to the respondent irrespective of any other consideration. . . . On a true interpretation of section 72 of the Indian Contract Act, the only two circumstances there indicated as entitling the party to recover the money back are that the moneys must have been paid by mistake or under coercion".

In *State of Madhya Pradesh v. Bhailal Bhai*³ this Court had to deal with 31 appeals arising out of an equal number of applications filed before the Madhya Pradesh High Court contending that the taxing provisions under which the tax was assessed and collected from the petitioners (the Madhya Pradesh Sales Tax Act) infringed Article 301 of the Constitution and did not come within the special provision of Article 304 (a). In all the petitions a prayer was made for refund of the taxes collected. The High Court allowed the prayer for refund in 24 applications but rejected the same in the other applications. This Court agreed with the decision of the High Court that the imposition of the tax contravened the provisions of Article 301 of the Constitution and was not within the saving provisions of Article 304 (a) and on that view observed that the payment was made under a mistake within section 72 of the Indian Contract Act and so the Government to whom the payment had been made must repay it. The tax provisions under which these taxes had been assessed and paid were declared void by the High Court of Madhya Bharat in their decision in *Mohammed Siddique v. The State of Madhya Bharat*⁴ on 17th January, 1956. The respondents claimed to have discovered their mistake in making the payments after they came to know of these decisions. Sixteen of the applications out of 31 were made to the High Court within three years from 17th January, 1956 and the High Court took the view that this was not an unreasonable delay and in that view ordered refund. The High Court also ordered refund in seven other applications made more than three years and eight months after the said 17th January, 1956.

This Court although of opinion that the High Court had power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law, observed :

"At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil Court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of *mandamus*. Among

1. A.I.R. 1952 All. 764.

3. (1964) 6 S.C.R. 261.

2. (1954) S.C.J. 573; (1954) 2 M.L.J. 124 :
(1955) 1 S.C.R. 243.

4. A.I.R. 1956 Madh. Bha. 214.

the several matters which the Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Thus, where, as in these cases, a person comes to the Court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the Court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule of universal application. It may however be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of *mandamus*. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a *prima facie* triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of *mandamus* for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil Court and to refuse to exercise in his favour the extraordinary remedy under Article 226 of the Constitution."

In *State of Kerala v. Aluminium Industries Ltd.*,¹ the respondents after submitting returns under the Sales Tax Act for the period 30th May, 1950 to 31st March, 1951, showing a net turnover exceeding Rs. 23 lakhs and depositing necessary sales tax claimed a refund on the ground of having discovered their mistake soon after 7th March, 1951. The petition to the Kerala High Court under Article 226 of the Constitution was opposed on behalf of the State on various grounds. Holding that money paid under a mistake of law was recoverable, this Court called for a finding from the Sales Tax Officer on the question whether the writ petition was within three years of the date on which the mistake first became known to the respondent so that a suit for refund on that date would not be barred under Article 96 of the Indian Limitation Act of 1908.

Speaking for myself I am not satisfied that the petitioners in this case had made a mistake in thinking that the money paid was due when in fact it was not due. As already noted, in their reply to the show cause notice dated 7th February, 1958, the petitioners' case was that the threat of the sales tax authorities to forfeit the amount was without the authority of law and that the firm had agreed to the condition of refunding the amount received to its own customers under coercion even though in law the authorities were bound to refund without any such condition. The petitioners did not content themselves merely by opposing the claim of the sales tax authorities to forfeit the amount but suited their action to their belief by presenting a writ petition to Bombay High Court describing the order of forfeiture as without the authority of law and in violation of Article 19 (1) (g) and Article 265 of the Constitution and praying for the necessary reliefs. They did not accept the decision of the learned single Judge of the Bombay High Court under Article 226 of the Constitution but filed their appeal raising practically the same contentions as they have done in the present petition except that they did not state having discovered any mistake on a perusal of the decision of any Court of law. The grounds of appeal to the the Divisional Bench of the Bombay High Court are illustrative of the frame of mind and viewpoint of the petitioners then. They complained about the violation of their fundamental rights, the illegality of the order of forfeiture and in particular

1. (1965) 16 S.T.C. 689.

mentioned the unreasonable restriction on their fundamental rights enshrined in Article 19 (1) (f) of the Constitution. Further, they had the benefit of the judgment of the appeal Bench of the Bombay High Court that the case was not being decided on the merits at all and even if there was any violation of the fundamental rights of the petitioners the exercise of discretion by the learned single Judge would not be interfered with in appeal.

It was therefore clear to the petitioners that there was no adjudication as to their fundamental rights or the merits of their claim and there was nothing to prevent the petitioners then from coming up to this Court by preferring an appeal from the judgment of the Bombay High Court or by instituting a suit for declaration of the order of forfeiture illegal and *ultra vires* and for an injunction restraining the State from giving effect thereto. Before the Bombay High Court the petitioners questioned the legality of the order of forfeiture and prayed for quashing it on the ground of the threatened invasion of their fundamental rights. On these facts it is idle to suggest that the petitioners ever entertained any belief or thought that the money was legally due from them. The way they asserted their position under the law precludes any inference that they were ever influenced by a mistake of law or that they ever failed to appreciate the correct position under the law. Even after the decision of the Bombay High Court they did not willingly pay up the amount forfeited but only made disbursements after an attachment had been levied on the business including the tenancy of the premises and its good will. They protested against the order of forfeiture not only out of Court but in Court and only paid after the issue of a legal process.

It is therefore not possible to hold that the payments complained of following the order of forfeiture were made in mistake of law. They were payments under compulsion or coercion. A payment under coercion has to be treated in the same way for the purpose of a claim to refund as a payment under mistake of law, but there is an important distinction between the two. A payment under mistake of law may be questioned only when the mistake is discovered but a person who is under no misapprehension as to his legal rights and complains about the illegality or the *ultra vires* nature of the order passed against him can immediately after payment formulate his cause of action as one of payment under coercion.

The Limitation Acts do not in terms apply to claims against the State in respect of violation of fundamental rights. A person complaining of infraction of any such right has one of three courses open to him. He can either make an application under Article 226 of the Constitution to a High Court or he can make an application to this Court under Article 32 of the Constitution, or he can file a suit asking for appropriate reliefs. The decision of various High Courts in India have firmly laid down that in the matter of the issue of a writ under Article 226 the Courts have a discretion and may in suitable cases refuse to give relief to the person approaching it even though on the merits the applicant has a substantial complaint as regards violation of fundamental rights. Although the Limitation Act does not apply, the Courts have refused to give relief in cases of long unreasonable delay. As noted above in *Bhailal Bhais case*¹, it was observed that the "Maximum period fixed by the Legislature as the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured". On the question of delay, we see no reason to hold that a different text ought to be applied when a party comes to this Court under Article 32 from one applicable to applications under Article 226. There is a public policy behind all statutes of limitation and

according to Halsbury's Laws of England (Third Edition Vol. 24) Article 330 at p. 181:

"The Courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim and (3) that persons with good causes of action should pursue them with reasonable diligence."

In my view, a claim based on the infraction of fundamental rights ought not to be entertained if made beyond the period fixed by the Limitation Act for the enforcement of the right by way of suit. While not holding that the Limitation Act applies in terms I am of the view that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise a plea successfully under Article 32 of the Constitution. Article 16 of the Limitation Act of 1908 fixed a period of one year for a suit against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears, from the date when the payment was made. As an attachment was levied under section 13 of the Bombay City Land Revenue Act (II of 1876) it is a moot question as to whether the payments made in 1959 and 1960 in this case would not attract the said article of the Limitation Act of 1908. It was held by this Court in *A. V. Subbarao v. The State*¹ that the period of limitation for a suit to recover taxes illegally collected was governed by Article 62 of the Limitation Act of 1908 providing a space of three years from the date of payment. But taking the most favourable view of the petitioners' case, Article 120 of the Limitation Act of 1908 giving a period of six years for the filing of a suit would apply to the petitioners' claim. The period of six years would have expired some time in 1966 but the Limitation Act of 1908 was repealed by the Limitation Act of 1963 and by section 30 (a) of the Act of 1963 it was provided that:

"Notwithstanding anything contained in this Act—

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of five years next after the commencement of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier:

(b) **

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A claim for money paid under coercion would be covered by Article 113 of the Limitation Act, 1963 giving a period of three years from the first of January, 1964, on which date the Act came into force. The period of limitation for a suit which was formerly covered by Article 120 of the Act of 1908 would in case like this be covered by Article 113 of the new Act and the suit in this case would have to be filed by the 1st January, 1967. As the petition to this Court was presented in February, 1968, a suit, if filed, would have been barred and in my view the petitioners' claim in this case cannot be entertained having been preferred after the 1st of January, 1967. The facts negative any claim of payment under a mistake of law and are only consistent with a claim for money paid under coercion. As the petitioners have come to this Court long after the date when they could have properly filed a suit, the application must be rejected.

1. (1966) 1 M.L.J. (S.C.) 42 : (1966) 1 An. S.C.R. 577.
W.R. (S.C.) 42 : (1966) 1 S.C.J. 241 : (1965) 2

I may also note in brief another contention urged on behalf of respondents that the present petition is barred by principles analogous to *res judicata*. It was contended by learned Counsel for the respondents that the decisions of the Bombay High Court were speaking orders and even if the petition to the Bombay High Court had been dismissed in *limine* there would be a decision on the merits. I am unable to uphold this contention. It was held in *Daryao and others v. The State of U. P. and others*,¹ that when a petition under Article 226 is dismissed not on the merits but because of laches on the party applying for the writ or because an alternative remedy is available to him, such dismissal is no bar to the subsequent petition under Article 32 except in cases where the facts found by the High Court might themselves be relevant under Article 32. It was pointed out in *Joseph v. State of Kerala*² that:

"Every citizen whose fundamental right is infringed by the State has a fundamental right to approach this Court for enforcing his right. If by a final decision of a competent Court his title to property has been negatived, he ceases to have the fundamental right in respect of that property and, therefore, he can no longer enforce it. In that context the doctrine of *res judicata* may be invoked. But where there is no such decision at all, there is no scope to call in its aid."

The judgment of the Bombay High Court in 1958 clearly shows that the merits of the petitioners' claim were not being examined. I can however find no merit in the contention that because there is an invasion of a fundamental right of a citizen he can be allowed to come to this Court, no matter how long after the infraction of his right he applies for relief. The Constitution is silent on this point; nor is there any statute of limitation expressly applicable, but nevertheless, on grounds of public policy I would hold that this Court should not lend its aid to a litigant even under Article 32 of the Constitution in case of an inordinate delay in asking for relief and the question of delay ought normally to be measured by the periods fixed for the institution of suits under the Limitation Acts.

The petition therefore fails and is dismissed with costs.

Hedge, J.—I had the advantage of studying the judgments just delivered by my brothers Sikri, Bhachawat and Mitter, JJ. The facts of the case are fully set out in those judgments. I shall not restate them.

I agree with the decision of Mitter, J., that to the facts of this case the rule laid down by this Court in *Daryao Rao and others v. The State of U. P. and others*³ is inapplicable. The principle underlying that decision as I understand, is that the right claimed by the petitioner therein had been negatived by a competent Court and that decision having become final, as it was not appealed against, he could not agitate the same over again. It is in that context the principle of *res judicata* was relied on. A fundamental right can be sought to be enforced by a person who possesses that right. If a competent Court holds that he had no such right, that decision is binding on him. The binding character of judgments of Courts of competent jurisdiction is in essence a part of the rule of law on which administration of justice depends.

In view of the decision of this Court in *Kantilal Babulal and Brothers v. H. C. Patel*⁴ that section 12-A (4) of the Bombay Sales Tax Act, 1946 is violative of Article 19 (1) (f) of the Constitution on the grounds that that section did not lay down any procedure for ascertaining whether in fact the dealer concerned had collected any amount by way of tax from its purchasers outside the State and if so what amount that was; neither the section nor any rule framed

1. (1962) 1 S.C.R. 574 : (1962) 1 S.C.J. 702. A.I.R. 1965 S.C. 1514.
2. (1966) 1 S.C.J. 99 : (1965) 2 S.C.R. 865: 3. (1965) 21 S.T.C. 174 : (1965) 1 S.C.J. 768.

under the Act contemplated any enquiry much less a reasonable enquiry in which the dealer complained of could plead and prove his case or satisfy the authorities that their assumptions were wholly or partly wrong and further the section also did not provide for any enquiry on disputed questions of fact or law or for making an order, it follows that the impugned collection was without the authority of law and consequently the same is an exaction resulting in the infringement of one of the proprietary rights of the petitioners guaranteed to them under Article 19 (1)(f) of the Constitution. Hence the petitioners have a fundamental right to approach this Court under Article 32 of our Constitution for appropriate relief and this Court has a duty to afford them appropriate relief. In *Kahrak Singh v. The State of U. P. and others*¹: Rajagopala Ayyangar, J., speaking for the majority observed that once it is proved to the satisfaction of this Court that by State action the fundamental right of a petitioner has been infringed it is not only the right but the duty of this Court under Article 32 to afford relief to him by passing appropriate orders in that behalf. The right given to the citizens to move this Court under Article 32 is itself a fundamental right and the same cannot be circumscribed or curtailed except as provided by the Constitution. It is inappropriate to equate the duty imposed on this Court to the powers of the Chancery Court in England or the equitable jurisdiction of the American Courts. A duty imposed by the Constitution cannot be compared with discretionary powers under Article 32, the mandate of the Constitution is clear and unambiguous and that mandate has to be obeyed. It must be remembered, as emphasized by several decisions of this Court that this Court is charged by the Constitution with the special responsibility of protecting and enforcing the fundamental rights under Part III of the Constitution. If I may with respect, borrow the felicitous language employed by Chief Justice Patanjali Sastri in *State of Madras v. V. G. Rao*², that as regards fundamental rights this Court has been assigned the role of a Sentinel on the *qui vive*. The anxiety of this Court not to whittle down the amplitude of the fundamental rights guaranteed has found expression in several of its judgments. It has not allowed its vision to be blurred by the fact that some of the persons who invoked its powers had no equity in their favour. It always took care to see that a bad case did not end in laying down a bad law. I am not unaware of the fact that the petitioners before us have no equity in their favour but that circumstances is irrelevant in deciding the nature of the right available to an aggrieved party under Article 32 of the Constitution.

All of us are unanimous on the question that the impugned collection amounts to an invasion of one of the fundamental rights guaranteed to the petitioners. Our difference primarily centres round the question whether their right to get relief under Article 32 is subject to any limitation or to be more accurate whether this Court has any discretion while exercising its jurisdiction under that Act? As mentioned earlier a right to approach this Court under Article 32 is itself a fundamental right. In that respect our Constitution makes a welcome departure from many other similar Constitutions. As seen earlier a party aggrieved by the infringement of any of its fundamental rights has a right to get relief at the hands of this Court, and this Court has a duty to grant appropriate relief—see *Joseph Pothen v. The State of Kerala*³. The power conferred on this Court by that Article is not a discretionary power. This power is not similar to the power conferred on the High Courts under Article 226 of the Constitution. Hence laches on the part of an aggrieved party cannot deprive him of the right to get relief from this Court under Article 32. A Division

1. (1964) 2 S.C.J. 107 : (1964) 1 S.C.R. 332. (1952) 2 M.L.J. 135.

2. (1952) S.C.R. 597 : (1952) S.C.J. 253 : 3. A.I.R. 1965 S.C. 1514 : (1966) 1 S.C.J. 99.

Bench of the Bombay High Court in *Kama'abai Harjivandas Parekh v. T. B. Desai*¹ held that where a constitutional objection to the validity of a legislation is taken in a petition under Article 226, the question of mere delay will not affect the maintainability of that petition. Law reports do not show a single instance, where this Court had refused to grant relief to a petitioner in a petition under Article 32 on the ground of delay.

There has been some controversy whether an aggrieved party can waive his fundamental right. That question was elaborately considered in *Basheshar Nath v. The Commissioner of Income-tax, Delhi, Rajasthan and another*², by a Constitution Bench consisting of S. R. Das, C.J., and Bhagwati, S. K. Das, S. L. Kapur and Subba Rao, JJ. The learned Chief Justice and Kapur, J., held that there could be no waiver of a fundamental right founded on Article 14. Bhagwati and Subba Rao, JJ., held that no fundamental right can be waived and S. K. Das, J., held that only such fundamental rights which are intended to the benefit of a party can be waived. I am mentioning all these aspects to show how jealously this Court has been resisting every attempt to narrow down the scope of the rights guaranteed under Part III of our Constitution.

Admittedly the provisions contained in the Limitation Act do not apply to proceedings under Article 226 or Article 32. The Constitution makers wisely, if I may say with respect, excluded the application of those provisions to proceedings under Articles 226, 227 and 32 lest the efficacy of the constitutional remedies should be left to the tender mercies of the Legislatures. This Court has laid down in *I. C. Golaknath and others v. State of Punjab and another*³, that the Parliament cannot by amending the Constitution abridge the fundamental rights conferred under Part III of the Constitution. If we are to bring in the provisions of Limitation Act by an indirect process to control the remedies conferred by the Constitution it would mean that what the Parliament cannot do directly it can do indirectly by curtailing the period of limitation for suits against the Government. We may console ourselves by saying that the provisions of the Limitation Act will have only persuasive value but they do not limit the power of this Court but the reality is bound to be otherwise. Very soon the line that demarcates the rule of prudents and binding rule is bound to vanish as has happened in the past. The fear that forgotten claims and discarded rights may be sought to be enforced against the Government after lapse of years, if the fundamental rights are held to be enforceable without any time limit appears to be an exaggerated one. It is for the party who complains the infringement of any right to establish his right. As years roll on his task is bound to become more and more difficult. He can enforce only an existing right. A right may be lost due to an earlier decision of a competent Court or due to various other reasons. If a right is lost for one reason or the other there is no right to be enforced. In this case we are dealing with an existing right even if it can be said that the petitioners' remedy under the ordinary law is barred. If the decision of Bachawat and Mitter, JJ., is correct, startling results are likely to follow. Let us take for example a case of a person who is convicted and sentenced to long period of imprisonment on the basis of a statute which had been repealed long before the alleged offence was committed. He comes to know the repeal of the statute long after the period prescribed for filing appeal expires. Under such a circumstance according to the decision of Bachawat and Mitter, JJ., he will have no right—the discretion of the Court apart—to move this Court a writ of *habeas corpus*.

1. (1965) Vol. 67 Bom.L.R. 85. 1207.

2. (1959) 1 S.C.R. (Supp.) 528 : (1959, S.C.J.

3. (1967) 2 S.C.R. 762 : (1967, 2 S.C.J. 486

Our Constitution makers in their wisdom thought that no fetters should be placed on the right of an aggrieved party to seek relief from this Court under Article 32. A comparison of the language of Article 226 with that of Article 32 will show that while under Article 226 a discretionary power is conferred on the High Courts the mandate of the Constitution is absolute so far as the exercise of this Court's power under Article 32 is concerned. Should this Court, an institution primarily created for the purpose of safeguarding the fundamental rights guaranteed under Part III of the Constitution, narrow down those rights? The implications of this decision are bound to be far reaching. It is likely to pull down from the high pedestal now occupied by the fundamental rights to the level of other civil rights. I am apprehensive that this decision may mark an important turning point in downgrading the fundamental rights guaranteed under the Constitution. I am firmly of the view that a relief asked for under Article 32 cannot be refused on the ground of laches. The provision of the Limitation Act have no relevance either directly or indirectly to proceedings under Article 32. Considerations which are relevant in proceedings under Article 226 are wholly out of place in a proceeding like the one before us. The decision of this Court referred to in the judgment of Bachawat and Mitter, JJ., where this Court has taken into consideration the laches on the part of the petitioners are not opposite for our present purpose. None of those cases deal with proceedings under Article 32 of the Constitution. The rule enunciated by this Court in the *State of M. P. v. Bhailal Bhai*¹, is only applicable to proceedings under Article 226. At page 271 of the report Das Gupta, J., who spoke for the Court specifically referred to this aspect when he says:

"that it has been made clear more than once that power to relief under Article 226 is a discretionary power."

Therefore those decisions are of no assistance to us in deciding the present case. Once it is held that the power of this Court under Article 32 is a discretionary power—that in my opinion is the result of the decision of Bachawat and Mitter, JJ.—then it follows that this Court can refuse relief under Article 32 on any one of the grounds on which relief under Article 226 can be refused. Such a conclusion militates not only against the plain words of Article 32 but also the lofty principle underlying that provision. The resulting position is that the right guaranteed under that Article would cease to be a fundamental right.

Assuming that the rule enunciated by this Court in *Sales Tax Officer v. Kanthaya Lal Mukand Lal Saraf*² and further refined by this Court in *State of M. P. v. Bhailal Bhai*¹ can apply to the facts of this case even then I am of opinion that the petitioners are entitled to the relief that they have asked for. As could be gathered from the decision of Bachawat and Mitter, JJ., the Bombay High Court did not decide the merits of the case in the writ petition filed by the petitioners. In that petition the Court refused to exercise its discretion in favour of the petitioners. The grounds on which the petitioners challenged the validity of section 12-A (4) of the Bombay Sales Tax Act, 1946 before the High Court of Bombay have now been found to be unsustainable by Gujarat High Court in *Kantilal Babulal and Brother v. H. C. Patil*³. In the appeal against that decision this Court did not examine those grounds. It struck down section 12-A (4) on a wholly different ground, a ground not put forward by the petitioners in their writ petition before the Bombay High Court. A mere impression of a party that a provision of law may be *ultra vires* the Constitution cannot be equated to knowledge that the provision invalid. Hope and desire are not the same things as knowledge. A law passed by a competent Legislature is bound

1. (1964) 6 S.C.R. 261.

2. (1959) S.C.R. 1350; (1959) S.C.J. 53.

3. (1965) 16 S.T.C. 273.

to be presumed to be valid until it is struck down by a competent Court. The fact after a futile attempt to get the provision in question declared invalid the petitioners gave up their fight and submitted to the law which was apparently valid is no proof of the fact that they knew that the provision in question is invalid. As seen earlier that none of the grounds urged by the petitioners in support of their contention that the provision in question is invalid has been accepted by any Court till now. Under these circumstances I see no justification to reject the plea of the petitioners that they became aware of the provision only after the decision of this Court in *Kantilal Babulal's case*¹ which decision was rendered on 29th September, 1967. This petition was filed very soon thereafter. Hence this case under any circumstance falls within the rule laid down by this Court in *Bhailal Bhai's case*.²

For the reasons mentioned above I allow this petition and grant the relief prayed for by the petitioners.

ORDER:—In accordance with the opinion of the majority, the petition fails and is dismissed with costs:

V. M. K.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—J. C. SHAH, *Acting Chief Justice*, V. RAMASWAMI AND A. N. GROVER, JJ.
Nazeeria Motor Service and others ... *Appellants**

v.

The State of Andhra Pradesh and another, etc.

... *Respondents.*

Andhra Pradesh Motor Vehicles (Taxation of Passengers and Goods) Amendment and Validation Act (XXXIV of 1961)—Scope—Constitutional validity—If infringes Article 14 and 19 (1) (g) of the Constitution—Act intended to augment revenues of the State—Previous sanction of President obtained under proviso to Article 304 (b)—Effect—Question of reasonableness of restrictions imposed and of restrictions being in public interest—Powers of Court to go into—Exemption of Telengana area under Notification dated 1st November, 1961—Vehicles on inter-State routes not subject to tax—If discrimination under Article 14—Constitution of India (1950), Articles 14, 19 (1) (g), 301 and 304 (b) Proviso—Scope of.

In the case of a statute, such as the Andhra Pradesh Motor Vehicles (Taxation of Passengers and Goods) Amendment Act, 1961, which was enacted with the object of augmenting the revenues of the State, notwithstanding the fact that the sanction of the President was obtained under the proviso to Article 304 (b) of the Constitution of India, the question of the restrictions being reasonable and in public interest is open to examination by the Court, and the Act can be held to be valid only if it is shown that the restrictions imposed by it are reasonable and in public interest. When the taxes imposed were enhanced the transporters were permitted to enhance the fares, and the burden therefore would not fall on the transporters. If the transport operators are not prepared to charge higher rates of fares as a matter of policy, or for the purpose of business competition, that cannot impinge on the reasonableness of the restriction imposed, particularly when there is nothing to show that the tax imposed exceeds the limits of permissible reasonableness. There is also nothing in the provisions of the Act with regard to imposition of tax, are not in public interest. Hence the Act cannot be challenged under Article 19 (1) (g) of the Constitution of India.

When it is found that the increase in the surcharge of fees and freight contemplated by the Validating Act of 1961 would not constitute an impediment

1. (1965) 16 S.T.C. 973.

2. (1964) 6 S.C.R. 261.

* C.A. Nos. 69, 112 and 113 of 1968.

21st August, 1969.

to the trade, and that the utmost that could be said was that it would result in the diminution of profits, it cannot be said that there is an infringement of Article 19 (1) (g).

Nor can the Act be said to be violative of Article 14, on the ground of discrimination in that it has not been made applicable to the Telengana area while made applicable to the Andhra area or on the ground that the vehicles on the inter-State routes or permits granted by other States (Madras) had not been subjected to tax.

There was no law in the erstwhile Hyderabad State imposing any tax on passengers and goods. After the merger of Telengana and Andhra areas, the laws in force in the Telengana region continued to remain in force under section 119 of the States Reorganisation Act, 1956. The Notification issued on 4th November, 1961, under section 19 of Act (X of 1958), exempted passengers, luggage and goods from payment of tax in the Telengana area, and this exemption was granted to the operators in the Telengana area for the reason that before the extension of the parent Act to this area, no tax similar to the one levied under the parent Act was payable in that area and their exemption was granted under a different enactment. Hence the challenge under Article 14 has no force. Since the laws in force in the two States, Madras and Andhra, are different, no question of discrimination can arise when taxes are being imposed under two different sets of laws in different States or geographical limits; and hence it cannot be said that Article 14 is infringed because vehicles on the inter-State routes or permits issued by other States had not been subjected to tax.

Case-law discussed and reviewed.

Appeal from the Judgment and Order dated the 25th October, 1962 of the Andhra Pradesh High Court in Writ Petitions Nos. 1307, 1305 and 1353 of 1961.

K. Srinivasamurthy and Naunit Lal, Advocates, for Appellants (In all the Appeals).

P. Ram Reddy, Senior Advocate, (*P. Parameshwara Rao*, Advocate, with him), for Respondent No. 1 (In all the Appeals).

The Judgment of the Court was delivered by

Grover, J.— These appeals by certificate from a judgment of the Andhra Pradesh High Court which disposed of several petitions under Article 226 of the Constitution including the petitions filed by the appellants involve the question of the constitutionality of the Andhra Pradesh Motor Vehicles (Taxation of Passengers and Goods) Amendment and Validation Act, 1961, Andhra Pradesh Act (XXXIV of 1961).

The appellants hold permits either for stage carriage or for public carriers issued under the Motor Vehicles Act, 1939. They ply these vehicles on different routes in the State as also on some of the inter-State routes. They were subject to tax levied under the Madras Motor Vehicles Taxation Act, 1931.

In 1952, the Madras Motor Vehicles (Taxation of Passengers and Goods) Act, (XVI of 1952) was enacted by which every operator had to pay Rs. 12.50 per seat per quarter or 37 nai paise per seat per mile over and above the tax payable under the Madras Motor Vehicles Taxation Act, 1931. Under that Act the operators were paying tax of Rs. 30 per seat per quarter. The validity of Act (XVI of 1952) was challenged before the Madras High Court. In *Mathurrai Pillay v. The State of Madras*¹ its validity was upheld except as to the proviso to section 3 of the Act. After the formation of Andhra Pradesh State the Governor promulgated an Ordinance amending Madras Act (XVI of 1952)

in the light of the above judgment. The provisions contained in the Ordinance were subsequently re-enacted as President's Act (XI of 1954). The operators, therefore, paid taxes imposed under Act (XVI of 1952) as amended in the State of Andhra Pradesh. By means of Act (XXI of 1959) the Legislature of Andhra Pradesh amended Act (XVI of 1952). Section 3 of Act (XVI of 1952) as amended read as follows :

"In clause (a) of sub-rule (i) of rule 1 in the Schedule to the Principal Act, for the words '37 nP. per seat per year per mile' the words Rs. 1.48 nP. per seat per year per mile and for the words Rs. 12.50 nP. per seat per quarter the words Rs. 50 per seat per quarters shall be substituted and clause (b) of the said sub-rule for the words Rs. 22.50 nP. per month the words Rs. 45 per month shall be substituted."

The validity of the Amending Act (XXI of 1959) was challenged by means of writ petitions before the High Court. A Division Bench struck down the impugned provisions as unconstitutional and *ultra vires* on the ground that since that Act imposed a restriction on the operator's freedom of trade and commerce under Article 301 of the Constitution the previous sanction of the President was necessary under the proviso to section 304 (b) and because that had not been obtained the Act was legally inoperative: *Venson Transport v. The State of Andhra Pradesh*¹. Subsequently Act (XXXIV of 1961) was enacted after the sanction of the President was obtained to the Bill under the proviso to Article 304 (b). It validated two acts, namely, Act (XXI of 1959) and Act (XXII of 1959) and also amended Act (XVI of 1952) and substituted sub-section (3) of section 3 of that Act by a new sub-section. It further validated the realisation of the tax paid or payable and the fee paid or payable and other action taken under Act (XXI of 1959) and Act (XXII of 1959). It empowered the Government to levy additional tax at the rate of Rs. 50 per seat per quarter from 8th May, 1959 to 16th January, 1961. Thereafter from 17th January, 1961 to 3rd November, 1961, the rate was fixed at Rs. 12.50 per seat per quarter. After the commencement of the Validating Act (XXXIV of 1961) the rate was to be Rs. 37.50 per seat per quarter. This was to be operative till 1st April, 1962, when the Act would cease to have any effect.

The validity and constitutionality of Validating Act (XXXIV of 1961) were challenged by means of various petitions under Article 226 of the Constitution. It was sought to be contended before the High Court that the impugned legislation was not regulatory in character. The sole object was to argument the revenue of the State. This brought the statute within the mischief of Article 301 of the Constitution. The High Court was of the view that the question whether the statute was regulatory or compensatory was relevant in the context of Part XIII of the Constitution only in the event of non-compliance with the proviso to Article 304 (b) of the Constitution. As the previous sanction of the President had been obtained in terms of the proviso such points could no longer be canvassed. The challenge on the ground of Article 14 before the High Court also failed. An argument was addressed that the impugned Act was repugnant to Article 19 (1) (g) of the Constitution. The reasonableness of the restriction within the meaning of Article 304 (b) also came up for consideration. The High Court, in the light of the facts and figures placed before it; held that the increase in surcharge of the fares and freights contemplated by the impugned Act did not constitute an impediment to the trade of the transporters and that the restriction in the shape of additional imposts was not unreasonable. It is unnecessary to refer to the other points agitated before and decided by the High Court.

Counsel for the appellant has urged the following points before us:

(1) The impugned Act imposed a tax for augmenting the revenues of the State. It was neither regulatory nor compensatory in nature and it fell directly within the mischief of Article 301 of the Constitution.

(2) Even though there had been compliance with the proviso to Article 304 (b) in the matter of obtaining the requisite sanction it was open to the Court to go into the question of reasonableness both with reference to the aforesaid provision and Article 19 (1) (g) read with clause (6) of that Article. The Court was equally entitled to determine whether the imposition was in the public interest.

(3) The impugned Act violated Article 14 of the Constitution and was discriminatory inasmuch as (a) it had not been made applicable to the Telengana area although it was applicable to the Andhra area, and (b) the vehicles on inter-State routes on permits granted by other States had not been subjected to tax.

In order to decide these points the principles which have been settled by this Court with regard to Article 301 and Article 304 (b) may be noted. According to the majority view in *Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and others*¹ if a tax is compensatory in character it cannot be said to fall within the mischief of Article 301. Subba Rao, J., (as he then was), who concurred in the majority decision but delivered a separate judgment preferred to rest his view on the regulatory nature of such taxing statute as would escape the mischief of Article 301. In *Khyerbari Tea Co. Ltd. and Anr. v. The State of Assam*², the difference between the view expressed in the *Automobile Transport (Rajasthan) case*¹, and an earlier decision is *Atiabari Tea Co. Ltd. v. State of Assam and others*³, with regard to the scope and effect of the provisions of Article 304 (b) was noticed. It was observed that according to the majority view expressed in *Atiabari Tea Co. case*³, if the Act is passed under Article 304 (b) and its validity is impeached the State may seek to justify the Act on the ground that the restrictions imposed by it are reasonable and in public interest and in doing so it may rely on the fact that the taxes levied by the impugned Act are compensatory in character. On the other hand, according to the majority decision in the *Automobile Transport (Rajasthan) case*¹, compensatory taxation would be outside Article 301 and cannot fall under Article 304 (b). Since it was not urged that the tax was of a compensatory nature in *Khyerbari Tea Co. Ltd. case*², this Court proceeded to examine whether the restrictions imposed by the statute impugned in that case were reasonable and in public interest within the meaning of Article 304 (b). The effect of compliance with the provisions of the proviso to Article 304 (b) by obtaining the previous sanction of the President to the Bill was also considered and it has been laid down that notwithstanding the sanction the question of the restrictions being reasonable and in public interest is open to examination by the Court. The Act can be held to be valid only if it is shown that the restrictions imposed by it are reasonable and in public interest.

It has not been contended on behalf of the State that the impugned Validating Act imposes a tax which is by way of a regulatory or compensatory measure. It has, therefore, to be seen whether the restriction imposed are reasonable and in public interest within the meaning of Article 304 (b). Before the High Court an attempt was made on behalf of the appellants to show that by raising the rate of tax the burden had been increased to such an extent that the business of the appellants had been virtually annihilated. According to some of the affidavits filed on behalf of the writ petitioners, profits derived in

1. (1963) 1 S.C.R. 491.

2. (1964) 5 S.C.R. 975.

3. (1961) 1 S.C.R. 809.

recent years did not exceed an average of Rs. 2,000 per stage carriage even without the additional burden which had been imposed and the transporters would suffer heavy losses if the tax as increased by the impugned legislation were to be realized. The High Court referred to the computation of the income by the Income-tax Department of some of the transporters in whose assessments the income in regard to each bus had been calculated at a figure of Rs. 7,000 annually, which showed that the profits were much higher than Rs. 2,000. It was not disputed before the High Court that the transporters had been permitted to enhance the fares. If the fares could be enhanced it was obvious that the burden would not fall on the transporters. It was urged that owing to competition from the railways and from operators whose vehicles had been registered in the Madras State and who could charge lower rates the appellants were not in a position to collect extra fares which they had been permitted to do. This argument also cannot hold and was rightly repelled by the High Court on the ground that if the operators were not prepared to charge higher rates as a matter of policy or for the purpose of business competition that could not impinge on the reasonableness of the restriction. Apart from a faint attempt to repeat some of the arguments which were addressed before the High Court on this point nothing new has been brought to our notice which would justify the view that the tax which has been imposed exceeds the limits of permissible reasonableness. As regards public interest we are unable to find nor has any attempt been made to satisfy us that the provisions of the impugned Validating Act with regard to imposition of tax are not in public interest.

This is sufficient to dispose of the challenge under Article 19 (1) (g) as well. We may in this connection refer briefly to the conclusion of the High Court which was reached on a consideration of the affidavits filed before it. It has been found that there is no material which would warrant the conclusion that the increase in the surcharge of the fares and freight contemplated by the impugned Validating Act would constitute an impediment to the trade. The utmost that could be said was that it would result in the diminution of profits. Even on the assumption that the profits would be diminished or greatly reduced it cannot be held that there is any infringement of Article 19 (1) (g).

Coming to the attack on the ground of violation of Article 14 reference may be made to the background relating to taxation of passengers and goods carried in motor vehicles in the State prior to the formation of Andhra Pradesh. It appears that there was no law in the erstwhile Hyderabad State imposing any tax on passengers and goods. After the merger of Telengana and Andhra areas the laws in operation in the Telengana region continued to remain in force by virtue of the provisions of section 119 of the States Reorganisation Act, 1956. By Act (X of 1958) the State of Andhra Pradesh amended Act (XVI of 1952) *inter alia* extending that Act, to the Telengana area. This Act (X of 1958) also amended the Principal Act by adding section 19 according to which the Government could grant an exemption by means of a notification in respect of any motor vehicle running in a particular area. On 4th November, 1961, a notification was issued exempting passengers, luggage and goods carried in stage carriages from payment of tax under the aforesaid Act within the Telengana area. There can be no manner of doubt that this exemption was given to the operators in the Telengana region for the reason that before the extension of the parent Act to this area no tax similar to the one levied under the parent Act was payable in that area and that this exemption was granted under a different enactment. It is apparent that for these reasons the challenge under Article 14 cannot succeed. The same is the position with regard to the tax payable by the appellants and that which the transporters having permits for inter-State routes have to pay. As has been pointed out in the affidavits filed on behalf of the State the laws in

the two States, Madras and Andhra Pradesh are different and persons having primary permits from Madras are naturally governed by the laws operating in that State. No question of discrimination can arise when taxes are being imposed under two different sets of laws in different States or geographical areas.

The appeals, therefore, fail and are dismissed with costs. One hearing fee.

P. R. N.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. C. SHAH AND K. S. HEGDE, JJ.

Somnath Barman

.. *Appellant.**

v.

Dr. S. P. Raju and another

... *Respondents.*

Limitation Act (IX of 1908), Articles 142 and 144—Scope—Suit for possession on basis of title alleging purchase and possession for over 12 years prior to suit—Plea of denial of title of plaintiff and adverse possession—Finding that plaintiff's title not proved but that possession within 12 years of suit was established—Defendants found to be trespassers and providing no proof of possession or adverse possession—Decree on basis of possessory title—If justified—Possessory title—Value of.

Possessory title is a good title as against everybody other than the lawful owner and a trespasser or wrongdoer cannot defeat the lawful possession of a person who has proved possession for more than twelve years by ousting him from the property.

Possession is, under the Indian Law, as under the English Law, good title against all but the true owner, and a wrongdoer cannot successfully resist the suit of a person proving prior possession in an action for ejectment, by showing that the title and right to possession are in a third person. It cannot therefore be held that in a suit for possession on the basis of title, the plaintiff cannot succeed unless he proves his title to the suit property as well as its possession within 12 years. If the plaintiff proves possession for a long period prior to suit he can succeed in the suit as against a trespasser who does not prove possession amounting to ouster of the plaintiff.

The plaintiff in 1949 brought a suit for possession of the suit land on the allegation that he purchased the land from one J.K. with other plots under two sale deeds dated 1930, and that he was put in possession and remained in possession about 1945, when the 2nd defendant trespassed on the land and took possession of it. The defendants 1 and 2 denied that the plaintiff had any title or that he was in possession at any time. The first defendant was said to have purchased the property from the 2nd defendant in 1946.

It was found that the plaintiff did not prove his title, but that he was in possession from 1930 to 1945. It was also found that the defendants had not proved their plea of title by adverse possession. The second defendant was not examined in Court at all as a witness to support the plea of adverse possession and no explanation was forthcoming for his non-examination. The first defendant's evidence was found to very little value and he had no knowledge of the property prior to the date of his alleged purchase in 1946.

Held, that the possession of the plaintiff was a sufficient evidence of title as owner against the defendants and that the plaintiff's suit for possession must be decreed.

* C.A. No. 2342 of 1966
C.M.P. No. 358 of 1965.

Ismail Ariff v. Mahomed Ghouse, (1893) I.L.R. 20 I.A. 99, Foll; *Narayana Row v. Dharmachar*, (1903) I.L.R. 25 Mad. 514; 13 M.L.J. 146; *Krishna V. Yeshwant and others v. Vasudeva Apaji Ghaotikar deceased by lrs.*, (1884) I.L.R. 8 Bom. 371; *Umrao Singh v. Ramji Das and others*, (1914) I.L.R. 36 All. 51; *Wali Ahmad Khan and others v. Ajudhia Kandu*, (1891) I.L.R. 13 All. 537; *Subodh Gopal Bose v. Province of Bihar and others*, A.I.R. 1950 Pat. 222, approved; *Deb Churn Bolda v. Issur Chunder Manjee*, (1883) I.L.R. 9 Cal. 39; *Ertaza Hossein and another v. Bany Mistry*, (1883) I.L.R. 9 Cal. 130; *Purneshwar Chowdhry and others v. Brija Lal Chowdhry*, (1890) I.L.R. 17 Cal. 256; *Miss Chand Gaita and others v. Kanchiram Bagani*, (1899) I.L.R. 26 Cal. 579.

Appeal from the Judgment and Decree dated the 8th October, 1963 of the Andhra Pradesh High Court in C.C.C. Appeal No. 47 of 1959.

H. R. Gokhale, Senior Advocate (*K. R. Chaudhury* and *G. Kausalya*, Advocates with him), for Appellant.

M. C. Chagla, Senior Advocate (*Messrs. R. V. Pillai and Subodh Markandeya*, Advocates, with him), for Respondent No. 1.

M. C. Bhandare and *K. Rajendra Chaudhuri*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Hegde, J.—This appeal has been brought by the 1st defendant in O.S. No. 210 of 1958 on the file of the 1st Additional Judge, City Civil Court, Hyderabad. That was a suit brought by the 1st respondent-plaintiff for possession of the suit property. That suit was dismissed by the Trial Court but in appeal the High Court of Andhra Pradesh reversed the decree of the Trial Court and decreed the plaintiff's suit for possession. Thereupon this appeal has been brought after obtaining a certificate under Article 133 (1) (a), of the Constitution.

The subject-matter of the suit is a piece of land in Himayatnagar measuring 2856 sq. yards. The plaintiff's case is that he purchased this land from one Jamsheer Khan with other plots in the vicinity under two sale deeds marked Exhibits P-2 and P-3; thereafter he was in possession of the same. When he was in possession, the second defendant trespassed into the said property and took possession of the same, thereafter he illegally sold the same to the 1st defendant. The defendants denied the plaintiff's allegations. They denied that the plaintiff had any title to the suit property or that he was in possession of the same at any time. On the other hand they pleaded that the second defendant who had acquired title to the suit property by adverse possession had sold the same to the 1st defendant in the year 1946.

The Trial Court came to the conclusion that the plaintiff has not established his title to the suit property. It also held that the plaintiff has not satisfactorily proved that he was in possession of the suit property at any time. In view of those findings thought that it was not necessary to go into the defendant's plea of adverse possession. In the result it dismissed the plaintiff's suit. In appeal the High Court agreed with the Trial Court that the plaintiff has not proved his title to the suit property. It rejected the plea of the defendants that they have perfected their title to the suit property by adverse possession. But differing from the Trial Court it came to the conclusion that the plaintiff was put into possession of the suit property by his vendor Jamsheer Khan Sahab in about the year 1930 and he was in possession of the same till about the year 1945, when the second defendant trespassed on the same and took possession of it.

In view of the concurrent finding reached by the Trial Court and the High Court that the plaintiff has not proved his title, that question was not reopened in this Court. The finding of the High Court that the defendants have not established their pleas of title by adverse possession was challenged though feebly. It was contended before us that the plaintiff who based his suit on title and prior

possession having failed to establish his title, his suit has to fail. Further the finding of the High Court that the plaintiff was in possession of the said property between 1930 to 1945 was also assailed before us.

The appellant claims that he came into the possession of the suit property on the strength of the sale deed executed by the second defendant in his favour on 1st October, 1946. The suit from which this appeal arises was initially instituted on the original side of the High Court of Hyderabad in the year 1949. Therefore to establish his claim of title by adverse possession, the 1st defendant must primarily depend on the fact that the second defendant was in possession of the suit property for a period of over nine years before he sold the same to him. Though the second defendant filed a written statement supporting the case of the 1st defendant and though he was present at the time of hearing on several occasions, he was not examined as a witness in this case to support the plea of adverse possession put forward by the defendants. No explanation is forthcoming for his non-examination. This circumstance goes a long way to discredit the defendant's plea of adverse possession. The 1st defendant's evidence as regards adverse possession is of very little significance as his knowledge of the suit property prior to the date he purchased the same is very little. The only other evidence relied on in support of the plea of adverse possession is that of D.W. 2, Shambhu Prashad who claims to have taken the suit property on lease from the second defendant. The lease deed said to have been executed by him is marked as Exhibit D-1. It is not explained how the 1st defendant came into possession of Exhibit D-1. Though the suit was filed as far back as 1949, Exhibit D-1 was produced into Court for the first time in the year 1960. No explanation has been given for this inordinate delay in producing Exhibit D-1 (an unregistered document) in Court. According to D.W. 2, the 1st defendant knew about this document as far back as 1950. Under these circumstances, the High Court was fully justified in rejecting the testimony of D.W. 2 and not relying on Exhibit D-1. The other evidence adduced by the 1st defendant relating to the plea of adverse possession was not commended for our acceptance. Therefore we need not consider the same. Hence we agree with the High Court that the defendants have failed to establish their plea of adverse possession.

Now coming to the evidence relating to the plaintiff's possession of the suit property from the year 1930 to 1945, we have firstly the oral testimony of the plaintiff. The High Court has accepted the plaintiff's evidence as credit-worthy. The plaintiff is a responsible person. He held important offices both under the State Government as well as under the United Nations. *Prima facie* his evidence is worthy of acceptance. This would be particularly so in view of the non-examination of the second defendant. The question before the Trial Court and the High Court was whether the plaintiff was in possession of the suit property between 1930 to 1945 or whether the second defendant was in possession of the same during that period? On this aspect, the evidence is really one-sided. The evidence of the plaintiff that he came into possession of the suit property under Exhibits P-2 and P-3 is supported by the recitals in those documents. In considering the question whether Jamsheer Khan, the vendor under Exhibits P-2 and P-3, had put the plaintiff into possession of the suit property, the fact that Jamsheer Khan had no title to the same is not very material. There is no reason to think that the recitals contained in Exhibits P-2 and P-3 as to the delivery of possession are false recitals. There is documentary evidence to show that the plaintiff paid the "Nazul" for the properties purchased by him under Exhibits P-2 and P-3 after his purchase. It is true that those documents do not show how much "Nazul" was paid in respect of the suit property but the second defendant has produced no documents to show that he had paid any 'Nazul' in respect of the suit property. Exhibit P-4 is a stamped revenue

receipt on a printed form executed in favour of the plaintiff by the Maqtadar on 16th August 1939 for Rs. 331-14-4. It relates to the lands which belonged to Jamsheer Khan and situate at Narayanguda. Evidently that recital refers to the lands covered by Exhibits P-2 and P-3. It recites that a sum of Rs. 331-14-4 was received from the plaintiff as 'Nazul' for the period from 15th Aban 1338 fasli to the end of the Aban 1346 fasli at the rate of Rs. 41-4-5 per year. The sale under Exhibits P-2 and P-3 was made in 1930. Evidently the 'Nazul' in respect of those properties was in arrears till 1939. The 'Nazul' due under Exhibits P-2 and P-3 comes to Rs. 41 and odd per year as seen from Exhibit P-6.

Exhibit P-5 is a letter dated 11th December, 1937 received by the plaintiff from Mr. J. D. M. Dean (P.W.-2), First Divisional Engineer, Hyderabad City. It relates to the construction of a road from Musheerabad to Bashir Bagh. It states that under the Ferman dated 29th Shaban 56 Hijri, H.E.H. The Nizam was pleased to accord sanction to the acquisition of 20 per cent. of the land without any compensation for the construction of road, from the owners of the land and that for the excess land required, compensation will be paid. That letter further mentions that total area of the land belonging to the plaintiff was 7815 sq. yards out of which 2112 sq. yards were required for the construction of the road. Out of that 1563 sq. yards being the 20 per cent. of the entire area was to be taken without any compensation and the value of the remaining 549 sq. yards will be paid to the plaintiff. That letter further informed the plaintiff that the value of the additional area which might finally be determined after the marking may be obtained from the department. It is established that road from Musheerabad to Bashir Bagh was laid not only across the plot covered under Exhibit P-3 but also across the site purchased under Exhibit P-2 in which the suit land is situate. That was obvious because if the road did not touch any portion of Exhibit P-2, the entire area of the land belonging to plaintiff would have been only 5114 sq. yards and not 7815 sq. yards as mentioned in Exhibit P-5. It also establishes that the plaintiff was recognised by the City Improvement Board as the person entitled to compensation in respect of that land. Evidence further discloses that the plaintiff was paid compensation in respect of the land taken from him in excess of 20 per cent. referred to earlier. The oral evidence adduced in the case coupled with Exhibits P-2, P-4 and P-5 satisfactorily establishes the fact that the plaintiff was in possession of the suit property till about 1945.

In addition to the evidence referred to earlier, the High Court has also relied on two other documents namely Exhibits D-8 and D-9, but those documents were produced as additional evidence in the High Court. Their connection with the suit property is not satisfactorily established. Therefore we have excluded them from consideration. If we bear in mind the fact that the question for decision is whether the plaintiff or the 2nd defendant was in possession of the suit property between the years 1932 to 1945, there is hardly any doubt that the preponderance of evidence is in favour of the plaintiff's case. As seen earlier, the defendants have not produced any reliable evidence to support their case. Hence we agree with the High Court that the plaintiff has succeeded in establishing that he was in possession of the suit property prior to 1945.

It was next contended on behalf of the appellant that in a suit for possession brought on the basis of title, the plaintiff cannot succeed unless he proves his title to the suit property as well as its possession within 12 years. According to the appellant except in a suit under section 9 of the Specific Relief Act, the plaintiffs for succeeding in the suit, has to prove both existing title to the suit property and its possession within 12 years. We are unable to accept this contention as correct. In our opinion the possession of the plaintiff prior to 1945 is

a good title against all but the true owner. The defendants who are mere trespassers cannot defeat the plaintiff's lawful possession by ousting him from the suit property. Possessory title is a good title as against everybody other than the lawful owner. In *Ismail Ariff v. Mahomed Ghouse*¹, the Judicial Committee came to the conclusion that a person having possessory title can get a declaration that he was the owner of the land in suit and an injunction restraining the defendant from interfering with his possession. There in it was observed that the possession of the plaintiff was a sufficient evidence of title as owner against the defendant.

In *Narayana Row v. Dharmachar*.² Bench of the Madras High Court consisting of Bashyam Ayyangar and Moore, JJ., held that possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 of the Specific Relief Act, is in no way inconsistent with the position that as against a wrongdoer, prior possession of the plaintiff, in an action of ejection, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrongdoer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The same view was taken by the Bombay High Court in *Krishna V. Yashvant and others v. Vasudeva Apaji Ghaotikar deceased by lrs*³. That was also the view taken by the Allahabad High Court—see *Umrao Singh v. Ramji Das and others*⁴; *Wali Ahmad Khan and others v. Ajudhia Kandhu*⁵; in *Subodh Gopal Bose v. Province of Bihar and others*⁶ the Patna High Court adhered to the view taken by the Madras, Bombay and Allahabad High Courts. The contrary view taken by the Calcutta High Court in *Deb Churn Bolda v. Issur Chunder Manjee*⁷; *Ertaza Hossein and another v. Bany Mistry*⁸ *Purmeshur Chowdhry and others v. Brijia Lall Chowdhry*⁹ and *Miss Chand Gaita and others v. Kanchiram Bagani*¹⁰ in our opinion does not lay down the law correctly.

In the result this appeal fails and the same is dismissed with costs. We see no reason to accept any additional evidence in this Court. Hence C.M.P. No. 3588 of 1968 is dismissed; but no costs.

P.R.N.

Appeal dismissed.

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT :—K.S. HEGDE AND A.N. RAY, JJ.

Budhan Singh (dead) by his legal representatives and another .. Appellants*

v.

Nabi Bux and another .. Respondents.

U.P. Zamindari Abolition and Land Reforms Act (I of 1950), sections 6 and 9—Scope of—Meaning of the word “held” in section 9.

Legislation—Object of—Construction of.

Practice and Procedure—One Bench of a High Court disagreeing with the decision already rendered by another co-ordinate bench of the same High Court—Procedure to be followed.

Words and Phrases—‘Held’ meaning of.

Though in fact the vesting of the Estates and the deemed settlements of some rights in respect of certain classes of lands or buildings included in the Estate took place simultaneously in law the two must be treated as different transac-

1. (1893) I.L.R. 20 I.A. 99.

2. (1903) I.L.R. 26 Mad. 514; 13 M.L.J. 146.

3. (1894) I.L.R. 8 Bom. 371.

4. (1914) I.L.R. 36 All. 51.

5. (1891) I.L.R. 13 All 537.

6. A.I.R. 1950 Pat. 222.

7. (1883) I.L.R. 9 Cal. 39.

8. (1883) I.L.R. 9 Cal. 130.

9. (1890) I.L.R. 17 Cal. 256.

10. (1899) I.L.R. 26 Cal. 579.

* G.A. No. 1789 of 1966.

tions; first there was a vesting of the Estates in the State absolutely and free of all encumbrances. Then followed the deemed settlement by the state of same rights with the persons mentioned in sections 6 and 9. Therefore in law it would not be correct to say that what vested in the State are only those interests not coming within sections 6 and 9. In view of section 9 all buildings situate within the limits of the Estate held by an intermediary or tenant or other person, whether residing in the village or not continues to be held by him and the site of the buildings within the area appurtenant thereto should be deemed to have been settled with him by the State Government on such terms and conditions as may be prescribed.

It is proper to assume that the law-makers who are representatives of the people enact laws which the society considers as honest, fair and equitable. The object of the very legislation is to advance public welfare. The entire legislative process is influenced by consideration of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation consequently where the suggested construction operates harshly, ridiculously or in any other manner, contrary to prevailing conceptions of justice and reason in most instance, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the Legislature there is little reason to believe that it represents the legislative intent.

It is not possible to believe that the Legislature intended to ignore the rights of persons having legal title to possession and wanted to make gift of any building to a trespasser howsoever recent the trespasser might have been if only he happened to be in physical possession of the building on the date of vesting.

It is true that the Legislature could have used the word "lawfully held" in place of the word "held" in section 9 but one of dictionary meaning given to the word "held" is "lawfully held". The word "held" is technically understood to mean to possess by legal title. Therefore by interpreting the word "held" as "lawfully held" the Court is not adding any word to the section. It is merely spelling out the meaning of that word. It is proper to construe the word "held" in section 9 when used in relation to the words "other person" as meaning "lawfully held" by that person. That interpretation flows from the context in which the word is used.

Held, The scheme of the Act is to abolish all estates and vest the concerned property in the State but at the same time certain rights were conferred on persons in possession of lands or building. It is reasonable to think that the persons who were within the contemplation of the Act are those who were in possession of lands or buildings on the basis of some legal title. The word "held" in section 9 means "lawfully held."

(On facts held, the owners of the old buildings continue to be the owners of the new building).

It is unfortunate that the latter Division Bench should have thought it proper to sit in judgment over the correctness of a decision rendered by a Bench of a co-ordinate jurisdiction. Judicial Propriety requires that if a Bench of a High Court is unable to agree with the decision already rendered by another co-ordinate bench of the same High Court, the question should be referred to a larger bench otherwise the decisions of High Courts will not only lack respect in the eyes of the public, it will also make the task of the subordinate Courts difficult.

Appeal from the Judgment and Decree dated the 24th May, 1961 of the Allahabad High Court in Second Appeal No. 1302 of 1952.

B.C. Misra, Senior Advocate, (G. S. Chatterjee and M.M. Kshatriya, Advocates, of M/s. Kshatriya and Chatterjee, with him), for Appellants.

J.P. Goyal and G.N. Wantoo, Advocates, for Respondents.

The judgment of the Court was delivered by

Hegde, J.—The scope of section 9 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act I of 1951) (to be hereinafter referred to as the Act) comes up for decision in this appeal by certificate.

The facts relevant for deciding this appeal are no more in dispute. The respondents were Ryots under the appellants in village Nagli Abdulla, a hamlet of village Muchhra. The site of the building in dispute in this appeal had been taken by the father of the respondents from the appellants' ancestors over 6 years ago and thereafter the respondents put up some buildings on that site for their residential purposes. During the communal disturbances in 1947 they left the village temporarily as a measure of safety and took shelter with some of their relations in some other village at a distant place. They came back to their village in the year 1949 when the conditions improved. At that time they found the appellants occupying that site after putting up a cowshed on the site in which their residential building stood. Those residential buildings had been demolished and the site in question included as a part of the house of the appellants. As the appellants refused to deliver possession of the suit property, the respondents instituted a suit for possession of the same on 9th January, 1951.

On 26th January, 1951, the Act came into force. Section 4 of the Act provided for the vesting of the Estates in the State. It prescribes that as soon as may be after the commencement of the Act, the State Government may, by notification, declare that, as from a date to be specified, all Estates situate in Uttar Pradesh shall vest in the State and as from the beginning of the date so specified, all such Estates shall stand transferred to and vest, except otherwise provided in the Act, in the State free from all encumbrances. Section 6 of the Act enumerates the consequences of the vesting of an Estate in the State. Section 9 deals with the buildings in the *abadi*. Reading sections 4, 6 and 9 together, it follows that all Estates notified under section 4 vest in the State free from all encumbrances. The qundam proprietors or tenure holders of those Estates lose all interests in those Estates. As proprietors or tenure holders they retain no interest in respect of them whatsoever. But in respect of the lands or buildings enumerated in section 6 and section 9, the State settled on the persons who held them certain rights. Though in fact the vesting of the Estates and the deemed settlement of some rights in respect of certain classes of lands or buildings included in the Estate took place simultaneously, in law the two must be treated as different transactions; first there was a vesting of the Estates in the State absolutely and free of all encumbrances. Then followed the deemed settlement by the State of some rights with the persons mentioned in sections 6 and 9. Therefore in law it would not be correct to say that what vested in the State are only those interests not coming within sections 6 or 9; see—*Rana Sheo Anwar Singh v. Allahabad Bank Ltd., Allahabad*¹. In this connection reference may also usefully be made to the decision of this Court in *Shivashankar Prasad Shah and others v. Veekunth Nath Singh and others*² a decision rendered under the Bihar Land Reforms Act, 1950, the relevant provisions of which are similar to the provisions of the Act. In this case notification under section 4 of the Act was issued on 1st July, 1952. Hence the vesting contemplated under section 4 took place on that date.

Section 9 of the Act, the section with which we are concerned in this case, reads thus :

“All wells, trees in *abadi*, and all buildings situated within the limits of an estate, belonging to or held by an intermediary or tenant or other persons, whether residing in the village or not, shall continue to belong to or be held by such intermediary or tenant or person, as the case may be, and the site of the wells or the buildings within the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed.”

In view of that provision all buildings situate within the limits of an Estate held by an intermediary or tenant or other person, whether residing in the village or not continues to be held by him and the site of the buildings within the area appurtenant thereto should be deemed to have been settled with him by the State Government on such terms and conditions as may be prescribed.

As seen earlier till about 1947, the respondents were lawfully holding the buildings and the site with which we are concerned in this case as Ryots. They never gave up their possession of the buildings voluntarily. The fact that they vacated those buildings and took shelter with their relations during the time of the communal disturbances cannot be considered as abandonment of the buildings. In law they continued to be in possession of the buildings. Hence the appellants' entry into the suit site was an unlawful act. In the eye of law they were trespassers. In demolishing the buildings put up by the respondents, they committed the offence of mischief. The fact that they had put up new structures cannot under the Transfer of Property Act, enhance their rights to the property. We have no material before us from which we can find out the value of the buildings demolished by them and the value of the building put up by them unlawfully. From the description of the building given in evidence, it appears that the newly put up building is only cattle shed. We are not satisfied that the newly put up building is worth more than the buildings that had been demolished by the appellants. In the circumstances of the case all that can be said is that the old buildings have been substituted by the new building. Therefore the owners of the old buildings continue to be the owners of the new building. In that view of the matter it is not necessary to consider whether if a stranger builds a building on the land of another, the true owner of the land is entitled to recover the land with the building on it. Equitable considerations persuade us to hold that when the respondents came back to their village in 1949, they were entitled to recover not only the site but also the building constructed on it by the appellants. Hence it should be held that on the date of vesting, the respondents were the owners of the building in question. In law they were holding the same.

The controversy between the parties in this appeal is as to the meaning to be attached to the word "held" in section 9 of the Act. Is the holding contemplated therein "lawful holding" or a mere holding lawful or otherwise. It is contended on behalf of the appellants that the dictionary meaning of the word "held" merely means "to have a possession of"; section 9 merely contemplates physical possession and nothing more; on the date of the vesting they were in physical possession of the site as well as the building; therefore the building must be deemed to have been settled with them. On the other hand it is contended on behalf of the respondents that the word "held" in section 9 of the Act means "lawfully held" and that section does not confer any benefit on a trespasser.

The meaning of the word "held" in section 9 came up for consideration before a Division Bench of the Allahabad High Court consisting of Agarwala and Chaturvedi, JJ., in *Phekū Chamar and others v. Harish Chandra and others*¹. In that case the learned Judges held that the Legislature has deliberately used the word "held" and that word connotes the existence of a right or title in the holder. They further opined that section 9 does not confer a right on the persons having no title to the land. The settlement contemplated by the section is confined in its application to the case where the building is lawfully held by the person in possession. The learned Judges also observed that in enacting section 9, the Legislature never meant to deprive the citizens of their lawful rights over the lands merely because a trespasser has succeeded in making some construction on it. Section 9 does not mean that if a person has made some construction whatsoever over any land lying within the limits of an Estate, however wrongful or recent the possession might be, that construction must be deemed to have been settled with him by the State Government. The meaning of the word "held" in section 9 again came up before another Division Bench of the Allahabad High Court consisting of Desai

and Takru, JJ. in *Bharat and another v. Ch. Khazan Singh and another*¹. The learned Judges declined to follow the decision in *Pheku Chamar's case*². They came to the conclusion that the Legislature used a wide language in section 9 and it covers the case of building belonging to persons who constructed them lawfully or unlawfully. It is unfortunate that the latter Division Bench should have thought it proper to sit in judgment over the correctness of a decision rendered by a Bench of co-ordinate jurisdiction. Judicial propriety requires that if a bench of a High Court is unable to agree with the decision already rendered by another co-ordinate bench of the same High Court, the question should be referred to a larger bench. Otherwise the decisions of High Courts will not only lose respect in the eyes of the public, it will also make the task of the subordinate Courts difficult.

The question of law referred to hereinbefore again arose for decision in this case. When this case came up in the second appeal before Sahai, J., he referred it to a Full Bench in view of the conflict of opinion noticed earlier. The Full Bench was presided over by Desai, C.J., who was a party to the decision in *Bharat's case*¹. The other members of the bench were Mukerji and Dwivedi, JJ. Mukerji and Dwivedi, JJ. agreed with the view taken in *Pheku Chamar's case*². Desai, C.J., in his dissenting judgment did not deal with the meaning of the word "held" in section 9 but on the other hand opined that the suit should have been dismissed because of the fact that the buildings put up by the respondents were not there on the date of vesting and hence the respondents were not entitled to the benefit of section 9.

Before considering the meaning of the word "held" in section 9, it is necessary to mention that it is proper to assume that the law makers who are the representatives of the people enact laws which the society considers as honest, fair and equitable. The object of every legislation is to advance public welfare. In other words as observed by Crawford in his book on statutory constructions that the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instance, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the Legislature, there is little reason to believe that it represents the legislative intent.

We are unable to persuade ourselves to believe that the legislature intended to ignore the rights of persons having legal title to possession and wanted to make a gift of any building to a trespasser howsoever recent the trespasser might have been if only he happened to be in physical possession of the building on the date of vesting. We are also unable to discern any legislative policy in support of that construction. It was urged before us by the learned Counsel for the appellants that the Legislature with a view to put a stop to any controversy as to any rights in or over any building directed that whoever was in physical possession of a building on the date of vesting shall be deemed to be the settlee of that building. He further urged that it would have been a hard and laborious task for the State to investigate into disputed questions relating to title or possession before making the settlement contemplated by section 9 and therefore the Legislature cut the Gordian Knot by conferring title on the person who was in possession of the building. We see no merit in this argument. The settlement contemplated by section 9 is a deemed settlement. That settlement took place immediately the vesting took place. No inquiry was contemplated before that settlement. If there is any dispute as to who is the settlee, the same has to be decided by the civil Courts. The State is not concerned with the same. Section 9 merely settles the building on the person who was holding it on the date of vesting.

It is true that according to the dictionary meaning the word "held" can mean either a lawful holding or even a holding without any semblance of a right such as holding by a trespasser. But the real question is as to what is the legislative intent? Did the Legislature intend to settle the concerned building with a person who was lawfully holding or with any person holding lawfully or otherwise? Mr. Misra contended that there is no justification for us to read into the section the word "lawfully" before the word "held". According to him, is the Legislature intended that the holding should be a lawful one, it would have said "lawfully held". He wanted us to interpret the section as it stands.

It is true that the Legislature could have used the word "lawfully held" in place of the word "held" in section 9 but as mentioned earlier one of the dictionary meanings given to the word "held" is "lawfully held". In Webster's New Twentieth Century Dictionary (Second Edition), it is stated that in legal parlance the word "held" means to possess by "legal title". In other words the word "held" is technically understood to mean to possess by legal title. Therefore by interpreting the word "held" as "lawfully held", we are not adding any word to the section. We are merely spelling out the meaning of that word. It may further be seen that the section speaks of all buildings. . . . with'n the limits of an Estate, belonging to or held by an intermediary or tenant or other person. . . The word "belonging" undoubtedly refers to legal title. The words "held by an intermediary" also refer to a possession by legal title. The words "held by tenant" also refer to holding by legal title. In the sequence mentioned above it is proper to construe the word "held" in section 9 when used in relation to the words "other person" as meaning "lawfully held" by that person. That interpretation flows from the context in which the word "held" has been used. We have earlier mentioned that the said interpretation accords with justice.

The expression "held" has been used in the Act in various other sections—see sections 2 (1), (c), 13, 17, 18, 21, 144, 204, 240-A, 298, 304 and 314 to connote possession by legal title. Mr. Misra, learned Counsel for the appellants does not deny that the expression "held" in those sections means held lawfully. But according to him that is because of the context in which the word is used. Mr. Misra is right in saying so but he overlooks the context in which that expression is used in section 9. We have already made reference to that context. He failed to point out to us any section in the Act, leaving aside section 9 for the time being where the word "held" has been used as meaning mere holding, lawful or otherwise. In *K. K. Handique v. The Member, Board of Agricultural Income-tax, Assam*¹ this Court was called upon to consider the meaning of the word "holds" in sections 12 and 13 of the Assam Agricultural Income-tax Act. Subba Rao, J., (as he then was) speaking for the Court observed that the expression "holds" includes a twofold idea of the actual possession of a thing and also of being invested with a legal title though sometimes it is used only to mean actual possession. After reading sections 12 and 13 together he observed that the word "holds" in these sections mean holding by legal title. In *Eramma v. Verrupanna and others*², this Court considered the meaning of the word "possessed" in section 14 (1) of the Hindu Succession Act which laid down that "any property possessed by a female Hindu whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as a limited owner". It held that the property possessed by a female widow, as contemplated in the section, is clearly a property to which she has acquired some kind of title whether before or after the commencement of the Act. It is true that in arriving at that conclusion the Court took into consideration the language of the provision as a whole and also the explanation to the section. The scheme of the Act is to abolish all Estates and vest the concerned property in the State but at the same time certain rights were conferred on persons in possession of lands or building. It is reasonable to think that the persons who were within the contem-

1. (1966) 1 I.T.J. 396 : (1966) 1 S.C.J. 499 : 60 I.T.R. 216 : A.I.R. 1966 S.C. 1191. 2. (1966) 2 S.C.R. 626 : (1967) 1 S.C.J. 746.

plation of the Act are those who were in possession of lands or buildings on the basis of some legal title. Bearing in mind the purpose with which the legislation was enacted, the scheme of the Act and the language used in section 9, we are of opinion that the word 'held' in section 9 means 'lawfully held'. In other words we accept the correctness of the view taken by Mukerji and Dwivedi, JJ. For the reasons already mentioned we are unable to agree with Desai, C.J., that the fact that the appellants had demolished the buildings put up by the respondents and put up some other building in their place had conferred any rights on them under section 9.

In the result the appeal is dismissed with costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND P. JAGANMOHAN REDDY, JJ.

Ram Dayal

.. *Appellant**

v.

Municipal Corporation of Delhi and another

.. *Respondents.*

Prevention of Food Adulteration Act (XXXVII of 1954), section 7 read with section 16, rules 26 and 28 and sub-section (2) of section 13—Criminal Procedure Code (V of 1898), section 257 and 510 (2)—Public Analyst report—Right of accused of section 257, Criminal Procedure Code, to require the Public Analyst to be produced—Duty of Court.

While it cannot be disputed that there are certain classes of cases where certificate have been treated as conclusive evidence, there were yet others though admissible without calling the functionaries that gave them were nonetheless only *prima facie* evidence. In cases where the certificates are not to be treated as conclusive evidence and they are only *prima facie* evidence, the party against whom they are produced has a right to challenge the subject-matter of the certificate. The statutes have also in some cases recognised this right, such as for instance in sub-section (2) of section 510 of the Criminal Procedure Code in respect of reports given under the hand of several experts named in sub-section (1) notwithstanding the fact that they may be used in evidence in enquiry, trial or other proceedings under the Code.

Where certificates are not made final and conclusive evidence of two facts stated therein, it will be open to the party against whom certificates which are declared to be sufficient evidence either to rebut the facts stated therein by his own or other evidence or to require the expert to be produced for cross-examination which prayer the Court is bound to consider on merits in granting or rejecting it. There is no presumption that the contents are true or correct though such a certificate is evidence without formal proof. In any case where there is evidence to the contrary the Court is bound to consider that evidence along with such a certificate with or without the evidence of the expert who gave it being called and come to its own conclusion. It is true that sub-section (2) of section 13 of the Act has given a right both to the accused as well as the complainant on payment of the prescribed fee to apply to the Court after the prosecution has been instituted to send part of the sample preserved as required under sub-clause (1) or sub-clause (iii) of clause (c) of sub-section (1) of section 11 to the Director of the central laboratory for a certificate, and the Court is bound to send it under its seal to the said Director who has to submit a report within one month from the date of the receipt. This certificate under sub-section (3) supersedes the Public Analysts' certificate and is conclusive and final under sub-section (5). But nothing contained in these sub-sections relating to certificate of the Director of the Central Food Laboratory in any way limits the right of the accused of section 257 of the Criminal Procedure Code to require the Public Analyst to be produced. The Court may reject the prayer

for good and sufficient reasons such as for instance where it is made for the purpose of vexation or delay or for defeating the ends of justice.

He'd on facts, the application was made more to delay the disposal of the case.

Appeal from the Judgment and Order dated the 6th November, 1967 of the Delhi High Court in Criminal Revision No. 189 of 1967.

Hardev Singh, Advocate, for Appellant.

Bishan Narain, Senior Advocate, (*B. P. Maheshwari*, Advocate, with him), for Respondent No. 1.

Dr. L. M. Singhvi, Senior Advocate, (*R.N. Sachthey*, Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Jaganmohan Reddy, J.—This appeal by certificate granted by the Delhi High Court under Article 134 (1) (c) of the Constitution is against its judgment which confirmed the conviction of the accused of an offence under section 9 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) and against the enhancement of the sentence of imprisonment from the one till the rising of the Court to six months R.I. which is the minimum prescribed under the Act together with a fine of Rs. 1,000 in default to undergo six months R.I.

The appellant is a sweetmeat seller. It is alleged that on 1st September, 1965, *Shri B. S. Sethi*, Food Inspector appointed by the Central Government under section 9 of the Act visited his shop and found that the appellant was selling coloured laddus. The Food Inspector purchased 1,500 grams of these laddus by way of a sample by paying him Rs. 9 as the price thereof. This sample was sub-divided into three parts and was put into three separate bottles as required under section 11 of the Act. One bottle was given to the accused, another was sent to the Public Analyst and the third was retained by the Food Inspector. The sample sent to the Public Analyst was analysed and a report was received from him on 10th September, 1965, to the effect that the laddus were adulterated with unpermitted colour. Thereupon a complaint was filed against the accused and he was convicted by the magistrate on 17th October, 1966, and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 1,000 in default to undergo six months R.I. It would appear that the Municipal Corporation filed before the Sessions Judge a revision for the enhancement of the sentence because the accused having been found guilty under the provisions of section 7 read with section 16 of the Act should have been awarded the minimum sentence of six months and a fine of Rs. 1,000 but instead he was sentenced to imprisonment till the rising of the Court and a fine of Rs. 1,000 which was not in accordance with the mandatory provisions of section 16 of the Act. The Sessions Judge, after hearing the parties accepted the contention of the Municipality and referred the case to the High Court recommending that the accused having been found guilty under the provisions of section 16 of the Act should have been awarded a minimum sentence of six months and a fine of Rs. 1,000. Before the High Court several contentions were raised on behalf of the accused one of which was that as his request for summoning the Public Analyst for cross-examination had not been acceded to, he had been prejudiced, as such the entire proceedings against him were vitiated. The High Court however rejected this contention on the ground that section 510 of the Code of Criminal Procedure had no application in that it only dealt with Chemical Examiner or an Assistant Chemical Examiner and other experts mentioned therein. It was also observed that where the accused desired to challenge the report of the Public Analyst under the Act, he had to follow the procedure provided in section 13 (2) for sending the sample to the Director of Central Food Laboratory for his examination, because any report given by him will supersede the report of the Public Analyst and would be final and conclusive as to the facts stated therein. Before us also a similar contention was urged by the learned Advocate for the accused *Shri Hardev Singh* who had produced before us the application made on behalf of the accused under section 510 (2) for calling the Public

Analyst which was summarily rejected on 28th August 1966. This contention urged before us has to be determined in the light of the relevant provisions of the Act.

It cannot be disputed that any person selling food with impermissible colouring matter contravenes the provisions of section 7 which prohibits the selling of any adulterated food and would be punishable under section 16 of the Act. What is adulterated article of food has been defined in section 2 (i) and so far as it is related to colouring sub-clause (j) of clause (i) of section 2 provides that an article of food shall be deemed to be adulterated "if any colouring matter other than that prescribed in respect thereof and in amounts not within the prescribed limits of variability is present in the article". Rules 23 and 27 of the Prevention of Food Adulteration Rules, 1955 prohibit the addition of any colouring matter except permitted by the Rules, and of inorganic colouring matters and pigments to any article of food. What is permitted and to what extent has been stated in rules 24 to 26 and 28 to 31, but in so far as this case is concerned we may merely refer to rules 26 and 28 the former of which gives a list of natural colouring matters that can be used and the latter with coal tar dyes. We are told that the laddus which were being sold by the accused had yellow colour. If so, item 2 of rule 28 prescribes that the only permitted colours are Tartrazine with colour index 640 belonging to Chemical class of Xanthene and Sunset Yellow FCF belonging to the chemical class Azo, and these alone can be used. It will therefore be incumbent on the Public Analyst to say whether the colour used is that which is permissible under any of the rules and if as in the report he has stated that the sample of the Laddus purchased by the Food Inspector was coloured with unpermitted colour, it would mean that the accused has not used any of the colours permitted under the rules. The report of the Public Analyst is as follows :—

"Butyro Refractometer reading at 40° C of the fact extracted from sweets—50.0 Baudouin test of the extracted fact—Positive Reichert value of the extracted fact—7.59 Colour—unpermitted.

"The same is adulterated due to 7.0 excess in Butyro Refractometer reading at 40° C of the fact extracted from sweets, 20.41 deficiency in Reichert value of the extracted fact Baudouin test of extracted fact being positive, and also coloured with unpermitted colour."

The learned Advocate or the accused submits that the refusal of the Court to grant the application of the accused to call the Public Analyst Shri Sudhama Rao for cross-examination has greatly prejudiced him, as such the conviction ought to be quashed. It is contended that the accused has a valuable right of cross-examination to test the contents of the report given by the Public Analyst and the Court has to summon him if so desired. On the other hand it is contended both by Shri Bishan Narain or the Delhi Municipality as well as Dr. Singhvi or the Union of India that no such right has been conferred under the Act when the provisions of section 13 (5) have not only made the document signed by the Public Analyst to be used in evidence of the facts stated therein in any proceedings under the Act or under section 272 to 276 of the Indian Penal Code but has given a right to the accused to have the sample sent to the Director of the Central Food Laboratories under section 13 (2) whose report supersedes that of the Public Analyst and is final and conclusive. In view of the provisions it is said that the Legislature inferentially took away the right of the accused to summon the Public Analyst either for examination or cross-examination, as such the analogy of section 510 (2) of the Criminal Procedure Code which specifically gives a right to summon and examine the chemical examiner and other experts therein stated, as to the subject matter of their respective reports has no relevance. Dr. Singhvi further contends that there are a class of cases which permit of trials by certificates where the general rule of evidence that every document in order to be admissible has to be proved by the person signing it has no application as the statute permits it to be proved without calling the author of it. While it cannot be disputed that there are certain classes of cases where cer-

ificates have been treated as conclusive evidence, there were yet others though admissible without calling the functionaries that gave them were nonetheless only *prima facie* evidence. In cases where the certificates are not to be treated as conclusive evidence and they are only *prima facie* evidence, the party against whom they are produced has a right to challenge the subject matter of the certificate. The statutes have also in some cases recognised this right, such as for instance in sub-section (2) of section 510 Criminal Procedure Code in respect of reports given under the hand of several experts named in sub-section (1) notwithstanding the fact that they may be used in evidence in enquiry, trial or other proceedings under the Code. Sub-section (2) provides: "The Court may if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the subject matter of the report". Similarly sub-section (1) of section 110 of the English Food and Drugs Act 1955 while providing that the production by one of the parties of the certificate of a Public Analyst in the form prescribed in section 92 (5) or of a document supplied to him by the other party as being a copy of such certificate shall be sufficient evidence of the facts stated therein unless in the first mentioned case the other party requires that the analyst shall be called as a witness. Sub-section (2) of section 110 also gives a like opportunity in the case of a certificate of an officer who took a sample of the milk. It appears to us that where certificates are not made final and conclusive evidence of the facts stated therein, it will be open to the party against whom certificates which are declared to be sufficient evidence either to rebut the facts stated therein by his own or other evidence or to require the expert to be produced for cross-examination which prayer the Court is bound to consider on merits in granting or rejecting it. There is no presumption that the contents are true or correct though such a certificate is evidence without formal proof. In any case where there is evidence to the contrary the Court is bound to consider that evidence along with such a certificate with or without the evidence of the expert who gave it being called and come to its own conclusion. It is true that sub-section (2) of section 13 of the Act has given a right both to the accused as well as the complainant on payment of the prescribed fee to apply to the Court after the prosecution has been instituted to send part of the sample preserved as required under sub-clause (1) or sub-clause (iii) of clause (c) of sub-section (1) of section 11 to the Director of the Central Laboratory for a certificate, and the Court is bound to send it under its seal to the said Director who has to submit a report within one month from the date of the receipt. This certificate under sub-section (3) supercedes the Public Analyst's certificate and is conclusive and final under sub-section (5). But nothing contained in these sub-sections relating to certificate of the Director of the Central Food Laboratory in any way limits the right of the accused under sections 257 of the Code of Criminal Procedure to require the Public Analyst to be produced. The Court may, as we said earlier, reject the prayer for good and sufficient reasons such as for instance where it is made for the purpose of vexation or delay or for defeating the ends of justice.

In *Mangaldas Raghavji v. State*¹, this Court held that where the accused had not done anything to call the Public Analyst the Court could legally act on the report of the Public Analyst. Mudholkar, J., speaking for the Court observed at page 900.

"It is true that the certificate of the Public Analyst is not made conclusive but this only means that the Court of fact is free to act on the certificate or not as it thinks fit."

Again at page 902 it was said:

"As regards the failure to examine the Public Analyst as a witness in the case no blame can be laid on the prosecution. The report of the Public Analyst was there and if either the Court or the appellant wanted him to be examined as a witness appropriate steps would have been taken. The prosecution cannot fail solely on the ground that the Public Analyst had not been called in the case."

In *Sukhmal Gupta v. The Corporation of Calcutta*¹ the Assistant Public Analyst who had analysed the sample was examined and was cross-examined by the defence. It was contended that the Public Analyst was not called. There does not appear to have been any attempt to have him called, nor was any prejudice shown. On the other hand, the accused could have availed of the valuable right given to him under section 13 (2) but he did not do so, nor did he put any question in cross-examination that the tea was liable to deterioration and could not be analysed by the Director of Central Food Laboratory. In these circumstances the evidence of the Assistant Public Analyst and the report of the Public Analyst was accepted in maintaining the conviction.

In this case we would have remanded it to give the accused an opportunity to examine the Public Analyst but it appears to us that even before us no attempt was made as to why the evidence was required and what is the specific point which needs to be elucidated. The accused knows what colour he added, he could have easily said that that colour was one of the permitted colours, but he did not say so in his examination under section 342 nor did he produce any evidence of those whom he employed as to the colour which was added. In our view, the application was made more to delay the disposal of the case otherwise he could have easily made an application under section 13 (a) as soon as a complaint was lodged against him on 19th January, 1966, which was within 3½ months from the purchase of the sample and the receipt of the report. There is nothing to show that either the Laddus or the colour would have deteriorated even if he had made his application under section 13 (2) when he made the application under section 510 (2) on 20th August, 1966.

In these circumstances, we do not consider this to be a fit case for interference. The appeal is accordingly dismissed.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—J.C. SHAH AND K.S. HEGDE, JJ.

Sudhir Kumar Saha

... *Petitioner**

v.

The Commissioner of Police, Calcutta and another

... *Respondents.*

Preventive Detention Act (IV of 1950), section 3 (2)—Power of detention under the Act—An exceptional power—Detention for maintenance of “public order”—When justified—“Law and Order” distinguished from “public order.”

The freedom of the individual is of utmost importance in any civilised society. It is a human right. Under our Constitution it is a guaranteed right. It can be deprived of only by due process of law. The power to detain is an exceptional power to be used under exceptional circumstances. It is wrong to consider then same, as the executive appears to have done the present case, that it is a convenient substitute for the ordinary process of law.

The three incidents mentioned in the grounds in the present case are stray incidents spread over a period of one year and four months. These incidents cannot be said to be inter-linked. They could not have prejudiced the maintenance of ‘public order’ nor can they be held to be subversive of ‘public order.’ They were at best, prejudicial to “Law and Order”, being mere breaches of law.

Disturbance of “public order” is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon

1. Unreported, Cri. A. No. 161 of 1966 decided on 3rd May, 1968.

* W.P. No. 378 of 1969.

18th December, 1969.

the life of the community in a locality which determines whether the disturbance amounts only to a breach of 'Law and Order.'

Under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*.

D.P. Singh, Advocate, *amicus curiae*, for Petitioner.

G.S. Chatterjee, Advocate for *Sukumar Basu*, Advocate for Respondents.

The Judgment of the Court was delivered by :

Hegde, J.—In this petition under Article 32 of the Constitution submitted from Jail, the petitioner seeks a writ of *Habeas Corpus* directing his release from detention. We have already directed the release of the petitioner on 15th December, 1969. Now we proceed to give our reasons in support of that order.

The petitioner was ordered to be detained by the Commissioner of Police, Calcutta under section 3 (2) of the Preventive Detention Act, (IV of 1950) by his order dated 15th July, 1969. It is stated in that order that the petitioner was ordered to be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of "public order." That order was confirmed by the State Government after the same was approved by the Advisory Board.

From the grounds served on the petitioner, it appears that his detention was ordered because of the three instances mentioned therein. It is said therein that on 28th February, 1968, between 9-50 P.M. and 10-30 P.M. the petitioner armed with a knife along with some others also armed, created disturbance on the Northern Avenue in the course of which he attacked the local people with knife as a result of which one Ajit Kumar Biswas sustained stab injuries. It is further alleged that during that incident, the petitioner and his associates hurled sodawater bottles and brickbats towards the local people endangering their lives and safety and thereby they created fear and frightfulness amongst the people of the locality and thus affected public peace and tranquillity of the locality.

The second incident mentioned therein is that on 29th October, 1968, at about 9-10 P.M. the petitioner being armed with bombs and accompanied by some others created disturbance of Raja Manindra Road, in the course of which he and his associates hurled bombs, used swords, iron rods and lathis against the local people endangering their lives and safety and thereby they created fear and frightfulness in the locality resulting in the disturbance of public peace and tranquillity of that locality.

The last incident mentioned is that on 28th June, 1969, at about 11-15 P.M., the petitioner and his associates armed with bombs created disturbance on Raja Manindra Road in the course of which they indiscriminately hurled bombs towards the local people endangering their lives and safety and thereby they affected public peace and tranquillity of that locality.

From the record it does not appear that the petitioner was prosecuted for any of the offences mentioned earlier. It is not known why he was not prosecuted. In the ordinary course, if there is truth in the allegations made, he should have been prosecuted and given an opportunity to defend himself. The allegations made against the petitioner do not amount to anything more than that he committed certain breaches of law.

The freedom of the individual is of utmost importance in any civilized society. It is a human right. Under our Constitution it is a guaranteed right. It can be deprived of only by due process of law. The power to detain is an exceptional power to be used under exceptional circumstances. It is wrong to consider the same as the executive appears to have done in the present case that it is a convenient substitute for the ordinary process of law. The detention of the petitioner under the circumstances of this case appears to be a gross misuse of the power conferred under the preventive Detention Act,

The three incidents mentioned in the grounds are stray incidents spread over a period of one year and four months. These incidents cannot be said to be inter-linked. They could not have prejudiced the maintenance of 'public order' nor can they be held to be subversive of 'public order'. They were at best prejudicial to "law and order." The distinction between the maintenance of 'public order' and maintenance of "law and order" was brought out by this Court in *Dr. Ram Manohar Lohia v. State of Bihar*¹. Therein this Court pointed out that maintenance of "law and order" is a conception much wider than the conception of maintenance 'public order.' The latter is the prevention of a disorder of grave nature. Every act that affects "law and order," need not affect 'public order.' If it is otherwise every one who disturbs "law and order", however petty the offence committed by him may be, can be detained under the Preventive Detention Act. This would be a total repudiation of the rule of law and an affront to our Constitution. The legal position relating to the point in issue was again recently considered by this Court in *Arun Ghosh v. State of West Bengal*². Therein it was observed that 'public order' is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of "law and order."

We are of the opinion that the grounds stated in support of the detention cannot amount to a disturbance of the maintenance of 'public order.'

V.K.

Petition allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

R. Kempraj

... *Appellant* *

v.

M/s. Barton son & Co., Private Ltd.

... *Respondent.*

Transfer of Property Act (IV of 1882), sections 5, 14 and 105—Lease for 10 years—Option given to lessee to get the lease renewed after every ten years—Whether hit by rule of perpetuity.

It is well known that the rule against perpetuity is founded on the principle that the liberty of alienation "shall not be exercised to its own destruction and that all contrivances shall be void which tend to create a perpetuity or place property for ever out of the reach of the exercise of the power of alienation." A lease is not a mere contract but it is a transfer of an interest in land and creates a right *in rem*. Owing to the provisions of section 105 a lease in perpetuity can be created but even then an interest still remains in the lessor which is called a reversion.

Section 14 is applicable only where there is transfer of property.

Held, on facts, even if creation of a lease-hold interest is a transfer of right in property and would fall within the expression 'transfer of property' the transfer was for a period of ten years only by means of the indenture Exhibit P-1. The stipulation relating to renewal could not be regarded as transferring property or any rights therein. The clause containing the option to get the lease renewed on the expiry of each term of ten years can by no means be regarded as creating an interest in property of the nature that would fall within the ambit of section 14.

Held, further the expression "covenant runs with the land" has been taken from the English law of real property. It is an exception to the general rule that all covenants are personal. Even on the footing that the clauses relating to renewal

1. (1966) M.L.J. (Cr.) 642 : (1966) 2 S.C.J. 549 : (1966) 1 S.C.R. 709.

* C.A. No. 1655 of 1963.

2. W.P. No. 287 of 1969 decided on 2nd December, 1969.

29th August, 1969.

in the lease contain covenants running with the land the rule against perpetuity contained in section 14 of the Act would not be applicable as no interest in property has been created of the nature contemplated by that provision.

Appeal by Special Leave from the Judgment and order dated the 20th December, 1967 of the Mysore High Court in regular Second Appeal No. 811 of 1965.

A. K. Sen, Senior Advocate, (Mrs. Shyamla Pappu and Vineet Kumar, Advocates, with him), for Appellant.

S. V. Gupte, Senior Advocate, (Janendra Lal, Advocate, B. R. Agarwala, Advocate of M/s. Gagrati & Co., and Kumar M. Mehta, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the Mysore High Court in which the question involved is whether an option given to a lessee to get the lease, which is initially for a period of 10 years, renewed after every 10 years is hit by the rule of perpetuity and is void.

The respondent entered into a deed of lease on 26th October, 1951, with the appellant in respect of premises Nos. 8 and 9, Mahatma Gandhi Road, (South Parade), Civil Station, Bangalore. It was stipulated that the lease would be for a period of 10 years in the first instance with effect from 1st November, 1961 "with an option to the lessee to renew the same as long as desired as provided." Clauses 9 and 10 which are material may be reproduced:—

"9. The lessee shall have the right to renew the lease of the scheduled premises at the end of the present period of ten years herein secured on the same rental of Rs. 450 per month, for a similar period and for further similar periods thereafter on the same terms and conditions as are set forth herein; and the Lessee shall be permitted and shall have the right to remain in occupation of the premises on the same terms and conditions for any further periods of ten years as long as they desire to do so.

10. The lessor shall not raise any objection whatsoever to the lessee exercising his option to renew the lease for any further periods of ten years on the same terms and conditions as long as they desire to be in occupation, provided that the lessee shall not have the right to transfer the lease or alienate any right thereunder."

It appears that before the expiry of the period of ten years from the date of the commencement of the lease the lessee wrote to the lessor informing him of the intention to exercise the option given to the lessee under the deed of lease to get the same renewed on the same terms and conditions as before for a period of ten years from 1st November, 1961. The lessor did not comply with the request. After serving a notice the lessee filed a suit for specific performance of the covenant in the lease for renewal. It was prayed that the lessor be directed to execute a registered deed of lease in favour of the lessee and if he failed to do so the Court should execute a deed in his favour. The lessor pleaded, *inter alia*, that the condition relating to renewal was hit by the rule against perpetuity. Certain other pleas were taken with which we are not concerned. The trial Court decreed the suit. The first appellate Court and the High Court affirmed the decree.

The rule against perpetuity is embodied in section 14 of the Transfer of Property Act, hereinafter called the Act. According to it no transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong. It is well known that the rule against perpetuity is founded on the principle that the liberty of alienation "shall not be exercised to its own destruction and that all contrivances shall be void which tend to create a perpetuity or place property for ever out of the reach of the exercise of the power of alienation." The words "transfer of property" have been defined by section 5 of the Act to mean an act by which a living person conveys property in present or in future to one or more other living persons etc. The words "living

persons" include a Company or association or body of individuals. Section 105 of the Act defines "lease." A lease of immovable property is a transfer of a right to enjoy such property made for a certain time express or implied or in perpetuity in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value. A lease is not a mere contract but it is a transfer of an interest in land and creates a right *in rem*. Owing to the provisions of section 105 a lease in perpetuity can be created but even then an interest still remains in the lessor which is called a reversion.

It is not disputed on behalf of the appellant that a lease in perpetuity could have been created but the lease in the present case was not of that kind and was for a period of ten years only in the first instance. It is said that the mischief is created by the clauses relating to renewal which are covenants that run with the land. It is pointed out that on a correct construction of the renewal clauses the rule of perpetuity contained in section 14 would be immediately attracted. We are unable to agree. Section 14 is applicable only where there is transfer of property. Even if creation of a lease-hold interest is a transfer of a right in property and would fall within the expression "transfer of property" the transfer was for a period of ten years only by means of the indenture Exhibit P-1. The stipulation relating to renewal could not be regarded as transferring property or any rights therein.

In *Ganesh Sonar v. Purnendu Narayan Singha and others*¹, in the case of lease of land an option had been given to the lessor to determine the lease and take possession of the lease hold land under specified conditions. The question was whether such a covenant would fall within the rule laid down in the English case *Woodall v. Clifton*², in which it was held that a proviso in a lease giving an option to the lessor to purchase the fee simple of the land at a certain rate was invalid as infringing the rule against perpetuity. The Patna High Court distinguished the English decision quite rightly on the ground that after the coming into force of the Act a contract for the sale of immovable property did not itself create an interest in such property as was the case under the English law. According to the Patna decision the option given by the lessee to the lessor to resume the lease hold land was merely a personal covenant and was not a covenant which created an interest in land and so the rule against perpetuity contained in section 14 of the Act was not applicable. The same principle would govern the present case. The clauses containing the option to get the lease renewed on the expiry of each term of ten years can by no means be regarded as creating an interest in property of the nature that would fall within the ambit of section 14.

Even under the English law the Court would give effect to a covenant for perpetual renewal so long as the intention is clear and it will not be open to objection on the ground of perpetuity; See Halsbury's Laws of England, 3rd Edn. Vol. 23 page 627. In *Muller v. Trafford*³, it was held that the covenant in a lease for renewal was not strictly a covenant for renewal. But Farwell, J., proceeded to observe that a covenant to renew had been held for at least two centuries to be a covenant running with the land. If so, then no question of perpetuity would arise. It appears that in England whatever might have been the reason, the objection of perpetuity had never been taken to cases of covenants for renewal. The following observations of Farwell, J., which were quoted with approval by Lord Evershed, M. R. in *Weg Motors Ltd. v. Hales and others*⁴, are note-worthy:

"But now I will assume that this is a covenant for renewal running with the land; it is then in my opinion free from any taint of perpetuity because it is annexed to the land. See *Rogers v. Hosegood*.⁵

The equitable rule that the burden of a covenant runs with the land is to be found in section 40 of the Act. This section reads:

"40. Where for the more beneficial enjoyment of his own immovable property, a third person, has, independently of any interest in the immovable pro-

1. A.I.R. 1962 Pat. 201.

2. L.R. (1905) 2 Ch. 257.

3. L.R. (1901) 1 Ch. 54.

4. (1961) 3 A.E.L.R. 181, 188.

5. L.R. (1900) 2 Ch. 388.

perty of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands."

As pointed out in Mulla's Transfer of Property Act, 5th Edn., at page 194, section 40 expressly says that the right of the covenantee is not an interest in the land bound by the covenant nor an easement. It is not an interest because the Act does not recognise equitable estates and it cannot be said as Sir George Jessal said in *London & South Western Railway v. Gomm*¹, that if a covenant "binds the land it creates an equitable interest in the land." The expression "covenant runs with the land" has been taken from the English law of real property. It is an exception to the general rule that all covenants are personal. Even on the footing that the clauses relating to renewal in the lease, in the present case, contain covenants running with the land the rule against perpetuity contained in section 14 of the Act would not be applicable as no interest in property has been created of the nature contemplated by that provision.

For the above reasons the appeal fails and it is dismissed with costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. M. SIKRI, J. M. SHELAT, V. BHARGAVA, G. K. MITTER AND C. A. VAIDIALINGAM, JJ.

Shri Hari Vishnu Kamath

... *Petitioner**

v.

Shri Gopal Swarup Pathak

... *Respondent.*

Presidential and Vice-Presidential Elections Act (XXXI of 1952), sections 4 and 18—Presidential and Vice-Presidential Elections Rules (1952), rule 4—Election of Vice-President—Nomination paper sent by post—Validity—Rejection of invalid nomination paper—Returning Officer if can reject as soon as it is received or should wait till date of scrutiny.

It will be noticed that rule 4 of the Presidential and Vice-Presidential Election Rules provides only one manner of presentation of nomination paper, i.e., delivery either in person by the candidate or by his proposer or seconder. Further it mentions the time within which it can be delivered, i.e., between the hours of eleven in the forenoon and three in the afternoon. If the nomination paper is not presented in person either by the candidate or by the proposer or the seconder it cannot be deemed to have been presented at all.

If a nomination paper is received by post it would be difficult to say that it has been presented and received before 3 o'clock on the last date appointed under clause (a) of section 4 (1) of the Act. Such a nomination paper could not be treated to have been received within the meaning of sub-rule (2) of rule 4 of the Presidential and Vice-Presidential Election Rules and the Returning Officer is entitled to reject it.

As soon as the Returning Officer finds that a nomination paper has not been duly presented and received he must reject it outright at the time it is handed over to him and it is not necessary for him to wait till the date of scrutiny.

The Rules contemplate only one method of presentation of nomination paper and if that method is not followed the nomination paper cannot be held to be

validly presented and must be rejected outright. To hold otherwise would lead to utter confusion and delay in the completion of the election.

In the result, the challenge to the election of Sri G. S. Pathak to the office of the Vice-President of India, on the ground that the nomination paper of Dr. Ram Sharan Das, which was sent by post, was wrongly rejected, must fail.

Under Article 71 of the Constitution of India and section 14 of the Presidential and Vice-Presidential Election Act (Act XXXI of 1952).

Sarjoo Prasad, Senior Advocate (*P. Parameswara Rao* and *K. C. Dua*, Advocates, with him), for Petitioner.

M. C. Setalvad, *N. A. Palkhivala* and *M. C. Chagla*, Senior Advocates, (*J. B. Dadachanji*, *Ravinder Narain* and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, with them), for Respondent.

Jagadish Swarup, Solicitor-General of India and *Dr. L.M. Singhvi*, Senior Advocate (*S. P. Nayar*, Advocate, with them), for the Election Commission of India and Attorney-General for India.

The Judgment of the Court was delivered by

Sikri, J.—This is a petition under Article 71 of the Constitution and section 14 of the Presidential and Vice-Presidential Elections Act (XXXI of 1952)—hereinafter referred to as the Act—praying for a declaration that the election of Shri Gopal Swarup Pathak, respondent, to the office of the Vice-President of India is void.

The main ground on which this declaration is sought is that the nomination paper of Dr. Ram Sharan Dass Sakhuja was wrongly rejected by the Returning Officer on 6th August, 1969. The respondent apart from meeting this ground has raised a number of other issues including the issue whether the nomination paper of Dr. Ram Sharan Dass Sakhuja was genuine, and if not, whether the petition is maintainable. The learned Counsel for the respondent strongly pressed on us that we should first try this issue suggested by him but as we have come to the conclusion that the petition must fail on the ground that the nomination paper of Dr. Ram Sharan Dass Sakhuja was rightly rejected on 6th August, 1969, it is not necessary to consider the other issues that arise out of the pleadings of the parties.

The two issues suggested by the petitioner which we propose to discuss are:

1. Whether the nomination of Dr. Ram Sharan Dass Sakhuja has been wrongly rejected on the ground that the nomination paper was not delivered in person;
2. Whether the Returning Officer had power to reject the nomination even before the date of scrutiny.

The relevant facts for determining these issues may now be set out. On 19th or 20th July, 1969, the office of the Vice-President of India fell vacant on the resignation of the then incumbent, Shri V. V. Giri. The Election Commission appointed Shri B. N. Banerjee, Secretary, Rajya Sabha, as returning officer for the election of the Vice-President of India. The Election Commission issued a notification under section 4 appointing 9th August, 1969, as the last date for filing nomination for election to the office of the Vice-President of India and 11th August, 1969, for scrutiny of nomination papers. A number of candidates filed nomination papers and on 11th August, 1969, the Returning Officer made a record of proceedings. The relevant part of the proceedings reads as follows:

"I held the scrutiny of nomination papers for the Vice-Presidential Election today, the 11th August, 1969, at 11 A.M. in my office (Room No. 29) in Parliament House, New Delhi, 24 nomination papers were delivered to me within the time and in the manner laid down in rule 4 of the Presidential and Vice-Presidential Election Rules, 1952. These nomination paper related to:—

1. Shri S. Nagappa—(One nomination paper).

2. Shri G S Pathak—(Seventeen nomination papers)
3. Shri Sivashanmugam—(Two nomination papers) (Jagannathan Pillai)
4. Smt. Manohara Nirmala Holkar—(One nomination paper).
5. Shri B. P. Mahaseth—(One nomination paper).
6. Shri Hari Vishnu Kamath—(Two nomination papers).

3. I gave the candidates and the others present all facilities for examining the nomination papers of all the candidates delivered to me. The nomination paper were examined by them. No objection was raised to any nomination papers by any candidate or his representative. I scrutinised all the nomination papers and I found that they satisfied the requirements of a valid nomination paper. I accordingly accepted all the nomination papers as valid and made endorsements on all the 24 nomination papers accepting them.

4. I also brought to the notice of those present that I had received some nomination papers, and some other papers purporting to be nomination papers, by post, and that I could not treat them as valid nomination papers as they were not delivered to me in accordance with sub-rule (1) of rule 4 of the Presidential and Vice-Presidential Election Rules, 1952, and that they also did not comply with the provisions of law in other respects. I further mentioned to those present that there were in addition three other papers which, though presented to me in person, did not comply with the requirements of the law as they were not accompanied by the certified extracts from the electoral roll and suffered from other defects. I had not given any serial number to any of these papers and had rejected all of them."

One of the nominations referred to in para. 4 of the proceedings was that of Dr. Ram Sharan Dass Sakhuja. It appears that the nomination papers of Dr. Sakhuja, alleged to be complete in every respect, were not delivered in person either by Dr. Sakhuja or by the proposer or seconder in person to the Returning Officer but were received by him by post on 6th August, 1969. On that very day the Returning Officer did not treat the papers as valid as they were not delivered to him in accordance with sub-rule (1) of rule 4 of the Presidential and Vice-Presidential Elections Rules, 1952.

In order to discuss the issues mentioned above it is necessary to set out the relevant statutory provisions. Under section 4 of the Act the Election Commission by notification appoints for every election (a) the last date for making nominations, (b) the date for scrutiny of nominations, (c) the last date for the withdrawal of candidatures, and (d) the date on which poll shall, if necessary, be taken. Under section 5 any person may be nominated as a candidate for election to the office of Vice-President if he is qualified to be elected to that office under the Constitution. Sub-section (2) of section 5 prescribes that each candidate shall be nominated by a nomination paper completed in the prescribed form and subscribed by the candidate himself as assenting to the nomination and by two electors as proposer and seconder.

We may assume for the purpose of this case that the conditions laid down in section 5 (2) were complied with.

Section 6 deals with the withdrawal of candidature and provides that any candidate may withdraw his candidature by a notice in writing in the prescribed form subscribed by him and delivered before three O'clock in the afternoon on the date fixed under clause (c) of sub-section (1) of section 4, to the Returning Officer either by such candidate in person or by his proposer or seconder who has been authorised in this behalf in writing by such candidate.

The learned Counsel for the petitioner rightly conceded that if a candidate wants to withdraw his candidature the notice in writing must be delivered to the Returning Officer in person by such candidate or by his proposer or seconder who has been authorised. In other words no candidate can withdraw by sending a notice in writing by post.

Section 18 gives the grounds for declaring the election of a returned candidate to be void. One of the grounds is:

“If the Supreme Court is of opinion that the nomination of any candidate has been wrongly rejected or the nomination of the successful candidate or of any other candidate who has not withdrawn his candidature has been wrongly accepted, the Supreme Court shall declare the election of the returned candidate to be void.”

Section 21 gives powers to the Central Government to make rules and the two matters among others, on which rules can be made are:

“(d) the form and manner in which nominations may be made and the procedure to be followed in respect of the presentation of nomination papers;

(e) the scrutiny of nominations and, in particular, the manner in which such scrutiny shall be conducted and the conditions and circumstances under which any person may be present or may enter objections thereat.”

In pursuance of these powers rules were framed. Rule 4 deals with the presentation of nomination papers and is in the following terms:

“4. (i) On or before the date appointed under clause (a) of sub-section (1) of section 4, each candidate shall, either in person or by this proposer or seconder, between the hours of eleven in the forenoon and three in the afternoon, deliver to the Returning Officer at the place specified in this behalf in the public notice a nomination paper completed in Form 2 in the case of a Presidential election, and in Form 3 in the case of a Vice-Presidential election, together with a certified copy of the entry relating to the candidate in the electoral roll for the Parliamentary constituency in which he is registered.

(2) Any nomination paper which is not received before three O'clock in the afternoon on the last date appointed under clause (a) of sub-section (1) of section 4 or to which the certified copy referred to in sub-rule (1) of this rule is not attached shall be rejected.”

Rule 5 prescribes the procedure on receipt of nomination papers as follows:

“5. On the presentation of a nomination paper, the Returning Officer shall—

(a) sign thereon a certificate stating the date and time of presentation of the nomination paper and enter thereon its serial number;

(b) inform the person or persons presenting the nomination paper of the date, time and place fixed for the scrutiny of nominations; and

(c) cause to be affixed in some conspicuous place in his office a copy of the nomination paper as certified and numbered under clause (a) of this rule.”

Rule 6 provides for the scrutiny of nominations and is in the following terms:

“6. (1) The candidates, one proposer and one seconder of each candidate, and one other person duly authorised in writing by such candidate, shall be entitled to be present at the time of scrutiny of nominations; and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in rule 4.

(2) The Returning Officer shall then examine the nomination papers and decide all objections which may be made to any of them.

(3) The Returning Officer may, either on such objection or on his own motion, and after such summary inquiry, if any, as he thinks necessary, reject a nomination paper on any of the following grounds, namely:—

(a) that the candidate is not eligible for election as President or Vice-President, as the case may be, under the Constitution; or

(b) that the proposer or seconder is not qualified to subscribe a nomination paper under sub-section (2) of section 5; or

(c) that the signature of the candidate, proposer or seconder is not genuine or has been obtained by fraud; or

(d) that the nomination paper has not been duly completed and the defect or irregularity is of a substantial character; or

(e) that the proposer or seconder has subscribed, whether as proposer or seconder, another nomination paper received earlier by the Returning Officer at the same election.

(4) The Returning Officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of sub-section (1) of section 4 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control;

Provided that, in case an objection is made, the candidate concerned shall, if he so requires, be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the Returning Officer shall record his decision on the date on which the proceedings have been adjourned.

(5) The Returning Officer shall endorse on each nomination paper his decision either accepting or rejecting it and if the nomination paper is rejected, he shall record in writing a brief statement of his reasons for rejecting it."

The question whether a candidate is entitled to send his nomination papers by post to the Returning Officer may now be considered. It will be noticed that rule 4 provides only one manner of presentation *i.e.*, delivery either in person by the candidate or by his proposer or seconder. Further it mentions the time within which it can be delivered *i.e.*, between the hours of eleven in the forenoon and three in the afternoon. It seems to us that if the nomination paper is not presented in person either by the candidate or by the proposer or the seconder it cannot be deemed to have been presented at all. There seems to be good reason for making this rule because otherwise not only the authenticity of the person sending the nomination paper will be in doubt but also the time of the delivery of the nomination paper would be in doubt.

Be that as it may, if the rule provides one method of presentation that method of presentation must be followed. That this is the only method of presentation of nomination papers is borne out by subsequent provisions. Sub-rule (2) of rule 4 provides that any nomination paper which is not received before 3 O'clock in the afternoon on the last date appointed under clause (a) of sub-section (1) of section 4 shall be rejected. This shows that even if a nomination paper is presented personally but after 3 O'clock in the afternoon it has to be rejected. The rule proceeds on the basis that the presentation must have been either in person or by the proposer or the seconder. If a nomination paper is received by post it would be difficult to say that it has been presented and received before 3 O'clock on the last date appointed under clause (a) of sub-section (1) of section 4.

Rule 5 also proceeds on the basis that the presentation of a nomination paper must be in person because it requires the Returning Officer to sign thereon a certificate stating the date and time of presentation of the nomination paper and inform the person or persons presenting the nomination paper of the date, time and place fixed for the scrutiny of nominations. It is clear that rule 5 contemplates only one method of presentation. This is again evident from rule 6 which directs the Returning Officer *inter alia* to give the candidates and other authorised persons present reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in rule 4. In other words, the nomination papers which have not been delivered within time and in the manner laid down in rule 4 have not to be shown for purposes of scrutiny.

The learned Counsel for the petitioner contends that sub-rule (2) of rule 4 gives two grounds of rejection, one that the nomination paper is not received before

3 O'clock in the afternoon of the last date appointed under clause (a) of sub-section (1) of section 4, and the second that the certified copy referred to in sub-rule (1) of rule 4 is not attached. He further says that rule 6 gives five more grounds of rejection. He says that the ground on which the nomination paper of Dr. Ram Sharan Dass Shakuja has been rejected is not covered by either sub-rule (2) of rule 4 or rule 6 and accordingly the nomination paper of Dr. Ram Sharan Dass Shakuja could not have been validly rejected.

It seems to us that this nomination paper could be rejected on the ground that it has not been presented in person and received before 3 O'clock in the afternoon on the last date appointed under clause (a) of sub-rule (1) of rule 4. Such a nomination paper could not be treated to have been received within the meaning of sub-rule (2) of rule 4 and the Returning Officer was entitled to reject it.

There is no force in the second submission that at any rate the Returning Officer should have waited till the date of the scrutiny because as soon as he finds that a nomination paper has not been duly presented and received he must reject it outright at the time it is handed over to him.

The learned Counsel contends that even if there has been a breach of rule 4 (1), the rule is not mandatory and the breach of it should not be deemed fatal. We are unable to agree with this submission. As we have mentioned before, the rules contemplate only one method of presentation and if that method is not followed the nomination papers cannot be held to be validly presented and must be rejected outright. To hold otherwise would lead to utter confusion and delay in the completion of the election. The Returning Officer would not know who and where to inform about the date of scrutiny, he would not be certain whether it is genuine and would have to take evidence as to whether it is a genuine nomination paper or a forged paper.

In the result the petition fails and is dismissed with costs. The petitioner will pay to the respondent Rs. 500 as total amount of costs.

V.K.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, J. M. SHELAT, V. BHARGAVA, K. S. HEGDE AND A. N. GROVER, JJ.

Baijnath Kedia, etc.

.. *Appellants**

v.

The State of Bihar and others, etc.

.. *Respondents.*

Dhalbham Shades and Industries Ltd.

.. *Intervener.*

Mines and Minerals (Regulation and Developments) Act (LXVII of 1957)—Second Proviso to section 1 (2) added by Bihar Land Reforms (Amendment) Act, 1964 (Bihar Act IV of 1965) and the second sub-rule of Rule 20 added by notification on 10th December, 1964 to Bihar Mineral Concession Rules (1964)—Validity of.

Entry 54 of the union list speaks both of Regulation of mines and minerals Developments and Entry 23 is subject to Entry 54. It is open to Parliament to declare that it is expedient in the public interest that the control should rest in Central Government. To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the state after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature. The

only dispute can be to what extent the declaration by Parliament leaves any scope for legislation by the State Legislature. If the impugned legislation falls within the ambit of such scope it will be valid, if outside it, then it must be declared invalid.

The declaration is contained in section 2 of Act (LXVII of 1957) and speaks of the taking under the control of the Central Government the regulation of mines and development of minerals to the extent provided in the Act itself. One has thus to look outside Act (LXVII of 1957) to determine what is left within the competence of the State Legislature but has to work it out from the terms of the Act. Since the Bihar State Legislature amended the Land Reforms Act after the coming into force of Act (LXVII of 1957) the declaration in the latter Act would carve out a field to the extent provided in that Act and to that extent Entry 23 would stand cut-down. To sustain the amendment the State must show that the matter is not covered by the Central Act. The other side must, of course, show that the matter is already covered and there is no room for legislation.

The subject of legislation is covered in respect of minor minerals by the express words of section 15 (1). Parliament has undertaken to legislate and laid down that regulation of the grant of prospecting licenses and mining leases in respect of minor minerals and for purposes connected therewith must be by rules made by the State Government whether the rules are made or not the topic is covered by Parliamentary legislation and to that extent the powers of State Legislature are wanting. Therefore, there is no room for State legislation.

The abolition of the rights of intermediaries in the mines and vesting these rights as lessors in the State Government was a topic connected, with land and land tenures. But after the mining leases stood between the State Government and the lessees any attempt to regulate those mining leases will fall not in Entry 18 but in Entry 23 even though the regulation incidentally touches land. The pith and substance of the amendment to section 10 of the Land Reforms Act falls within Entry 23 although it incidentally touches land not *vice versa*. Therefore this amendment was subject to the overriding power of Parliament as declared in Act (LXVII of 1957) in section 15.

The Union consists of its three links, namely, Parliament, Union Government and the Union Judiciary. Here the control is being exercised by Parliament, the legislative organ of the Union and that is also controlled by the Union. By giving the power to the State Government to make rules, the control of Union is not negated. In fact, it establishes that the Union is exercising the control. By enacting section 15 of Act (LXVII 1957) the union has taken all the powers to itself and authorised the State Government to make rules for regulation of leases. By the declaration and the enactment of section 15 the whole of the field relating to minor minerals came within the jurisdiction of Parliament and no scope was left for the enactment of the second proviso to section 10 in the Land Reforms Act.

Vested rights cannot be taken away except under authority of law and mere rule making power without the support of a legislative enactment is not capable of achieving such an end. The whole of the topic of minor minerals became a union subject. The Union Parliament allowed rules to be made but that did not recreate a scope for legislation at the state level.

Therefore, if the old leases were to be modified a legislative enactment by Parliament on the lines of section 16 of Act (LXVII 1957) was necessary. The place of such a law could not be taken by legislation by the State Legislature as it purported to do by enacting the second proviso to section 10 of the Land Reforms Act. Although section 16 applies to minor minerals it only permits modifications of mining leases granted before 25th October, 1949. In regard to leases of minor minerals executed between this date and December, 1964 where rule 20 (1) was enacted, there is no provision of law which enables the terms of existing leases to be altered. A mere rule is not sufficient. As no such Parliamentary law had been passed the second sub-rule to rule 20 was in effect. It could not derive

substance from the second proviso to section 10 (2) of the Land Reforms Act since that proviso was not validly enacted.

Appeals from the Judgments and Orders dated the 1st November, 1966, 21st December, 1966 and 23rd December, 1966 of the Patna High Court in C.W.J.C. Nos. 1036, 686, 1200 and 778 of 1965 respectively.

A.K. Sen, Senior Advocate, (*P.K. Chatterjee*, Advocate, with him), for Appellants in all the Appeals).

Lal Narain Singha, Senior Advocate, (*Lakshman Saran Sinha* and *D. Goburdhun*, Advocates, with him), for Respondent, (In C.A.No. 685 of 1967).

B.P. Jha, Advocate, for Respondents, (In C.A.No. 686 of 1967).

U.P. Singh, Advocate, for Respondents Nos. 1 to 3 (In C.As. Nos. 687 and 688 of 1967).

Miss Krishna Sen, Advocate, and (*M.M. Kshatriya* and *G.S. Chatterjee*, Advocates of *M/s. Kshatriya* and *Chatterjee*, for Respondent No. 4 (In C.A.No. 687 of 1967) and Respondents Nos. 5 to 8 (In C.A.No. 688 of 1967).

R.G. Prasad, Advocate, for Intervener (In C.A. No. 685 of 1967).

The Judgment of the Court was delivered by

Hidayatullah, C.J.—This judgment will also govern the disposal of Civil Appeals 686 (*Kanti Prasad Pandey v. State of Bihar and others*), 687 (*Shri Krishna Chandra Gangopadhyay v. State of Bihar and others*) and 688 (*M/s. Pakur Quarries Private Ltd. and another v. State of Bihar and others*) of 1967. These four appeals have been brought against a common judgment, 1st November, 1966, of the High Court of Patna and arise out of four petitions under Article 226 of the Constitution filed to question the validity of proviso (2) to section 10 (2) added by Bihar Land Reforms (Amendment) Act, 1964 (Bihar Act IV of 1955) and the operation of the second sub-rule of rule 20 added on 10th December, 1964, by a notification of the Governor in the Bihar Minor Mineral Concession Rules, 1964. The facts of all the four cases are similar and the same points arise for determination. It is, therefore, sufficient to state the facts in Civil Appeals 685 and 686 as illustrative of the others as well.

One Jyoti Prakash Panday obtained on 23rd March, 1955, from Babu Bijan Kumar Panday and Smt. Anila Devi acting for herself and also as legatee under the will of one Baidyanath Pandey, registered leases to quarry stone ballast, boulders and chips from and upon Blocks Nos. 32, 45/1, 45/2 and 45/3 in tauzi No. 1452 khata No. 1 in Mouza Malpahari No. 89 in Pakur Sub Division of Santal Parganas. The leases were to commence from 1st November, 1954, and to end on 31st October, 1984; that is to say, they were for a total period of 30 years. Jyoti Prakash Pandey was working under the name and style of 'stone India'. He sold his rights, title and interest by a registered sale-deed on 9th September, 1963 to the present appellant. It is admitted that rent under the terms of the original lease was deposited upto September, 1965.

On the passing of the Bihar Land Reforms Act (XXX of 1950) the ex-landlords ceased to have any interest from the date of vesting and in their place the State of Bihar became lessor under section 10 (1) of the Land Reforms Act. The terms of section 10 were as given below¹. After the vesting of the estate of

1. "10. *Subsisting leases of mines and minerals.*

—(1) Notwithstanding anything contained in this Act, where immediately before the date of vesting of the estate or tenure there is a subsisting lease of mines or minerals comprised in the estate or tenure or any part thereof, the whole or that part of the estate or tenure, comprised in such lease shall, with effect from the date of vesting, be deemed to have been leased by the State Government to the holder of the said subsisting lease for the remainder of the term of that lease, and such holder shall be entitled to retain posses-

sion of the lease-hold property.

(2) The term and conditions of the said lease by the State Government shall *mutatis mutandis* be the same as the terms and conditions of the subsisting condition that, if in the opinion of the State Government the holder of the lease had not before the date of the commencement of this Act, done any prospecting or development work, the State Government shall be entitled at any time before the expiry of one year from the said date to determine the lease by giving three months' notice in writing :

the intermediaries, the State of Bihar as the new lessor recognised the lease for the quarrying of stones for the remaining period and the Deputy Commissioner, Santhal Parganas asked for the rent from the date of vesting to 30th April, 1965, at the rate of Rs. 200 per year as stated in the original lease. This was by a letter issued from his office on 2nd February, 1963. On 10th December, 1964, the appellants received a letter which gives the gist of the facts on which the present controversy starts and the relevant part may be quoted here :

- “ Government have been pleased to amend the section 10 of Bihar Land Reforms Act, 1950, and according to which the terms and conditions in regard to leases for minor minerals stand statutorily substituted by the corresponding terms and conditions by the Bihar Minor Mineral Concession Rules, 1964. As a result of this, rent and royalty, etc. in respect of minor minerals in the State irrespective of the date on which the lease was granted are to be paid by all categories of leases according to the rates given in the aforesaid Rules with effect from 27th October, 1964.”

The appellants denied their liability to pay. The Government informed them by letter as follows :

“ This is to inform you that the terms and conditions of your mining lease in so far as they are inconsistent with the Bihar Minor Mineral Concession Rules, 1964, framed by the State Government under section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, stand substituted by the corresponding terms and conditions prescribed by the Bihar Mineral Concession Rules, 1964, from 27th January, 1964. Accordingly, dead rent, royalty and surface rent in addition to the other substitution as per Bihar Mineral Concession Rules, 1964, will be as follows :—

1. Dead rent .. Rs. 50 per acre per annum.
2. Royalty @ Rs. 3 per 100 cwt. of stone chips.
@ Rs. 2 per 100 cft. of stone ballast and boulders.
@ Rs. 4 per 100 cft. on building stones.
@ Rs. 1 per 100 Nos. of stones “setts”.
3. Surface rent @ Rs. 10 per acre per year.”

It is this additional demand and the liability to pay, which is the subject of controversy here. The Bihar Government contends that the terms of the original lease have been validly altered by the operation of the second proviso to section 10 (2) of the Bihar Land Reforms Act added first by Ordinance III of 1964 and later incorporated again by the Bihar Land Reforms (Amendment) Act, 1964 (IV of 1965) and the addition of section 10-A to the Act by the same enactments. The material part of the second section of Act (IV of 1965) is quoted below¹. Section 10-A provided for the vesting of the interest of leases of mines or minerals which were subject to such leases and need not be read here. The State Government also

Provided that nothing in this sub-section shall be deemed to prevent any modifications being made in the terms and conditions of the said lease in accordance with the provisions of any Central Act for the time being in force regulating the modification of existing mining leases.

(3) The holder of any such lease of mines and minerals as is referred to in sub-section (1) shall not be entitled to claim any damages from the outgoing proprietor or tenure-holder on the ground that the terms of the lease executed by such proprietor or tenure-holder in respect of the said mines and minerals have become incapable of fulfilment by the operation of this Act.

1. Amendment of section 10 of Bihar Act (XXX of 1950)—In section 10 of the Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950) (here-

inafter referred to as the said Act),—

(a) in sub-section (2), the following second proviso shall be added, namely :—

“ Provided further that the terms and conditions of the said lease in regard to minor minerals as defined in the Mines and Minerals (Regulation and Development) Act, (LXVII of 1957), shall, in so far as they are inconsistent with the rules made by the State Government under section 15 of that Act, stand substituted by the corresponding terms and conditions prescribed by those rules and if further ascertainment and settlement of the terms will become necessary then necessary proceedings for that purpose shall be undertaken by the Collector”; and

(b) after sub-section ”

relied upon the Bihar Mineral Concession (First Amendment) Rules, 1964 by which a second sub-rule was added to rule 20. The twentieth rule, purporting to be framed under section 15 of the Mines and Minerals (Regulation and Development) Act, (LXVII of 1957) was amended on 19th December, 1964, and now reads:

Rule 20.—(1) Dead rent, royalty and surface rent.—When a lease is granted or renewed,

(a) Dead rent shall be charged at the rates specified in Schedule I.

(b) royalty shall be charged at the rates specified in Schedule II, and

(c) surface rent shall be charged at the rates specified by the Government in the Revenue Department from time to time.

(2) On and from the date of commencement of these rules, the provisions of sub-rule (1) shall also apply to leases granted or renewed prior to the date of such commencement and subsisting on such date."

The contention is that the amendment of section 10 of the Bihar Land Reforms Act is *ultra vires* the Constitution and that rule 20 (2) does not legally entitle the recovery of the dead-rent, royalty, etc., as in the Schedules to the Bihar Minor Mineral Concession Rules, 1964.

To understand fully the argument on behalf of the appellants a resume of the legislation on the subject of mines and minerals is necessary. Under the Government of India Act, 1935, the subject of Mines and Minerals was covered by Entry 36 of the Federal Legislative List I and Entry 23 of the Provincial Legislative List II of the 7th Schedule. These entries read as follows :

"Entry 36.—Regulation of mines and oil fields and mineral development to which such regulation and development under a Federal control is declared by Federal law to be expedient in the public interest."

"Entry 23.—Regulation of mines and oil fields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control."

When the Indian Independence Act, 1947 was passed the word 'federal' where it occurs for the first time in Entry 36 and in Entry 23 was changed to 'dominion'. The entries are practically repeated in the present Constitution and may be read immediately here :

Entry 54 of List I—Union List—reads :

"Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."

Entry 23 of List II—State List—reads :

"Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."

The difference between the entries of the Government of India Act, 1935 and the present Constitution lies in the removal of oil fields from the entries and the declaration now must be by Parliament. Entry 53 in List I deals with oilfields and mineral resources.

In 1948 the Legislative Assembly enacted the Mines and Minerals (Regulation and Development) Act, (LIII of 1948). It received the assent of the Governor-General on 8th September, 1948. It was an Act to provide for the regulation of mines and oilfields and for the development of minerals. In section 2 of that Act is to be found the declaration contemplated by Entries 36 and 23, 7th Schedule of the Government of India Act, 1935. That declaration reads as follows :

"2. It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the regulation of mines and oilfields and the development of minerals to the extent hereinafter provided."

Section 3 of the Act of 1948 contained definitions. There were definitions of 'mine' and 'minerals'. The former meant an excavation for the purpose of searching for or obtaining minerals and included an oil-well and the latter included natural gas and petroleum. Section 4 provided that no mining lease would be granted after the commencement of that Act otherwise than in accordance with the rules made under that Act and that a mining lease granted contrary to the provisions would be void and of no effect. Section 5 empowered the Central Government, by notification to make rules for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or in any area. In particular the rules could provide for the manner in which, the minerals or areas in respect of which and the persons by whom, applications for mining leases could be made and the fees payable, the terms on which and the conditions subject to which, mining leases might be granted, the areas and the period for which any mining lease might be granted and the maximum and minimum rent payable by a lessee, whether the mine was worked or not. Under section 6 the Central Government had power to make rules as respect mineral development. Section 7 then provided as follows :

"7. (1) The Central Government may, by notification in the Official Gazette, may rules for the purpose of modifying or altering the terms and conditions of any mining lease granted prior to the commencement of this Act so as to bring such lease into conformity with the rules made under section 5 and 6 :

Provided that any rules so made which provide for the matters mentioned in clause (c) of sub-section (2) shall not come into force until they have been approved, either with or without modifications, by the Central Legislature.

(2) The rules made under sub-section (1) shall provide—

(a) for giving previous notice of the modification or alteration proposed to be made thereunder to the lessee, and when the lessor is not the Central Government, also to the lessor and for affording them an opportunity of showing cause against the proposal ;

(b) for the payment of compensation by the party who would be benefitted by the proposed modification or alteration to the party whose rights under the existing lease would thereby be adversely affected ; and

(c) for the principles on which, the manner in which and the authority by which the said compensation shall be determined."

Section 8 provided that the Central Government might by notification direct that any power exercisable under that Act might be exercised, subject to such conditions if any, as might be specified by such officer or authority or might be specified in the direction. In furtherance of the powers conferred the Central Government framed the Mineral Concession Rules, 1949 and they came into force on the twenty-fifth day of October, 1949. These rules for the first time defined minor minerals and after amendments from time to time the term meant :

"3 (ii) "minor mineral" means building stone, boulder, shingle, gravel, Chalcedony pebbles (used for ball mill purposes only), limshell, kankar and limestone used for lime burning, murrum, brick-earth (Fuller's earth), Bentonite, ordinary clay, ordinary sand (used for non-industrial purposes), road metal, reh-matti, slate and shale when used for building material."

Rule 4 however provided :

"4. *Exemption*—These rules shall not apply to minor minerals, the extraction of which shall be regulated by such rules as the Provincial Government may prescribe."

The word "provincial" was later changed to 'State'. Although some of the Provinces (now States) made Minor Mineral Concession Rules, it is admitted that Bihar Government did not frame any such rules.

The leases of the appellants' predecessors were granted in 1955 during the subsistence of the Act of 1948 and the Rules of 1949. It is also to be noticed that a fresh declaration was made by Parliament as required by Entry 54, List I—Union List of the 7th Schedule of the Constitution. The existing laws, however, continued. Without a declaration by Parliament the field of legislation might have been open to the State Legislatures under Entry 23 of List II—State List of the Constitution but no law was made except what was enacted by the Bihar Legislature in the Land Reforms Act about vesting of mines in the State and the emergence of the State as a lessor in place of all original lessors.

Further rules were made by the Central Government in 1955 and 1956. In 1955 Minerals Conservation and Development Rules were made which were later replaced in 1958. On 4th September, 1956, the Central Government in exercise of the powers conferred by section 7 of the Act of 1948 made the Mining Leases (Modification of Terms) Rules, 1956. Under these rules existing mining leases were to be brought into conformity with the Minerals Conservation and Development Rules. The expression 'existing mining leases' was defined as a mining lease granted before the 25th day of October, 1949 and subsisting at the commencement of those rules but did not include any lease in respect of any minor mineral within the meaning of clause (c) of section 3 of the Act of 1948.

We now come to the year 1957. In that year Parliament enacted the Mines and Minerals (Regulation and Development) Act (LXVII of 1957). It came into force from 28th December, 1957, Act (LXVII of 1957) made amendments in the Act of 1948 so as to make the latter relate to oilfields only. All references to minerals other than oil were removed, with the result that it became legislation exclusively relating to oil and gas. Since the Act of 1948 was thus altered, Parliament enacted new provisions for minerals in Act (LXVII of 1957). We are primarily concerned with this Act in these appeals. A glance at some of the provisions of Act (LXVII of 1957) is necessary.

The Act (LXVII of 1957) came into force on 1st June, 1958, and extended to the whole of India. It contained the following declaration in section 2 :

"It is hereby declared that it is expedient in the public interest that the Union should take under the control the regulation of mines and the development of 'minerals to the extent hereinafter provided."

By definition minerals excluded mineral oils because the Act of 1948 exclusively dealt with oil. 'Minor minerals' were defined to mean building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral. Act (LXVII of 1957) contained 33 sections which were separated by general headings showing the topics dealt with. The first group of sections 4—9 contained general restrictions on undertaking prospecting and mining operations. Of this group we may quote here section 4 which will be considered later :

"4. Prospecting or mining operations to be under licence or lease—

(1) No person shall undertake any prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a prospecting licence or, as the case may be, a mining lease, granted under this Act and the rules made thereunder :

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement.

(2) No prospecting licence or mining lease shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder."

Section 5 lays down restrictions on the grant of prospecting licences or mining leases. Section 6 prescribes the maximum area for which a prospecting licence or

mining lease may be granted and section 7 the periods for which prospecting licences may be granted or renewed and section 8 the periods for which mining leases may be granted or renewed. Section 9 fixes the royalties in respect of mining leases.

Then follows another group of sections 10—12 which lays down the procedure for obtaining prospecting licences or mining leases in respect of land in which the minerals vest in the Government. The next group of section 13—16 is headed Rules for regulating the grant of prospecting licences and mining leases. Section 13 gives power to the Central Government to make rules in respect of minerals. Section 14 however excludes the application of sections 4-13 to minor minerals. It reads :

“The provisions of sections 4 to 13 (inclusive) shall not apply to prospecting licences and mining leases in respect of minor minerals.”

Section 15 gives power to the State Governments to make rules in respect of minor minerals. It reads :

“15 (1). The State Government may, by notification in the Official Gazette make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith.

(2) Until rules are made under sub-section (1), any rules made by a State Government regulating the grant of prospecting licences and mining leases in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force.”

Section 16 gives power to modify mining leases granted before 25th October, 1949. It reads :

“16 (1). All mining leases granted before the 25th day of October, 1949, shall, as soon as may be after the commencement of this Act, be brought into conformity with the provisions of this Act and the rules made under section 13 and 18 :

Provided that if the Central Government is of opinion that in the interests of minerals development it is expedient so to do, it may, for reasons to be recorded permit any person to hold one or more such mining leases covering in any one State a total area in excess of that specified in clause (b) of section 6 or for a period exceeding that specified in sub-section (1) of section 8.

(2) The Central Government may, by notification in the Official Gazette, make rules for the purpose of giving effect to the provisions of sub-section (1) and in particular such rules shall provide—

(a) for giving previous notice of the modification or alteration proposed to be made in any existing mining lease to the lessee and where the lessor is not the Central Government also to the lessor and for affording him an opportunity of showing cause against the proposal ;

(b) for the payment of compensation to the lessee in respect of the reduction of any area covered by the existing mining lease ; and

(c) for the principles on which, the manner in which, and the authority by which, the said compensation shall be determined.”

Section 17 stands by itself as a group and contains special powers of Central Government to undertake prospecting or mining operations in certain cases. Section 18 deals with mineral development and gives additional rule making power to the Central Government. Next follow some miscellaneous provisions ; of these, only two interest us. Section 19 lays down that prospecting licences or mining leases granted, renewed or acquired in contravention of the provisions of the Act shall be void and of no effect and section 20 that the provisions apply to prospecting licences or mining leases whether granted before or after the Act. The rest of this Act does not concern this dispute.

It may be pointed out here that the rules made under section 13 do not apply to minor minerals in view of the provisions of section 14. The State of Bihar had not made any rule till the Bihar Minor Minerals Concession Rules, 1964 were made.

The modification of the terms of existing mining leases was provided for in section 16 but that provisions applied to mining leases granted before 25th October, 1949. The provisions of Mining Leases (Modification of Terms) Rules 1955 did not apply to minor minerals because the definition of 'existing mining lease' excluded a lease in respect of any minor minerals. The power to modify the existing leases in the case had to be found elsewhere.

The argument of the appellants is that apart from the provisions of the 2nd proviso to section 10 added to the Land Reforms Act 1950 in 1964 by Act (IV of 1965) and second sub-rule added to rule 20 of the Bihar Minor Mineral Concession Rules, 1964, there is no power to modify the terms. These provisions of law are said to be outside the competence of the State Legislature and the Bihar Government. With regard to the State Legislature it is contended that the scheme of the relevant entries in the Union and State List is that to the extent to which regulation of mines and mineral development is declared by Parliament by law to be expedient in the public interest, the subject of legislation is withdrawn from the jurisdiction of the State Legislature and therefore Act (LXVII of 1957) leaves no legislative field to the Bihar Legislature to enact Act (IV of 1965) amending the Land Reforms Act. As regards rule 20 (2) it is contended that the rule making power of its own force cannot reach mining leases granted in 1955 and that this could only be done by a competent Legislature. These are the two matters which need decision.

The main arguments are supplemented by the following contentions. That the Bihar Rules in so far as they make demands of rent and royalty on the existing leases which were executed prior to their coming into force are beyond the power to make rules in respect of minor minerals under section 15 of Act (LXVII of 1957), that section 15 itself is unconstitutional and void because it delegates legislative power to the rule-making authority and it is excessive delegation and that the amendment of Bihar Land Reforms Act is void because it affects the fundamental rights of the appellants guaranteed under Articles 31 and 19 of the Constitution.

Although these supplementary arguments were raised it is obvious that they can arise according as the two main arguments are allowed or disallowed. Therefore it is necessary to address ourselves to the first argument that the legislative competence to enact the amendment to section 10 of the Reforms Act was wanting. As the amendment was made after Act (LXVII of 1957) we have to consider the position in relation to it. Entry 54 of the Union List speaks both of Regulation of mines and minerals Development and entry 23 is subject to entry 54. It is open to Parliament to declare that it is expedient in the public interest that the control should rest in Central Government. To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature. This proposition is also self-evident that no attempt was rightly made to contradict it. There are also two decisions of this Court reported in the *Hirgir-Rampur Coal Co., Ltd. and others v. State of Orissa and others*¹ and *State of Orissa v. M.A. Tulloch & Co.*,² in which the matter is discussed. The only dispute, therefore, can be to what extent the declaration by Parliament leaves any scope for legislation by the State Legislature. If the impugned legislation falls within the ambit of such scope it will be valid; if outside it, then it must be declared invalid.

The declaration is contained in section 2 of Act (LXVII of 1957) and speaks of the taking under the control of the Central Government the regulation of mines and development of minerals to the extent provided in the Act itself. We have thus not to look outside Act (LXVII of 1957) to determine what is left within the competence of the State Legislature but have to work it out from the terms of that Act. In this connection we may notice what was decided in the two cases of this Court. In the

1. (1951) 2 S.C.R. 537.

2. (1954) 4 S.C.R. 461.

*Hingir-Rampur case*¹, a question had arisen whether the Act of 1948 so completely covered the field of conservation and development of minerals as to leave no room for State legislation. It was held that the declaration was effective even if the rules contemplated under the Act of 1948 had not been made. However, considering further whether a declaration made by a Dominion Law could be regarded as a declaration by Parliament for the purpose of Entry 54, it was held that it could not and there was thus a lacuna which the Adaptation of Laws Order 1950 could not remove. Therefore, it was held that there was room for legislation by the State Legislature.

In the *M.A. Tulloch case*², the firm was working a mining lease granted under the Act of 1948. The State Legislature of Orissa then passed the Orissa Mining Areas Development Fund Act, 1952, and levied a fee for the development of mining areas within the State. After the provisions came into force a demand was made for payment of fees due from July, 1957 to March, 1958 and the demand was challenged. The High Court held that after the coming into force of Act (LXVII of 1957) the Orissa Act must be held to be non-existent. It was held on appeal that since Act (LXVII of 1957) contained the requisite declaration by Parliament under Entry 54 and that Act covered the same field as the Act of 1948 in regard to mines and mineral development, the ruling in *Hingir-Rampur case*¹, applied and as sections 18 (1) and (2) of the Act (LXVII of 1957) were very wide they ruled out legislation by the State Legislature. Where a superior Legislature evinced an intention to cover the whole field, the enactments of the other Legislature whether passed before or after must be held to be overborne. It was laid down that inconsistency could be proved not by a detailed comparison of the provisions of the conflicting Acts but by the mere existence of two pieces of legislation. As section 18 (1) covered the entire field, there was no scope for the argument that till rules were framed under that section, room was available.

These two cases bind us and apply here. Since the Bihar State Legislature amended the Land Reforms Act after the coming into force of Act (LXVII of 1957), the declaration in the latter Act would carve out a field to the extent provided in that Act and to that extent entry 23 would stand cut down. To sustain the amendment the State must show that the matter is not covered by the Central Act. The other side must, of course, show that the matter is already covered and there is no room for legislation.

We have already analysed Act (LXVII of 1957). The Act takes over the control of regulation of mines and development of minerals to the Union of course, to the extent provided. It deals with minor minerals separately from the other minerals. In respect of minor minerals it provides in section 14 that sections 4—13 of the Act do not apply to prospecting licences and mining leases. It goes on to state in section 15 that the State Government may, by notification in the official Gazette, make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith, and that until rules are made, any rules made by the State Government regulating the grant of prospecting licences and mining leases in respect of minor minerals which were in force immediately before the commencement of the Act would continue in force. It is admitted that no such rules were made by the State Government. It follows that the subject of legislation is covered in respect of minor minerals by the express words of section 15 (1). Parliament has undertaken legislation and laid down that regulation of the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith must be by rules made by the State Government. Whether the rules are made or not the topic is covered by Parliamentary legislation and to that extent the powers of State Legislature are wanting. Therefore, there is no room for State legislation.

Mr. Lal Narain Sinha argued that the topic of legislation concerns land and therefore falls under Entry 18 of the State List and he drew our attention to other

1. (1961) 2 S.C.R. 537.

2. (1964) 4 S.C.R. 461.

provisions on the subject of mines in the Land Reforms Act as originally passed. The abolition of the rights of intermediaries in the mines and vesting these rights as lessors in the State Government was a topic connected with land and land tenures. But after the mining leases stood between the State Government and the lessees, any attempt to regulate those mining leases will fall not in Entry 18 but in Entry 23 even though the regulation incidentally touches land. The pith and substance of the amendment to section 10 of the Reforms Act falls within Entry 23 although it incidentally touches land not *vice versa*. Therefore this amendment was subject to the overriding power of Parliament as declared in Act (LXVII of 1957) in section 15. Entry 18 of the State list, therefore, is no help.

Mr. Lal Narain Sinha next contended that the provisions of sections 4-14 do not envisage *control of the Union* which is a condition precedent to the ousting of the jurisdiction under Entry 23. Obviously Mr. Lal Narain Sinha reads Union as equivalent to Union Government. This is erroneous. Union consists of its three limbs, namely, Parliament, Union Government and the Union Judiciary. Here the control is being exercised by Parliament, the legislative organ of the Union and that is also controlled by the Union. By giving the power to the State Government to make rules, the control of Union is not negated. In fact, it establishes that the Union is exercising the control. In view of the two rulings of this Court referred to earlier we must hold that by enacting section 15 of Act (LXVII of 1957) the Union has taken all the power to itself and authorised the State Government to make rules for the regulation of leases. By the declaration and the enactment of section 15 the whole of the field relating to minor minerals came within the jurisdiction of Parliament and no scope was left for the enactment of the second proviso to section 10 in the Land Reforms Act. The enactment of the proviso was, therefore, without jurisdiction.

This leaves for consideration the second sub-rule added to rule 20 in December, 1964, by the State Government. It will be noticed that the rule as it stood previously applied prospectively to all leases which came to be executed *after* the promulgation of the rules. The second sub-rule made applicable those provisions to all leases subsisting on the date of the promulgation of the rules. The short question is whether the rules could operate on leases in existence prior to their enactment without the authority of a competent Legislature. Vested rights cannot be taken away except under authority of law and mere rule-making power without the support of a legislative enactment is not capable of achieving such an end. There being two Legislatures to consider, namely, Parliament and the State Legislature we have first to decide which Legislature would be competent to grant such power.

We have already held that the whole of the legislative field was covered by the Parliamentary declaration read with the provisions of Act (LXVII of 1957), particularly section 15. We have also held that Entry 23 of List II was to that extent cut down by Entry 54 of List I. The whole of the topic of minor minerals became a Union subject. The Union Parliament allowed rules to be made but that did not recreate a scope for legislation at the State level. Therefore, if the old leases were to be modified a legislative enactment by Parliament on the lines of section 16 of Act (LXVII of 1957) was necessary. The place of such a law could not be taken by legislation by the State Legislature as it purported to do by enacting the second Proviso to section 10 of the Land Reforms Act. It will further be seen that Parliament in section 4 of Act (LXVII of 1957) created an express bar although section 4 was not applicable to minor minerals. Whether section 4 was intended to apply to minor minerals as well or any part of it applies to minor minerals are questions we cannot consider in view of the clear declaration in section 14 of Act (LXVII of 1957) that the provisions of sections 4-13 (inclusive) do not apply. Therefore, there does not exist any prohibition such as is to be found in section 4 (1) proviso in respect of minor minerals. Although section 16 applies to minor minerals it only permits modification of mining leases granted before 25th October, 1949. In regard to leases of minor minerals executed between this date and December,

1964, when Rule 20 (1) was enacted, there is no provision of law which enables the terms of existing leases to be altered. A mere rule is not sufficient.

Faced with this difficulty Mr. Lal Narain Sinha attempted to claim power for the second proviso to section 10 of the Land Reforms Act from entry 18 of List II, a contention we have rejected. He also attempted to find a field for enactment by the State Legislature for the said proviso. This argument was extremely ingenious and needs separate notice.

The contention was that modification of existing leases was a separate topic altogether and was not covered by section 15 of Act (LXVII of 1957). Therefore if Parliament had not said anything on the subject the field was open to the State Legislature. The other side pointed to the words "and for purposes connected therewith" in section 15 and contended that those words were sufficiently wide to take in modification of leases". Mr. Lal Narain Sinha's argument is unfortunately not tenable in view of the two rulings of this Court. On the basis of those rulings we have held that the entire legislative field in relation to minor minerals had been withdrawn from the State Legislature. We have also held that vested rights could only be taken away by law made by a competent Legislature. Mere rule-making power of the State Government was not able to reach them. The authority to do so must, therefore, have emanated from Parliament. The existing provision related to regulation of leases and matters connected therewith to be granted in future and not for alteration of the terms of leases which were in existence before Act (LXVII of 1957). For that special legislative provision was necessary. As no such Parliamentary Law had been passed the second sub-rule to Rule 20 was ineffective. It could not derive substance from the second proviso to section 10 (2) of the Land Reforms Act since that proviso was not validly enacted.

In the result, therefore, these appeals must succeed. They are allowed with costs. A *mandamus* shall issue restraining the State Government from enforcing the provisions of the second proviso to section 10 (2) added by Bihar Land Reforms (Amendment) Act, 1964 (Bihar Act IV of 1965) and the second sub-rule of Rule 20 added by a notification on 10th December, 1964 to the Bihar Mineral Concession Rules 1964.

S. V. J.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, G. K. MITTER AND P. JAGANMOHAN REDDY, JJ.

Kashmiri Lal

.. Appellant*

v.

The State of U.P.

.. Respondent.

Railway Stores (Unlawful Possession) Act (LI of 1955), section 3—Ingredients of offence—Burden of proof—Section 2—"Railway Stores"—Meaning of.

Before any one can be charged with the offence under section 3 of the Railways Stores (Unlawful Possession), Act, 1955, it must be shown that he was in possession of railway stores which, under the definition in section 2, does not include all articles which are the property of a railway administration but only those which are used or intended to be used in the construction, operation or maintenance of a railway.

Mere unlawful possession of the property of any railway is not an offence. The prosecution must also prove that the article was being actually used or was intended to be used by the railway. Any article which is the property of a railway

administration but which has been discarded or rejected for further use would be outside the definition of railway stores.

It is only when the articles satisfy the definition of "railway stores" that the prosecution can be successfully launched against a person in unlawful possession thereof. Even in such a case the prosecution must first adduce evidence to show that there was cause for reasonable suspicion of the stores being stolen or obtained unlawfully. It is only when the burden in respect of this is discharged by the prosecution that the onus shifts to the accused to account satisfactorily for his possession of the same. He may, for instance, show that he had purchased the property in open market where goods of this kind are usually sold, or he had bought them from someone *bona fide* in the belief that the vendor had lawfully obtained the same.

Majalal Rostagir v. The State, (1962) 66 C.W.N. 269.

Udaya Dalai v. The state, (1964) 30 Cut. L.T. 275.

Appeal by Special Leave from the Judgment and Order dated the 6th October, 1967 of the Allahabad High Court, Lucknow Bench in Criminal Revision No. 152 of 1966.

A. S. R. Chari, Senior Advocate, (R. K. Garg, R. A. Gupta and S. C. Agarwal, Advocates, with him), for Appellant.

H. R. Khanna and O. P. Rana, Advocates, for Respondent.

The Judgment of the Court was delivered by

Mitter, J.—In this appeal by Special Leave the appellant challenges his conviction under section 3 of the Railway Stores (Unlawful Possession) Act, 1955.

The Act is a measure providing for punishment of persons in unlawful possession of railway stores who cannot satisfactorily account how they came by the same. By section 2 "railway stores" are defined to mean any article—(a) which is the property of any railway administration; and (b) which is used or intended to be used in the construction, operation or maintenance of a railway. Section 3 defines the offence as also the measure of punishment therefor. It reads:

"If any person is found, or is proved to have been, in possession of any article of railway stores reasonably suspected of being stolen or unlawfully obtained, and cannot account satisfactorily how he came by the same, he shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both."

Before any one can be charged with the offence under section 3 it must be shown that he was in possession of railway stores which by the definition of section does not include all articles which are the property of a railway administration but only those which are used or intended to be used in the construction, operation or maintenance of a railway. Mere unlawful possession of the property of any railway administration is not an offence. The prosecution must also prove that the articles were being actually used or were intended to be used for by the railway. Thus any article which is the property of a railway administration but which has been discarded or rejected for further use would be outside the definition of railway stores. Railway stores may be new or old and an offence may be committed in respect of stores of either kind. If the railway administration has no further use of them be they new or old as in the case where they have become unserviceable or out-moded no person can be charged with an offence under section 3 in respect thereof. It is only when the articles satisfy the definition of railway stores that the prosecution can be successfully launched against a person in unlawful possession thereof. Even in such a case, the prosecution must first adduce evidence to show that there was cause for reasonable suspicion of the stores being stolen or obtained unlawfully. It is only when the burden in respect of this is discharged by the prosecution that the onus shifts to the accused to account satisfactorily of his possession of the same. He may, for instance, show that he had purchased the property in open market where goods of this kind are usually sold or that he had bought them from someone *bona fide* in the belief that the vendor had lawfully obtained the same.

The facts in this case are as follows. On the strength of some information received on 28th July, 1964, that some stolen railway property was being sent out of Lucknow through a motor transport agency, a Sub-Inspector attached to the Railway Protection Force along with another Sub-Inspector of Police searched the premises of the motor transport company at Lucknow the same night the search which took place in the presence of the appellant and the manager of the transport company revealed that a large number of parts of railway machinery (railway engines) bearing railway marks were contained in 23 bags of metal scrap booked the same day by the appellant for consignment to Jullunder. The usual formality of preparing a recovery memo. and the sealing of goods in bags in the presence of witnesses was gone through. One Jaswant Singh, described as an expert of railway machinery parts and Foreman and Chief Inspector of N. R. Kotwali Chowk Lucknow, examined the goods said to be railway stores and kept in 11 bags and made a report to the effect that they were all railway stores being parts of a railway engine. It was the case for the prosecution that the appellant failed to offer any satisfactory explanation of his possession of the goods. On the strength of the evidence adduced and principally on the report of Jaswant Singh along with his oral testimony the Magistrate found him guilty and sentenced him to imprisonment for two years. The conviction was maintained by the Sessions Judge and the High Court.

The report made by Jaswant Singh shows that he had examined the material which he classified under 38 heads and described the same as unauctionable property. Against each item he put a remark either "O" or "H", "O" signifying old goods and 'N' meaning new ones. The report seems to suggest that the goods being unauctionable a third party could not lawfully obtain possession of the same. Curiously in his testimony before the Court although he said that he had prepared the report and signed the same he made no statement to the effect that the contents of the report were correct. His definite averment was:

"Railway engine is auctioned in the market. I cannot say if these articles were auctioned in the market. I cannot say if these articles were auctioned or not."

In his cross-examination he repeated the same averment in different words but only added that he had examined the articles and they were parts of an engine and that railway articles were mixed with other goods in the bags. From his deposition it is not possible to spell out any averment to the effect that the items mentioned in his report were used or intended to be used in the construction, operation or maintenance of a railway.

In our view there was no evidence before the Courts to prove that the articles seized were railway stores within the meaning of section 2 of the Act. Our attention was drawn to the case of *Moyalal Rostagir v. The State*¹, wherein it was held that in order to prove that the articles were railway stores it was necessary to establish that the articles in question were not only the property belonging to a railway administration but they were used or intended to be used for the construction, or operation of a railway. Counsel for the respondent however cited a decision of the Orissa High Court in *Uday Dalai v. The State*². The materials seized in that case were tie-bars and iron sleepers which were brand new. According to the learned Judge of the Orissa High Court:

"* * * section 2 of the Act does not require the prosecution to prove that the incriminating articles belonged to a particular railway. From the evidence of P.W. 5 it can be reasonably inferred that as the seized articles were found to conform to the specifications of the Indian Railway Standards they held that they belonged to any of the railways in India. His further evidence that they were 'brand new' is also sufficient to show that they were intended to be used in the construction, operation or maintenance of the railway."

In our view although the prosecution is not called upon to prove that the goods belonged to any particular railway administration it has to establish that the

1. (1962) 66 C.W.N. 269.

2. (1964) 30 Cut. L.T. 275.

articles were the property of a railway administration. Evidence to the effect that the goods conformed to the Railway Standards falls short of such proof. In most cases the burden of proof in this respect may be discharged by leading evidence about the identifying marks on the goods or some peculiarity of the goods not to be found in cases of non-railway goods. Again the mere description of the goods as new would not fulfil the requirements of section 2 (b). Some evidence will have to be led to the effect that the goods of the kind were being actually used by a railway administration and that the goods were in a serviceable condition. In the case of goods which had not been put to use evidence would have to be led to establish that they had been manufactured for such use.

The evidence in the case before us did not establish that the goods were railway stores within the meaning of section 2 of the Act and as such the question of punishment under section 3 did not arise. The appeal will therefore be allowed and the bail bond of the appellant directed to be cancelled.

P.R.N.

*Appeal allowed.
Bail bond cancelled.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

The Estates Development Ltd. (In liquidation) through its Official Liquidator

.. Appellants*

v.

Union of India and others

.. Respondents.

Displaced persons (Compensation and Rehabilitation) Act (XLIV of 1954), section 24 (2)—Scope and applicability—Cancellation of allotment—Conditions precedent—Absence of finding that allotment was obtained by fraud, false representation or concealment of material facts—Effect.

Before the Chief Settlement Commissioner can pass an order under section 24 (2) of the Displaced Persons (Compensation and Rehabilitation) Act, cancelling an allotment granted to a displaced person, there must be a clear finding that the allottee had obtained the allotment of land "by means of fraud, false representation or concealment of any material fact" within the meaning of that sub-section. A mere finding recorded by him that the allottee had not proved his title to any land in Pakistan and that the allotment was "undeserved" is not tantamount to a finding that the allotment had been obtained by fraud, false representation or concealment of any material fact. Such a finding is a condition precedent for taking action under section 24 (2). The condition imposed in mandatory and in the absence of any such finding, the Chief Settlement Commissioner has no jurisdiction to cancel the allotment made.

Appeal from the Judgment and Order dated the 26th October, 1965 of the Punjab High Court in Letters Patent Appeal No. 174 of 1964.

Bishan Narain, Senior Advocate, (S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta & Co. with him), for Appellant.

Harbans Singh and R. N. Sachthy, Advocates for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—In the month of August, 1942, the appellant-company (hereinafter called the Company) was incorporated with its registered office in the city of Jullunder dealing in sale and purchase of land as its substantial business. By a sale deed executed on 24th November, 1944, the company purchased 646 kanals, 9 marlas of land from Harjit Singh for a sum of Rs. 32,326. The land was located in village Monanpura of District Sheikpura, now in West Pakistan. Out of the

consideration for the sale, a sum of Rs. 9,000 was left with the company for payment to the previous mortgagees and the balance of the money was paid to Harjit Singh before the Sub-Registrar at the time of registration. On the basis of the registered sale deed the company was allotted 27 standard acres and $11\frac{1}{2}$ units of land in village Bohani, Tehsil Phagwara, District Kapurthala in the year 1950 in lieu of the land abandoned in Pakistan. A sanad No. K2/4/8 dated 9th March, 1950 was issued in favour of the company. There was consolidation of holdings in village Bohani and as a result of consolidation the area allotted to the company came to 23 kanals and 5 marlas. Out of this the company sold $9\frac{1}{2}$ kanals to Mohan Singh, a Jat of village Bohani for Rs. 1,900.00 by registered sale deed, dated 22nd May, 1956. Another portion of 220 kanals and 15 marlas was sold on 12th September, 1958 for Rs. 10,012 to one Mehnga Singh and his sons. It was later discovered that the company had been allotted less area of land than it was entitled to as a result of consolidation operations and so an additional area of 24 kanals was allotted to the company in village Bohani to make up the deficiency. On 30th August, 1960 the Managing Officer, respondent No. 3, made a report, Annexure C, to the Chief Settlement Commissioner, Respondent No. 2 recommending cancellation of the allotment of land to the company and consequently the grant of permanent rights to it. The company was heard by the Chief Settlement Commissioner and thereafter the Chief Settlement Commissioner rejected the registered sale deed and balance-sheets and relying on the jamabandi, annexure X, came to the conclusion that at the time of partition the company did not own any land in Pakistan nor was it in occupation of any such land. By his order dated 27th February, 1961 respondent No. 2 set aside the permanent rights acquired by the company to the extent of 27 standard acres, $11\frac{1}{2}$ units and also cancelled the quasi-permanent allotment of the land made in the name of the company. On 29th March, 1961, a revision petition was filed by the company to the Central Government, respondent No. 1. But the revision petition was dismissed on 10th May, 1961. On 8th June 1961, the company filed a writ petition under Article 226 of the Constitution praying for grant of a writ to quash the order of the Chief Settlement Commissioner, dated 27th February, 1961. The writ petition was allowed by Shamshar Bahadur, J. But the respondent took the matter in appeal under clause 10 of Letters Patent to a Division Bench which reversed the judgment of the learned single Judge and ordered the writ petition to be dismissed.

Section 24 of the Displaced Persons (Compensation and Rehabilitation) Act, (LXIV of 1954) (hereinafter called the Act) states:

“(1) The Chief Settlement Commissioner may at any time call for the record of any proceeding under this Act in which a Settlement Officer, an Assistant Settlement Officer, an Assistant Settlement Commissioner, an Additional Settlement Commissioner, a Settlement Commissioner, a Managing Officer or a Managing Corporation has passed an order for the purpose of satisfying himself as to the legality or propriety of any such order and may pass such order in relation thereto as he thinks fit.

(2) Without prejudice to the generality of the foregoing power under subsection (1), if the Chief Settlement Commissioner is satisfied that any order for payment of compensation to a displaced person or any lease or allotment granted to such a person has been obtained by him by means of fraud, false representation or concealment of any material fact, then, notwithstanding anything contained in this Act, the Chief Settlement Commissioner may pass an order directing that no compensation shall be paid to such a person or reducing the amount of compensation to be paid to him, or as the case may be, cancelling the lease or allotment granted to him; and if it is found that a displaced person has been paid compensation which is not payable to him, or which is in excess of the amount payable to him, such amount or excess, as the case may be, may on a certificate issued by the Chief Settlement Commissioner, be recovered in the same manner as an arrear of land revenue.

In support of the appeal it was contended on behalf of the company that the document described as jamabandi, annexure *H* to writ petition, was not the jamabandi of the year 1946-47 of the land in dispute and the Division Bench was in error in holding that the Chief Settlement Commissioner could properly rely upon annexure *H*. It was pointed out that annexure *H* was not the jamabandi for 1946-47 but it consisted of three notes one saying "Maamur bai," that is, that there is no land of non-Muslims in the village, the second note related to Kartar Chand and Gopal Dass who embraced Islam and the third related to sale of his land by Harjit Singh in favour of S. A. Latif. All these notes are dated 3rd May, 1951. It was pointed out that these notes were made on 3rd May, 1961 for the purposes of exchange of jamabandi and the document did not depict the state of affairs as on 15th August, 1947 which was the material date. It is not necessary to examine this document in detail for we are of opinion that the appeal must be allowed and the order of the Chief Settlement Commissioner must be quashed on the ground that there is no finding of the Chief Settlement Commissioner that the company had obtained allotment of the land "by means of fraud, false representation or concealment of any material fact" within the meaning of section 24 (2) of the Act. It is true that the Chief Settlement Commissioner had recorded a finding that the company had not proved its title to any land in village Momonpura and the allotment was "undeserved." But this is not tantamount to a finding that the allotment had been obtained by a false representation or fraud or concealment of material facts. Such a finding is a condition precedent for taking action under section 24 (2) of the Act. The condition imposed by the section is mandatory and in the absence of any such finding the Chief Settlement Commissioner had no jurisdiction to cancel the allotment made to the company under section 24 (2) of the Act. For these reasons we hold that the appeal should be allowed and the judgment of the Division Bench dated 26th October, 1965 in Letters Patent Appeal should be reversed and the judgment of Shamshar Bahadur, J., dated 28th November, 1963 quashing the order of the Chief Settlement Commissioner dated 27th February, 1961, should be restored.

The appeal is accordingly allowed with costs.

P.R.N.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER* JJ.

Bai Radha

.. Appellant*

v.

The State of Gujarat

.. Respondent.

Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), section 15 (1)
—Scope—Search of the premises—Omission to record the reasons before search or even thereafter in a proper way if makes the trial illegal.

Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), section 15 (2)
—Scope—Search of the premises—Non-compliance with the directions, if amounts to an illegality—Criminal Procedure Code (V of 1898), section 537—Applicability.

On the question whether the trial became illegal by reason of the search not having been conducted strictly in accordance with the provisions of section 15 of the Suppression of Immoral Traffic in Women and Girls Act, (CIV of 1956).

Held that, (1) The omission to record the reasons before the search as required under section 15 (1) of the Act or even thereafter in a proper way does not make

the trial illegal because jurisdiction or power to make a search was conferred by the statute and not derived from the recording of reasons.

(2) Non-compliance with the directions contained in section 15 (2) of the Act in the matter of search would only be an irregularity and not such an illegality which will vitiate the trial. It is significant that there is no provision in the Act according to which any search carried out in contravention of section 15 would render the trial illegal. It is therefore abundantly clear that section 537 of the Criminal Procedure Code would be applicable to the proceedings in the present case.

Appeal by Special Leave from the Judgment and Order, dated the 12th/13th October, 1966 of the Gujarat High Court in Criminal Appeal No. 390 of 1965.

B. Datta, Advocate for *J. B. Dadachanji & Co.* for Appellant.

H. R. Khanna and *B. D. Sharma* Advocates, for Respondent.

The Judgment of the Court was delivered by

Grover J.—The sole point which arises for decision in this appeal by Special Leave is whether the trial became illegal by reason of the search not having been conducted strictly in accordance with the provisions of section 15 of the Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), hereinafter called the "Act."

The facts need not be stated in detail. The appellant and two other persons were tried for various offences under the provisions of the Act, the charge substantially against her being that she was keeping a brothel in her house and knowingly lived on the earnings of the prostitution of women and girls. All the three accused persons were acquitted by the magistrate. The State preferred an appeal to the High Court against the appellant and the third accused only. The High Court set aside the order of acquittal in respect of the appellant and convicted her for offences punishable under sections 3 (1) and 4 (1) of the Act. She was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 200 (in default to suffer further rigorous imprisonment for six months) and to suffer rigorous imprisonment for six months) on the second count the sentences of imprisonment being concurrent.

The prosecution case was that on receiving complaints from several residents of the locality a raiding party was organised. The services of a decoy witness Kishan Taumal were requisitioned and he agreed to work as the punter. After ascertaining that he had no money he was given Rs. 8 in all. That amount included a currency note of Rs. 5 and three currency notes of Re. 1 each, the numbers of notes having been noted down in the first part of the panchanama. The punter was instructed to hand over the amount for the charges that would have to be paid for having sexual intercourse with any girl or woman in the appellant's house. He was however only to engage himself in talk and not the actual act. A punch witness Prem Singh Hiraji was also to accompany the raiding party. The raid was ultimately made according to the original plan and Kishan, the punter managed to engage a woman in conversation in a room in the house of the appellant. The raiding party found that she had opened the buttons of her blouse and she was found with her clothes in such a disordered condition that it was apparent that she was getting ready to have sexual intercourse with Kishan, but on seeing the police party she got up and dressed herself. The seven currency notes, i.e. one five rupee note and two of one rupee currency notes were recovered from the appellant which were marked and which had been given by Kishan. Sub-sections (1) and (2) of section 15 of the Act provide as follows:

"(1) Notwithstanding anything contained in any other law for the time being in force whenever the special police officer has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a woman or girl living in any premises and that such search of the premises with warrant cannot be made without undue delay such officer

may, after recording the grounds of his belief enter and search such premises without a warrant.

(2) Before making a search under sub-section (1) the Special Police Officer shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them so to do."

What has been stressed greatly by learned Counsel for the appellant is that the Act being a special Act its provisions should have been strictly followed. It is pointed out that the panch witness Prem Singh was not an inhabitant of the locality in which the place to be searched was situate. Another panch witness had also been taken who was a woman (Bai Shanta) to satisfy the requirement of sub-section (2) of section 15 but she also was not an inhabitant of the locality where the house of the appellant was situate. It has been pointed out that in *Public Prosecutor, Andhra Pradesh v. Uttavalli Nageswararao*¹ it was held by Sharfuddin Ahmed J., that the Act being a special piece of legislation enacted with a specific purpose all the directions contained in section 15 were mandatory. According to the learned Judge while the recording of reasons for proceeding without obtaining the search warrant might not be done which was a matter of discretion, so far as the requisition of the services of the respectable inhabitants was concerned the direction was mandatory and the Legislature by insisting on the presence of one woman mediator at the time of search had undoubtedly chosen to safeguard the interests of the persons with whom the Act was intended to deal. In that case the services of a woman mediator had not been requisitioned at all. The search was held to be altogether illegal with the result that the accused person in that case was acquitted and his acquittal was upheld by the High Court.

In the present case two main defects have been pointed out in the matter of search; one is that the Special Police Officer Shri Markad has been found both by the Magistrate and the High Court to have prepared the document Exhibit 81-A long after the search. As found by the High Court this document contained reproduction of section 15 (1) and it hardly contained any ground on which the Police Officer had formed the belief with regard to the matters stated in sub-section (1). The other point which has been pressed on behalf of the appellant relates to contravention of sub-section (2) inasmuch as the panch witnesses were not inhabitants of the locality in which the appellant's house was situate. The High Court was of the view that power to conduct the search was derived from the statute and not from the recording of reasons and therefore the search was not rendered illegal in the present case, on account of contravention of section 15 (1) of the Act. On the second point it was held that there was no provision in law which rendered the evidence of the panch witnesses inadmissible even though section 15 (2) had been contravened. The High Court did not agree with the decision of the Andhra Pradesh High Court that the directions contained in sub-section (2) were of a mandatory nature.

Our attention has been drawn to *State of Rajasthan v. Rehman*² in which a Deputy Superintendent of Central Excise who had received information that the respondent in that case had cultivated tobacco but had not paid the excise duty went to search his house. He was obstructed while making the search with the result that he fell down and was injured. The respondent was prosecuted under section 353, Indian Penal Code. It was held that section 165 of the Code of Criminal Procedure was applicable to such a search and the search being in contravention of that section it was illegal. The respondent therefore had been rightly acquitted. In this case however it was observed that the recording of reasons under section 165 did not confer on the officer jurisdiction to make search though it is a necessary condition for doing so. Jurisdiction or power to make a search was conferred by the statute

1. (1965) 1 An.W.R. 200 : (1965) M.L.J. (Cr.) 121 : (1965) 1 An.L.T. 183 : A.I.R. 1965 A.P. 176. 2. (1960) S.C.J. 521 : (1960) M.L.J. (Cr.) 424 : (1960) 1 S.C.R. 991.

and not derived from the recording of reasons. These observations are sufficient to dispose of the first point which has been pressed about the omission to record the reasons before the search of even thereafter in a proper way. This case cannot be of much assistance to the appellant because no question is involved in the present case of any public servant having been obstructed in the course of a search conducted under section 165 of the Criminal Procedure Code. The trial of the appellant was for contravention of certain provisions of the Act and the search was made in respect of those offences. The trial having taken place the question of the applicability of section 537 of the Criminal Procedure Code will at once arise. If the non-observance of the provisions of section 15 (2) is not an illegality but is a mere irregularity then the sentence cannot be set aside unless it can be shown that such irregularity has caused failure of justice. As will be presently seen we are of the opinion that non-compliance with the directions contained in section 15 (2) in the matter of search would only be an irregularity and not such an illegality which will vitiate the trial. The decision in *Delhi Administration v. Ram Singh*¹, which concerned offences committed under the Act and on which reliance has been placed on behalf of the appellant involved a different point. There the Police Officer who had entered the premises where the offences were alleged to be committed was not a Special Police Officer who alone is authorised to do the various things mentioned in the provisions of the Act. It was observed that the Act created new offences and provided for the forum before which they would be tried. Necessary provisions of the Code of Criminal Procedure had been adopted fully or with modification. As the Act provided machinery to deal with the offences created, the necessary implication must be that the new machinery was to deal with those offences in accordance with the provisions of the special Act. The entire police work connection with the purposes of the Act within a certain area had been put in the charge of a Special Police Officer. According to the majority judgment in that case, only the Special Police Officer was competent to investigate and as the investigation had been conducted by a regular Police Officer who did not come within the category of a Special Police Officer the order of the magistrate quashing the charge-sheet was upheld. This case certainly supports one part of the submission of the counsel for the appellant that the Act is a complete Code with respect to what has to be done under it. In that sense it would be legitimate to say that a search which is to be conducted under the Act must comply with the provisions contained in section 15; but it cannot be held that if a search is not carried out strictly in accordance with the provisions of that section the trial is rendered illegal. There is hardly any parallel between an officer conducting a search who has no authority under the law and a search having been made which does not strictly conform to the provisions of section 15 of the Act. The principles which have been settled with regard to the effect of an irregular search made in exercise of the powers under section 165 of the Code of Criminal Procedure would be fully applicable even to a case under the Act where the search has not been made in strict compliance with its provisions. It is significant that there is no provisions in the Act according to which any search carried out in contravention of section 15 would render the trial illegal. In the absence of such a provision we must apply the law which has been laid down with regard to searches made under the provisions of the Criminal Procedure Code.

Now in *The State of Uttar Pradesh v. Bhagwati Kishore Jishi*², this court had to deal with a case where a booking clerk was stated to have committed an offence of criminal breach of trust. A Sub-Inspector of police made some investigation and submitted a report but this was done without obtaining the order of a magistrate. Subsequently the permission of the magistrate was obtained to investigate into the case as required by section 5-A of the Prevention of Corruption Act. After making further investigation he submitted a charge sheet. The respondent in that case was tried and convicted under section 5 (2) of that Act. It was held by this Court (by the majority) that there was a contravention of section 5-A of the Prevention of Corruption Act at the first stage of investigation when the requisite permission of

1. (1962) 2 S.C.R. 694.

2. (1964) 3 S.C.R. 71.

the magistrate had not been obtained but after the permission had been given there was practically a *de novo* investigation. Therefore, the accused not having been prejudiced by the illegality committed by the police, the conviction could not be set aside on the ground of mere irregularity or illegality in the matter of investigation. The following passage at page 84 may be usefully reproduced:

“The High Court set aside the conviction on the ground that there was a breach of the mandatory safeguards of the Act in that the first stage of the investigation was contrary to the provisions of the Act. But it did not consider the other question whether the said breach caused prejudice to the accused in the matter of his trial. In doing so, the High Court ignored the provisions of section 537 of the Code of Criminal Procedure. Having carefully gone through the record for the reasons aforesaid, we are satisfied that no such prejudice has been caused to the accused. He had a fair trial and had his full say.”

It is abundantly clear that section 537 of the Criminal Procedure Code would be applicable to the proceedings in the present case. Section 5 (2) of the Code provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code. All offences under any other law shall be similarly investigated etc., according to the same provisions but subject to any enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. According to section 22 no Court inferior to that of a magistrate as defined in clause (c) of section 2 shall try any offence under sections 3 to 8 of the Act.

Thus all proceedings including investigation had to be conducted in accordance with the procedure laid down in the Criminal Procedure Code except to the extent of the specific provisions contained in the Act. No such provision has been brought to our notice nor indeed has it been contended that section 537 of the Code of Criminal Procedure would not govern the investigation, inquiry or trial of the offences with which the appellant was charged. The ratio of the decision in the case of *Bhagwati Kishore Joshi*¹ must be followed and in the absence of any prejudice having been shown by non-compliance with the provisions of sub-sections (1) and (2) of section 15 of the Act, the order of the High Court must be upheld.

In conclusion it may be observed that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-sections (1) and (2) of section 15 of the Act. The Legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of delicate situations in respect of females. But the entire proceedings and the trial do not become illegal and vitiated owing to the non-observance of or non-compliance with the directions contained in the aforesaid provisions. The Court, however, has to be very careful and circumspect in weighing the evidence where there has been such a failure on the part of the investigating agency but unless and until some prejudice is shown to have been caused to the accused person or persons the conviction and the sentence cannot be set aside. It may not be out of place to reiterate what was said in *H. N. Rishbud and Inder Singh v. The State of Delhi*², that a defect or an illegality in the investigation, however serious, has no direct bearing on the competency or the procedure relating to cognizance or trial of an offence and that whenever such a situation arises, section 537 of the Code of Criminal Procedure is attracted and unless the irregularity or the illegality in the investigation or trial can be shown to have brought about a miscarriage of justice, the result is not affected.

For the above reasons this appeal fails and it is dismissed.

V.M.K.

Appeal dismissed.

1. (1964) 3 S.C.R. 71.

2. (1955) S.C.J. 283; (1955) 1 M.L.J. (S.C.)

173: (1955) 1 An.W.R. (S.C.) 173: (1955) 1 S.C.R. 1150.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

(In forma pauperis)

PRESENT :—V. BHARGAVA, K. S. HEGDE AND A. N. RAY, JJ.

N. S. Rajabadar Mudaliar

.. Appellant*

v.

M. S. Vadivelu Mudaliar and others

.. Respondents.

Deed—Construction—Trust deed providing both for grant to charities and also for maintenance of members of the founder's family—Dominant intention—Determination—Held on facts that the predominant intention of the settlor was to benefit the charities and provision by way of settlement for members of the family was only secondary.

Cy-pres doctrine—Applicability.

Appeal from the Judgment and Order, dated the 6th February, 1964, of the Madras High Court in O.S.A.No. 39 of 1961.

T.R. Sangameswaran and K. Jayaram, Advocates, for Appellant.

A.K. Sen, Senior Advocate, (M.S. Narasimhan and S. Balakrishnan, Advocates, with him), for Respondents Nos. 1, 5, 6 and 7.

The Judgment of the Court was delivered by

Ray, J.—This appeal is from the judgment of the High Court at Madras, dated 6th February, 1964, dismissing the appellant's suit.

The important question which falls for consideration is whether the deed of trust dated 1st January, 1908 created an absolute dedication to charity subject only to a charge for the payment of maintenance to the members of the founder's family or whether the dominant intention of the founder was the maintenance of the family and the grant to the charities was secondary.

The trust deed was executed on 1st January, 1908, by S.D. Mudaliar in favour of himself, A. P. M. Mudaliar, M.T.S. Mudaliar and C.V.S. Mudaliar. S.D. Mudaliar and his pre-deceased son D.S. Mudaliar's adopted son S. Mudaliar effected a deed of partition dated 25th November, 1907 in respect of the immovable and movable properties. By the said deed of partition S.D. Mudaliar the settlor of the deed of trust obtained the property forming the subject matter of the said trust deed. The founder dedicated the said property by the deed of trust to the trustees. The trustees were the settlor and three other Mudaliars, viz., A.P.M. Mudaliar, M.T.S. Mudaliar and C.V.S. Mudaliar.

Broadly stated, the trust deed contained the following provisions. First, the trustees after excluding the tax and maramath expenses, shall during the lifetime of the settlor pay him entire income for the purpose of discharging the debt of Rs. 3,000 mentioned in the deed of partition and for the maintenance of the settlor during his lifetime. Secondly, after the death of the settlor the balance of the debt that might be found due on the date after excluding the payments made by the settlor is to be paid to the creditors. Thirdly, after the settlor's lifetime a sum of Rs. 10 per mensem would be paid out of the income to the settlor's daughter-in-law, namely, the appellant's grand-mother, viz., father's mother "for her lifetime, for her charity expenses". Fourthly, after the lifetime of the appellant's grand-mother the trustees are to pay a sum of Rs. 10 per mensem permanently to the appellant's adoptive father who was the adopted son of the appellant's grand-mother and of the settlor's pre-deceased son and after the lifetime of the appellant's adoptive father "to his male descendants hereditarily". Fifthly, the settlor gave full power to the trustees after meeting the expenses of the Utsavam to be celebrated in Nungambakkam Devasthanams and the trust expenses and the tax and maramath expenses to expend such sum as they might deem proper to maintain and educate the male descendants of the settlor's pre-deceased adopted son. The settlor further provided that if the trustees were not willing they would stop such maintenance and education

expenses. Sixthly, the trustees after the life-time of the settlor would spend from and out of the aforesaid trust income in such manner as they might deem proper and have the Vasantha Utsavam celebrated for a period of not less than three days during the Vasantha Utsavam which would be celebrated every year in the Temples of Sri Agastheeswarar and Venkatesa Perumal installed by the settlor's ancestors and enshrined in Nungambakkam. Finally, after the lifetime of the settlor the trustees were directed to accumulate the amount remaining out of the income from the property after excluding the assessment, quit-rent and maramath and the monthly and annual expenses and purchase properties therewith and provide the same as income for the aforesaid charity.

In the background of these provisions, counsel for the appellant contended that the dominant intention was a provision by way of a settlement for the members of the family and that the charities were subsidiary purposes to the said deed of trust. The provisions or direction to the trustees first to accumulate the income after meeting the expenses of assessment, quit rent and maramath and the monthly and annual expenses and secondly to purchase properties therewith were to provide income only for the aforesaid charity. The words "for the aforesaid charity" are of important significance. The entire accumulation was for the charity. The provisions regarding maintenance and education were subordinate to the provisions for meeting the expenses of the Utsavam. The matter does not rest there. The provisions regarding maintenance and education were to be at the sole discretion of the trustees who could stop the same if the trustees were not willing. This power of trustees to stop maintenance and education expenses is a complete negation of the appellant's contention that the intention of the settlor was that education and maintenance expenses were the dominant purpose of the settlement. The reason is obvious. The dominant object is never allowed by the settlor to be repelled by a discretion conferred on the trustees to stop such expenses. This power to stop is consistent with the intention of the settlor to treat the education and maintenance expenses as secondly objects only after the primary purpose of the trust, namely, charities are fulfilled. The tenor of the document points to the inescapable conclusion that the pre-dominant and overwhelming intention of the settlor was to benefit the charities and provide for the same not only by making the expenses for the charities as the first and foremost direction but also by providing for accumulation of income and purchase of properties out of the said accumulated income only for the purpose of charities.

A contention was raised by the appellant that the High Court should not have reversed the finding of the trial Court for the payment of maintenance of the appellant at Rs. 50 per mensem. The High Court came to the conclusion that there was no legal principle to sustain this increase in maintenance. In this Court the contention which was raised in the High Court was repeated, viz., that this was a case where the *cy-pres* doctrine would apply. The *cy-pres* doctrine applies where a charitable trust is initially impossible or impracticable and the Court applies the property *cy-pres*, viz., to some other charities as nearly as possible, resembling the original trust. In the present case, the maintenance and education expenses are neither charitable trusts nor similar objects of charity.

For these reasons, the appeal fails and is dismissed with costs. The appellant will pay the court-fees.

V.K.

Appeal dismissed.

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NOTICE

Volume XLII (1970) I S. C. J. will end with this Part. The index for the Volume will be issued in due course.

The first part for (1970) II S. C. J. will be issued on 1st July, 70. It will be sent by V.P.P. for Rs. 21-25 to realise the second half-yearly subscription to subscribers who have not paid their subscription before this date. Subscribers who do not want a V.P.P. to be sent are requested to remit their subscriptions by M.O. sufficiently in advance.

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